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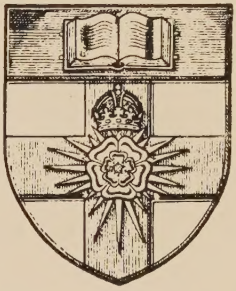

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THE

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# CASES REPORTED IN THIS VOLUME


| | PAGE |
|---|---|
| A.B.'s Petition, *Re* [Div.] | 681 |
| Albemarle Supply Co., Ltd. *v.* Hind & Co. [C.A.] | 401 |
| Alefounder's Will Trusts, *Re*, Adnams *v.* Alefounder [Ch.D.] | 221 |
| Allison *v.* Allison [Div.] | 671 |
| Anderson-Berry, *Re*, Harris *v.* Griffith [C.A.] | 143 |
| Attorney-General *v.* Belilios [C.A.] | 723 |
| Attorney-General *v.* Metropolitan Water Board [C.A.] | 526 |
| Barkwell *v.* Barkwell [Prob.] | 138 |
| Behnke *v.* Bede Shipping Co., Ltd. [K.B.D.] | 689 |
| Bell and Another *v.* Harker [K.B.D. Divl. Ct.] | 151 |
| Boorne *v.* Wicker [Ch.D.] | 388 |
| Bower Williams, *Re*, *Ex Parte* Trustee [C.A.] | 275 |
| Bowker *v.* Woodroffe [K.B.D. Divl. Ct.] | 415 |
| Bridgett and Hayes' Contract, *Re* [Ch.D.] | 191 |
| British and North European Bank, Ltd. *v.* Zalzstein [K.B.D.] | 556 |
| Brown & Co., Ltd. *v.* Harrison [C.A.] | 195 |
| Buerger and Another *v.* New York Life Assurance Co. [C.A.] | 342 |
| Donald Campbell & Co., Ltd. *v.* Pollak [H.L.] | 1 |
| Cassel (*deceased*), *Re*, Public Trustee *v.* Mountbatten and Others [Ch.D.] | 739 |
| Chardon, *Re*, Johnston *v.* Davies [Ch.D.] | 483 |
| Chartres, *Re*, Farman and Another *v.* Barrett [Ch.D.] | 408 |
| Cliff's Contract, *Re* [Ch.D.] | 553 |
| Collaroy Co., Ltd. *v.* Giffard and Another [Ch.D.] | 346 |
| Colyer's Farningham Estate, *Re* [Ch.D.] | 181 |
| Cottage Club Estates *v.* Woodside Estates Co. (Amersham), Ltd. [K.B.D.] | 397 |
| Crossingham *v.* Park [K.B.D. Divl. Ct.] | 175 |
| Davis *v.* Harrison [K.B.D.] | 743 |
| Debtor (No. 229 of 1927), *Re* [C.A.] | 282 |
| Debtor (No. 883 of 1927), *Re* [C.A.] | 267 |
| De Freville *v.* Dill [K.B.D.] | 205 |
| De la Garde *v.* Worsnop and Co. [Ch.D.] | 673 |
| De Vries *v.* Smallbridge [C.A.] | 613 |
| Draycott Settled Estate, *Re* [Ch.D.] | 492 |
| Ellwood, *Re*, *Ex parte* River Dee Drainage Board *v.* Hooson [Ch.D.] | 320 |
| Farey *v.* Cooper and Others [C.A.] | 311 |
| Fegan, *Re*, Fegan *v.* Fegan [Ch.D.] | 606 |
| Firemen's Fund Insurance Co. *v.* Western Australian Insurance Co., Ltd. and Atlantic Insurance Co., Ltd. [K.B.D.] | 514 |
| Fletcher *v.* Fletcher [Div.] | 664 |
| Flint (*deceased*), *Re*, Flint and Others *v.* Flint and Others [Ch.D.] | 304 |
| Forder, *Re*, Forder *v.* Forder and Others [C.A.] | 324 |
| Forsey and Hollebone's Contract, *Re* [C.A.] | 635 |
| Forster *v.* National Amalgamated Union of Shop Assistants, Warehousemen and Clerks [Ch.D.] | 618 |
| Fullwood *v.* Hurley [C.A.] | 610 |
| Gilbey *v.* Gilbey [Div.] | 662 |
| Glaskie *v.* Watkins [C.A.] | 579 |
| Goole and Hull Steam Towing Co., Ltd. *v.* Ocean Marine Insurance Co., Ltd. [K.B.D.] | 621 |
| Goulandris, *The* [Adm.] | 592 |
| Gowar *v.* Hales [C.A.] | 631 |
| Great Western Rail. Co. *v.* Mostyn (Owners), The Mostyn [H.L.] | 113 |
| Halifax Corporation *v.* Fairbanks' Estate [P.C.] | 601 |
| Hall (R. & H.), Ltd. and Pim (W. H.) (Junior) & Co.'s Arbitration [C.A.] | 227 |
| Hayward, *Re*, Merson and Another *v.* Hayward and Others [Ch.D.] | 749 |
| Heyn *v.* Ocean Steamship Co., Ltd. [K.B.D.] | 657 |
| Higgs and May's Contract, *Re* [Ch.D.] | 748 |
| Holy Law South Broughton Burial Board *v.* Failsworth Urban District Council [K.B.D. Divl. Ct.] | 628 |
| Houghton (J. C.) & Co. *v.* Nothard, Lowe and Wills, Ltd. [H.L.] | 97 |
| Hourani *v.* Harrison [C.A.] | 195 |
| Humber Conservancy Board *v.* Federated Coal and Shipping Co., Ltd. [K.B.D. Divl. Ct.] | 626 |
| Importers Co., Ltd. *v.* Westminster Bank, Ltd. [C.A.] | 683 |
| Inland Revenue Commissioners *v.* Yorkshire Agricultural Society [C.A.] | 536 |
| James *v.* British General Insurance Co., Ltd. [K.B.D.] | 442 |
| Janera, *The* [Adm.] | 490 |
| Jupiter (No. 3), *The* [Adm.] | 237 |
| King, *Re*, Public Trustee *v.* Aldridge [Ch.D.] | 214 |
| Konskier *v.* B. Goodman, Ltd. [C.A.] | 187 |
| Kreditbank Cassel G.m.b.H. *v.* Schenkers, Ltd. and Others [C.A.] | 421 |
| Lake *v.* Simmons [H.L.] | 49 |
| Lanyon, *Re*, Lanyon *v.* Lanyon [Ch.D.] | 61 |
| Lawrence *v.* Hayes [K.B.D. Divl. Ct.] | 639 |
| Leigh's Settled Estates, *Re* [Ch.D.] | 166 |
| Leyton Urban District Council *v.* Wilkinson [C.A.] | 651 |
| Liggett (B.) (Liverpool), Ltd. *v.* Barclays Banks, Ltd. [K.B.D.] | 451 |
| Macnaghten *v.* Douglas [K.B.D. Divl. Ct.] | 178 |
| Marbé *v.* George Edwardes (Daly's Theatre), Ltd. [C.A.] | 253 |
| Mathieson's Trustee *v.* Burrup, Mathieson & Co. [Ch.D.] | 172 |
| Maxwell *v.* Keun and Others. Same *v.* Same [C.A.] | 335 |
| Mitchell *v.* B. W. Noble, Ltd. [C.A.] | 717 |
| Monk, *Re*, Giffen *v.* Wedd [C.A.] | 157 |
| Mostyn, *The* [H.L.] | 113 |
| Myhill, *Re*, Hull *v.* Myhill [Ch.D.] | 218 |
| Nance *v.* Naylor [C.A.] | 184 |
| Newcastle Breweries, Ltd. *v.* Inland Revenue Commissioners [H.L.] | 287 |
| O'Cedar, Ltd. *v.* Slough Trading Co., Ltd. [K.B.D.] | 446 |
| Paget, *Re*, *Ex parte* Official Receiver [C.A.] | 465 |
| Parker's Settled Estates, *Re*, Parker *v.* Parker [Ch.D.] | 546 |
| Patrick *v.* Russo British Grain Export, Co., Ltd. [K.B.D.] | 692 |
| Payne, *Re*, Taylor *v.* Payne [Ch.D.] | 223 |
| Pratt *v.* Pratt [Div.] | 234 |
| Purnell *v.* Roche and Another [Ch.D.] | 560 |
| Putsman *v.* Taylor [C.A.] | 356 |
| R. *v.* Church Assembly Legislative Committee, *Ex parte* Haynes Smith [K.B.D. Divl. Ct.] | 696 |
| R. *v.* Cory Bros. & Co., Ltd. and Others [Glamorgan Ass.] | 438 |

| | PAGE |
|---|---|
| R. *v.* Daily Mirror (Editor and Proprietors) and Others, *Ex parte* Smith [K.B.D. Divl. Ct.] | 503 |
| R. *v.* Essex Justices, *Ex parte* Perkins [K.B.D. Divl. Ct.] | 393 |
| R. *v.* Harris [C.C.A.] | 473 |
| R. *v.* Kent Justices, *Ex parte* Triplow [K.B.D. Divl. Ct.] | 309 |
| R. *v.* Sheffield Justices, *Ex parte* T. Rawson and Co., Ltd. [K.B.D. Divl. Ct.] | 477 |
| R. *v.* Teesdale [C.C.A.] | 710 |
| R. *v.* Wood, *Ex parte* Anderson [K.B.D. Divl. Ct.] | 707 |
| Radcliffe *v.* Buckwell [K.B.D. Divl. Ct.] | 386 |
| Ranson *v.* Burgess [K.B.D. Divl. Ct.] | 667 |
| Richardson *v.* Richardson, National Bank of India, Ltd., Garnishees [Div.] | 92 |
| Robins *v.* National Trust Co., Ltd. [P.C.] | 73 |
| Royal Exchange Assurance *v.* Hope [C.A.] | 67 |
| Ruapehu (Owners) *v.* R. and H. Green and Silley Weir, Ltd., *The* Ruapehu [H.L.] | 564 |
| Ryder and Steadman's Contract, *Re* [C.A.] | 506 |
| Salvesen (or Von Lorang) *v.* Austrian Property Administrator [H.L.] | 78 |
| Scollick *v.* Scollick [Div.] | 523 |
| Seymour *v.* Reed [H.L.] | 294 |
| Silverman *v.* Imperial London Hotels, Ltd. [K.B.D.] | 712 |
| Société Anonyme Des Grands Establissments De Touquet Paris-Plage *v.* Baumgart [K.B.D.] | 280 |
| Stamford and Warrington (Earl), *Re*, Payne *v.* Grey [Ch.D.] | 469 |
| Stanton, Ltd. (F. & E.), *Re*, Hogg *v.* Maule and Another [K.B.D. Divl. Ct.] | 496 |
| Sugar Supply Commission *v.* Hartlepools Seatonia Steamship Co., Ltd. [K.B.D.] | 377 |
| Sunderland Corporation *v.* Priestman [Ch.D.] | 460 |
| Tallack *v.* Tallack and Broekema [Div.] | 676 |
| Touraine, *The* [Adm.] | 372 |
| Trollope's Will Trusts, *Re*, Public Trustee *v.* Trollope [Ch.D.] | 365 |
| United General Commercial Insurance Corporation, Ltd., *Re* [C.A.] | 380 |
| Vosper *v.* Great Western Rail. Co. [K.B.D. Divl. Ct.] | 702 |
| Wallems Rederij A./S. *v.* W. H. Muller and Co. Batavia [K.B.D.] | 369 |
| Welton *v.* Welton [C.A.] | 431 |
| Williams *v.* Barton [Ch.D.] | 751 |
| Williams *v.* Sanders [K.B.D.] | 735 |
| Wisbech Rural District Council *v.* Ward [C.A.] | 486 |
| Woodward *v.* Oldfield [K.B.D. Divl. Ct.] | 645 |

THE
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E

## DONALD CAMPBELL & CO., LTD. *v.* POLLAK

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Haldane, Viscount Dunedin, Viscount Sumner, Lord Atkinson, Lord Shaw and Lord Blanesburgh), January 20, 21, 24, 25, May 5, 1927; (Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore and Lord Carson), May 13, 19, 20, 24, July 29, 1927]

F

[Reported [1927] A.C. 732; 96 L.J.K.B. 1093; 137 L.T. 656; 43 T.L.R. 495; 71 Sol. Jo. 450]

*House of Lords—Costs—Jurisdiction to hear appeal against order of Court of Appeal as to costs.*

There is no rule of the House of Lords which prevents a party from asking G to have a decision of the Court of Appeal reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of costs. Where, therefore, it is alleged that the Court of Appeal, in dealing with costs, has fallen into error on a point of law which governs or affects costs—e.g., where a discretion as to costs has been exercised on material that is illegitimate or non-existent or in violation of H some principle of substantive right—an appeal on that question will be entertained by the House.

So **Held** by VISCOUNT CAVE, L.C., VISCOUNT HALDANE, VISCOUNT DUNEDIN, and LORD ATKINSON, VISCOUNT SUMNER and LORD SHAW dissentiente.

Per VISCOUNT DUNEDIN: Other grounds on which the House of Lords will hear such an appeal are (i) if an express statutory provision applies and the I Court of Appeal has disregarded it, and (ii) if a rule of law and not mere discretion could decide the question.

*Court of Appeal—Costs—Jurisdiction to review order of High Court judge—Discretion of judge—Judicial exercise—Supreme Court of Judicature Act, 1890 (53 & 54 Vict., c. 44), s. 5—R.S.C., Ord. 65, r. 1.*

Under s. 5 of the Supreme Court of Judicature Act, 1890 (see now s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925), the costs of and incidental to all proceedings in the High Court are in the discretion of the

court or judge. This discretion must be exercised judicially, and if a judge were to refuse to give a successful party his costs on the ground of some misconduct wholly unconnected with the case, or of some prejudice, the Court of Appeal would have power to intervene, but when the judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation, which have been proved before him or which he has himself observed during the progress of the case, then the Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by statute from entertaining an appeal from his decision.

*Frederick King & Co., Ltd.* v. *Gillard & Co., Ltd.* (1), [1905] 2 Ch. 7; *Edmund* v. *Martell* (2), (1907), 24 T.L.R. 25; and *Ritter* v. *Godfrey* (3), [1920] 2 K.B. 47, questioned.

**Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 27, s. 31 (1) (h), and s. 50 (1), has replaced the Supreme Court of Judicature Act, 1873, s. 19 and s. 49, and the Supreme Court of Judicature Act, 1890, s. 5, respectively. R.S.C., Ord. 65, r. 1, was amended in 1929, the second proviso being deleted.

Considered: *Co-operative Wholesale Society, Ltd.* v. *Lilly* (1930), 23 B.W.C.C. 513. Followed: *Baylis Baxter, Ltd.* v. *Sabath*, [1958] 2 All E.R. 209. Referred to: *The Young Sid*, [1929] P. 190; *Clark* v. *Urquhart, Stracey* v. *Urquhart*, [1930] A.C. 28; *London Welsh Estates, Ltd.* v. *Philip* (1931), 144 L.T. 643; *Midland Employees' Mutual Assurance, Ltd.* v. *Lewis* (1930), 23 B.W.C.C. 192; *Mabro* v. *Eagle Star and British Dominions Insurance Co., Ltd.*, [1932] All E.R. Rep. 411; *Hamilton* v. *Branch*, [1933] W.N. 11; *British Russian Gazette and Trade Outlook, Ltd.* v. *Associated Newspapers, Ltd., Talbot* v. *Associated Newspapers, Ltd.*, [1933] 2 K.B. 616; *Lancashire Loans, Ltd.* v. *Black*, [1933] All E.R. Rep. 201; *Brown* v. *New Empress Saloons, Ltd.*, [1937] 2 All E.R. 133; *Cecil-Wright* v. *McCullock*, [1936] 3 All E.R. 518; *Culver* v. *Beard*, [1937] 1 All E.R. 301; *Evans* v. *Bartlam*, [1937] 2 All E.R. 646; *Re Margolin's Registered Design*, [1936] 3 All E.R. 347; *Williams* v. *Dorothea Slate Quarry Co.* (1936), 29 B.W.C.C. 174; *Dick* v. *Pillar* [1943] 1 All E.R. 627; *P. Rosen & Co.* v. *Dowely and Selby*, [1943] 2 All E.R. 172; *Stotesbury* v. *Turner*, [1943] 1 K.B. 370.

As to the exercise of the discretion of the court as to costs and appeals therefrom see 26 Halsbury's Laws (2nd Edn.) and cases there cited For Supreme Court of Judicature Acts see 18 Halsbury's Statutes (2nd Edn.) 467 et seq.

Cases referred to:

(1) *Frederick King & Co., Ltd.* v. *Gillard & Co., Ltd.*, [1905] 2 Ch. 7; 74 L.J.Ch. 421; 92 L.T. 605; 53 W.R. 598; 21 T.L.R. 398; 49 Sol. Jo. 401, C.A.; Digest Practice 854, *3998*.

(2) *Edmund* v. *Martell* (1907), 24 T.L.R. 25; 52 Sol. Jo. 10, C.A.; Digest Practice 852, *3979*.

(3) *Ritter* v. *Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; 36 T.L.R. 144, C.A.; Digest Practice 854, *4002*.

(4) *Tod* v. *Tod*, (1827), 2 Wils. & S. 542; 1 Bli.N.S. 639, H.L.

(5) *Garnett* v. *Bradley* (1878, 3 App. Cas. 944; 48 L.J.Q.B. 186; 39 L.T. 261; 43 J.P. 20; 26 W.R. 698, H.L.; Digest Practice 851, *3969*.

(6) *Huxley* v. *West London Extension Rail Co.* (1886), 17 Q.B.D. 373; 55 L.J.Q.B. 506; affirmed (1887), unreported, C.A.; affirmed (1889), 14 App. Cas. 26; 58 L.J.Q.B. 305; sub nom. *Huxley* v. *West Indian Extension Rail Co.*, 60 L.T. 642, H.L.; Digest Practice 896, *4371*.

(7) *Duvall* v. *Terrey* (1694), Show. Parl. Cas. 15; 1 E.R. 11; 7 Digest 215, *569*.

(8) *Huband* v. *Huband* (1713), 7 Bro. Parl. Cas. 433.

(9) *Gould* v. *Granger* (1730), Mos. 395.

A (10) *Owen* v. *Griffith* (1749), Amb. 520; 1 Ves. Sen. 250; 27 E.R. 336, L.C. 21 Digest 574, *1506.*

(11) *Cowper* v. *Scott* (1731), 3 P. Wms. 119; 24 E.R. 993; 44 Digest 936, *7917.*

(12) *Wirdman* v. *Kent* (1782), 1 Bro. C.C. 140.

(13) *Fitzgibbon* v. *Scanlan* (1813), 1 Dow. 261; 3 E.R. 694; 43 Digest 634, *723.*

(14) *Burkett* v. *Spray* (1829), 1 Russ. & M. 113.

B (15) *Brodie* v. *Sinclair* (1831), 5 Wils. & S. 567.

(16) *Inglis* v. *Mansfield* (1835), 3 Cl. & Fin. 362; 6 E.R. 1472; 36 Digest (Repl.) 367, *43.*

(17) *Clyne's Trustees* v. *Dunnet* (1839), Macl. & Rob. 28; 9 E.R. 11, H.L.; 8 Digest (Repl.) 608, *501.*

C (18) *Angell* v. *Davis* (1839), 4 My. & Cr. 360; 9 L.J.Ch. 3; 3 Jur. 838; 41 E.R. 140, L.C.; 43 Digest 835, *2805.*

(19) *Home* v. *Pringle and Hunter* (1841), 8 Cl. & Fin. 264; 8 E.R. 103, H.L.; 36 Digest (Repl.) 371, *109.*

(20) *Wilson* v. *R.* (1866), L.R. 1 P.C. 405; 4 Moo. P.C.C.N.S. 307; 16 E.R. 333, P.C.; 16 Digest 136, *341.*

D (21) *Yoe* v. *Tatem, The Orient* (1871), L.R. 3 P.C. 696; 8 Moo. P.C.C.N.S. 74; 40 L.J. Adm. 29; 24 L.T. 918; 20 W.R. 6; 1 Asp. M.L.C. 108; 17 E.R. 241, P.C.; 41 Digest 931, *8212.*

(22) *Metropolitan Asylum District* (*Managers*) v. *Hill* (1880), 5 App. Cas. 582; 49 L.J.Q.B. 745; 43 L.T. 225; 28 W.R. 663, H.L.; Digest Practice 854, *3995.*

E (23) *Rieken* v. *Yorke Peninsula Justices, Keam* v. *Adelaide Licensing Justices*, [1908] A.C. 454; 78 L.J.P.C. 45; 99 L.T. 529; 24 T.L.R. 821, P.C.; 16 Digest 136, *345.*

(24) *Robertson* v. *Tait* (1852), unreported.

(25) *Marquess of Ailsa* v. *Kerr* (1853), unreported.

(26) *Sawers* v. *Monteith* (1869), unreported.

F (27) *Thallon* v. *Kinnear Moode & Co.* (1884), unreported.

(28) *Caledonian Rail Co.* v. *Barrie*, [1903] A.C. 126; 36 Digest (Repl.) 366, *41.*

(29) *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.*, [1903] 2 K.B. 756; 72 L.J.K.B. 933; 89 L.T. 429; 52 W.R. 181; 20 T.L.R. 10; 47 Sol. Jo. 877; 9 Asp. M.L.C. 477, C.A.; Digest Practice 852, *3978.*

G (30) *Lord Advocate* v. *Lord Dunglas, Lord Dunglas* v. *Officers of State for Scotland* (1841), 9 Cl. & Fin. 173; 4 State Tr. N.S. 737; 8 E.R. 381, H.L. 36 Digest (Repl.) 367, *45.*

(31) *R.* v. *Johnson* (1839), 6 Cl. & Fin. 41; Macl. & Rob. 1; 7 E.R. 613, H.L.; 36 Digest (Repl.) 371, *118.*

(32) *Jones* v. *Curling* (1884), 13 Q.B.D. 262; 53 L.J.Q.B. 373; 50 L.T. 349; 32 W.R. 651, C.A.; Digest Practice 892, *4335.*

H (33) *Kierson* v. *Joseph L. Thompson & Sons, Ltd.*, [1913] 1 K.B. 587; 82 L.J. K.B. 920; 108 L.T. 236; 29 T.L.R. 205; 57 Sol. Jo. 226; 6 B.W.C.C. 58, C.A.; Digest Practice 854, *3994.*

(34) *Granville & Co.* v. *Firth* (1903), 72 L.J.K.B. 152; 88 L.T. 9; 19 T.L.R. 213, C.A.; Digest Practice 858, *4031.*

I (35) *Elms* v. *Hedges* (1906), 95 L.T. 145; 22 T.L.R. 574, D.C.; Digest Practice 858, *4034.*

(36) *Home Secretary* v. *O'Brien*, [1923] A.C. 603; 92 L.J.K.B. 830; 129 L.T. 577, H.L.; 16 Digest 258, *601.*

(37) *Cox* v. *Hakes* (1890), 15 App. Cas. 506, 531; 54 J.P. 820; 6 T.L.R. 465; sub nom. *Bell-Cox* v. *Hakes*, 60 L.J.Q.B. 89; 63 L.T. 392; 39 W.R. 145, 17 Cox, C.C. 158, H.L.; Digest Practice 786, *3486.*

(38) *Attenborough* v. *Kemp* (1861), 14 Moo. P.C.C. 351; 5 L.T. 67; 25 J.P. 627; 7 Jur. N.S. 665; 9 W.R. 771; 15 E.R. 338, P.C.; 16 Digest 136, *342.*

(39) *Bew* v. *Bew*, [1899] 2 Ch. 467; 68 L.J.Ch. 657; 81 L.T. 284; 48 W.R. 124, C.A.; Digest Practice 761, *3280.*

(40) *Westgate* v. *Crowe*, [1908] 1 K.B. 24, 77 L.J.K.B. 10; 97 L.T. 769; 24 T.L.R. 14; 52 Sol. Jo. 13, D.C.; Digest Practice 858, *4035.*

(41) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295; 42 L.J.Ch. 417; 28 L.T. 218; 37 J.P. 4; 21 W.R. 234, L.C. & L.J.J.; 35 Digest 696, *4393.*

(42) *Turner* v. *Hancock* (1882), 20 Ch.D. 303; 51 L.J.Ch. 517; 46 L.T. 750; 30 W.R. 480, C.A.; 43 Digest 831, *2763.*

(43) *Foster* v. *Great Western Rail Co.* (1882), 8 Q.B.D. 515; 51 L.J.Q.B. 233; 46 L.T. 74; 30 W.R. 398; 4 Ry. & Can. Tr. Cas. 58, C.A.; Digest Practice 851, *3970.*

(44) *Re Mills Estate, Ex parte Works and Public Buildings Comrs.* (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 35 W.R. 65; 3 T.L.R. 61, C.A.; Digest Practice 869, *4114.*

(45) *The City of Manchester* (1880), 5 P.D. 221; 49 L.J.P. 81; 42 L.T. 521; 4 Asp. M.L.C. 261, C.A.; 30 Digest (Repl.) 157, *107.*

(46) *Walter* v. *Steinkopff*, [1892] 3 Ch. 489; 61 L.J.Ch. 521; 67 L.T. 184; 40 W.R. 599; 8 T.L.R. 633; 36 Sol. Jo. 556, Digest Practice 856, *4009.*

(47) *Bostock* v. *Ramsay U.D.C.*, [1900] 2 Q.B. 616; 69 L.J.Q.B. 945; 83 L.T. 358; 64 J.P. 660; 16 T.L.R. 520; 44 Sol. Jo. 642, C.A.; 38 Digest 131, *964.*

(48) *Harnett* v. *Vise* (1880), 5 Ex. D. 307; 43 L.T. 645; 29 W.R. 7, C.A.; Digest Practice 854, *3996.*

(49) *Hudsons, Ltd.* v. *De Halpert* (1913), 108 L.T. 416; 29 T.L.R. 257, D.C.; Digest Practice 893, *4355.*

(50) *Levy* v. *Johnson* (1913), 29 T.L.R. 507; Digest Practice 858, *4032.*

(51) *Higgins* v. *L. Higgins & Co.*, [1916] 1 K.B. 640; 85 L.J.K.B. 1224; 114 L.T. 59; 9 B.W.C.C. 122, C.A.; Digest Practice 853, *3980.*

**Appeal** by plaintiffs from an order of the Court of Appeal varying an order of BRANSON, J.

The facts are set out in the opinions of their Lordships. The respondent raised the preliminary objection that the appeal was incompetent as being an appeal as to costs only.

*Jowitt, K.C.* and *Astell Burt* for the respondent.

*Stuart Bevan, K.C., Barrington Ward, K.C.,* and *E. F. Spence, K.C.* for the appellants.

The House took time for consideration.

May 5. The following opinions were read.

**VISCOUNT CAVE, L.C.**—BRANSON, J., who re-tried this action (under an order for a new trial) without a jury, decided the issues of fact in favour of the defendant (the respondent in this appeal), but gave judgment for him without costs. In arriving at his decision not to give the defendant his costs, the learned judge relied mainly upon the fact—established by the verdict and judgment in another action which had been consolidated with the present action—that the defendant had been guilty of improper conduct which (as he held) had induced the liquidator of the appellant company, and, indeed, had forced him, in the execution of his duty, to bring the present action. On an appeal by the defendant to the Court of Appeal against so much of the judgment of BRANSON, J., as had ordered that no order should be made as to costs, that court held that the trial judge was not entitled to take into account the proceedings in the other action—which (as they held) had been " de-consolidated " and wholly separated from the present action by the order for a new trial of this action—and, accordingly, that the judge had no materials before him upon which it was right for him to exercise his discretion as to costs; and they allowed the appeal and declared the defendant entitled to his costs of action. The plaintiffs have now appealed to this House against the

A order of the Court of Appeal. The costs in question amount to a very large sum, as they include the costs of two long trials and several appeals. The respondent raises the preliminary objection that the appeal is incompetent as being an appeal as to costs only, and your Lordships have now to deal with this preliminary objection.

The objection appears, at first sight, to be somewhat surprising. Under s. 5 of B the [repealed] Supreme Court of Judicature Act, 1890, and R.S.C. Ord. 65, r. 1, the costs of a trial without a jury are in the absolute discretion of the trial judge; and under [the repealed] s. 49 of the Supreme Court of Judicature Act, 1873 (which was in force when the appeal to the Court of Appeal was heard), no order made by the High Court of Justice or any judge thereof as to costs only which by law were left to the discretion of the court was subject to any appeal except by C leave of the court or judge making such order. Notwithstanding these enactments, the respondent appealed (without leave of the court or judge) to the Court of Appeal against the order of the trial judge as to costs, and he succeeded in that appeal on the ground that the judge had no right in law to make that order; and, now that the appellants ask your Lordships to review that decision and to hold that the trial judge had such a right, the respondent objects that the appeal to this D House is as to costs only and cannot be entertained. It would seem that, if the appeal to the Court of Appeal, which was an appeal as to costs only, was competent notwithstanding the statutory prohibition of such appeals, the appeal to this House must be equally competent notwithstanding the rule of the House which prohibits such appeals, but the respondent contends that the rule adopted by this House goes beyond the terms of the statute which binds the Court of Appeal, and E that under that rule this appeal cannot be heard.

There are passages to be found, both in speeches made in this House and in text-books of authority, which lay it down in broad terms that an appeal as to costs only will not be entertained here; but it is plain that the rule, so stated, needs some qualification. For instance, an order made contrary to a statute F which gives a party a right to his costs is clearly appealable: see *Tod* v. *Tod* (4). So, an order as to costs made by the Court of Appeal without jurisdiction must needs be subject to an appeal to this House, for otherwise the law might be broken without redress; and *Garnett* v. *Bradley* (5) and *Huxley* v. *West London Extension Rail. Co.* (6) are instances of such appeals. Why, then, should a decision of the Court of Appeal as to costs which is founded on a wrong view of the law—and in dealing with the preliminary objection this must be assumed to be the case— G be exempt from review? If, on argument, it should appear that the Court of Appeal was wrong in holding that the trial judge had no right to refer to the proceedings in the consolidated action, then there was no ground on which the Court of Appeal could discharge his decision as to costs, and the order setting that decision aside was made contrary to the statute and was without jurisdiction. Why should the H appellants be prohibited from putting forward this contention? The suggestion that, if the appeal were allowed on that ground, the House would be reviewing a discretion exercised by the Court of Appeal is obviously untenable; for if that court was wrong in setting aside the discretionary order of the trial judge, then there was no field for the exercise of any discretion by the Court of Appeal itself. On principle, therefore, unless there is some settled rule of the House which I prevents your Lordships from hearing the appeal, I am of opinion that it should be heard.

If the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of costs. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law.

As the contention of the respondent is wholly based on the citation of cases, I feel compelled to trouble your Lordships with a review of the decisions of this House bearing upon the point; and I have thought it well to include in order of date the relevant decisions of the Judicial Committee of the Privy Council and some statements made by Lord Chancellors when sitting on appeal from judges in Chancery. The earliest case with which I am acquainted is *Duvall* v. *Terrey* (7) where the appeal failed on merits and the report concludes (Show. Parl. Cas. at p. 16):

> "And as to costs, held no cause for an appeal in this case, nor in truth was it ever known to be a cause, if the merits were against the party appellant. And so the decree was affirmed in the whole."

In *Huband* v. *Huband* (8) a decree of LORD KEEPER HARCOURT was affirmed except as to costs. In *Gould* v. *Granger* (9)

> "the Lord Chancellor (LORD KING) allowed an appeal from the Master of the Rolls, for costs only, and his Lordship said, he had known the House of Lords allow an appeal for costs only, tho' the old practice was otherwise."

In *Owen* v. *Griffith* (10) on an appeal from a decree made by ABNEY, J., upon a bill against an execution creditor for an account on the ground that the judge had not given the defendant her costs, counsel for the respondent insisted on "the general rule that there could not be an appeal for costs only"; but LORD HARDWICKE, L.C., allowed the appeal, saying that the creditor was clearly entitled to his costs on the merits " if not precluded by that rule; which I have often heard so delivered by the court." He added (1 Ves. Sen. at p. 250):

> "The foundation of it was to prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which as the reason of mankind might differ, it would create perpetual appeals: but this is no printed rule; and it seems somewhat strict and hard to adhere to it; for since the stamp duties, costs come to be very material. Yet if it was to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience, to which a particular inconvenience ought to give way. But if a sound distinction from the rule can be made, it ought to be allowed; and it will be very unfortunate if in this case the defendant should be precluded thereby; for being an incumbrancer for a just debt, and having a lien on the estate for his costs as well as his demand; it seems to be an exception, and different from the court's not suffering matters to be overruled merely for costs."

In *Cowper* v. *Scott* (11) the Lord Keeper (LORD NORTHINGTON) said that an appeal or re-hearing for costs only was not to be encouraged,

> "Because costs are merely discretionary, and depending upon particular circumstances; and when a judge has once determined the matter, a re-hearing for costs should be admitted with great caution."

But upon the authority of *Owen* v. *Griffith* (10) he allowed the appeal. In *Wirdman* v. *Kent* (12) LORD THURLOW, L.C., is reported to have said that the appeal in *Owen* v. *Griffith* (10) was admitted upon such an apparent mistake that upon motion for enrolment the minutes of the decree would have been altered; but (as the editor of BROWN'S REPORTS points out) LORD THURLOW can hardly have said this, as LORD HARDWICKE clearly treated the case of an execution creditor as a sound exception to the rule.

I turn now to the cases which were cited in the argument on this appeal. In *Fitzgibbon* v. *Scanlan* (13) the appellant, although unsuccessful on the merits, was relieved of some of the costs thrown upon him by the order below; and LORD ELDON said that,

A "although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters."

In *Tod* v. *Tod* (4) where there was a cross-appeal as to costs only, LORD ELDON said that this House never entertained an appeal for costs "where costs are in the discretion of the court below"; but the appellant in the cross-appeal, who B was entitled by statute to his costs, succeeded in his appeal. In *Burkett* v. *Spray* (14) a decree was varied on appeal as to costs only, LORD LYNDHURST saying that an appeal would lie in respect of costs if any principle were involved and they were not merely given as consequential on the decree. In *Brodie* v. *Sinclair* (15) where a pursuer who had succeeded as to a part of his claim had been ordered to pay the defender's costs of suit on the ground C

"that the expense of litigation had been mainly, if not altogether, occasioned by the pursuer insisting for the other items in the account which had not been sustained,"

this House set aside that part of the decree, LORD BROUGHAM, L.C., saying:

D "It is quite true that the costs are in the discretion of the court in all cases, but I find there is no such rule as that assumed for the interlocutor."

In *Inglis* v. *Mansfield* (16) the appeal failed on merits, but the appellant was relieved of the costs thrown upon him by the judgment, and LORD BROUGHAM said (3 Cl. & Fin. at p. 371):

E "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the court called upon to review the case, the court of review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the court below, consider the question of costs as if it is fairly raised." F

In *Clyne's Trustees* v. *Dunnet* (17) LORD COTTENHAM used similar expressions, but said that the order of the court below as to costs was right. In *Angell* v. *Davis* (18) where a decree had been made giving a trustee his costs of the cause out of the estate, LORD COTTENHAM, relying on *Owen* v. *Griffith* (10), *Cowper* v. *Scott* (11) and *Burkett* v. *Spray* (14) allowed an appeal by the beneficiaries against G that part of the decree and ordered the trustee to pay the costs of the cause so far as they had been occasioned by his own misconduct. In *Home* v. *Pringle and Hunter* (19) the House dismissed an appeal by trustees claiming to be entitled to their costs, LORD COTTENHAM, L.C., saying (8 Cl. & Fin. at p. 293):

"A court of appeal does not interfere in the question of costs without reluctance, in any case, and generally will not entertain an appeal for costs alone." H

I pass to the more recent cases, and first to *Wilson* v. *R.* (20). In that case one of the appellants (Cole) appealed to the Queen in Council against a decree of the Admiralty judge at Sierra Leone on the ground that, although he had succeeded in the court below, he had not been awarded the costs of the proceedings, and CAIRNS, L.J., said (L.R. 1 P.C. at p. 408):

I "Their Lordships are of opinion that, with regard to the appellant, Cole, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule, that an appeal for costs could not be entertained."

The order for costs which was the subject of appeal was clearly discretionary. In *The Orient* (21) an action in the Admiralty Court for damages caused by collision, the defendants pleaded a general denial and also a special defence founded on the doctrine of res judicata. On evidence that the damage had been

caused by a third party the court gave judgment for the defendants without costs, and declined to go into the special defence. On an appeal by the defendants to the Judicial Committee, it was held that, although the issue on the special defence had become material only as regards costs, the appellants were entitled to have judgment upon it and to have the general costs of the action. The appeal was accordingly allowed; and SIR JOSEPH NAPIER, who delivered the judgment of the Board, said (L.R. 3 P.C. at p. 702):

> "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs; but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

This was a plain case of an appeal on a point affecting costs only, and the appeal was allowed. The same may be said of *Garnett* v. *Bradley* (5) where, the plaintiff in an action for slander tried with a jury having recovered only one farthing damages, the Court of Appeal had held that under the Limitation Act, 1623, he was not entitled to the costs of the action; but the House of Lords, holding that the statute of James I had in effect been repealed by Ord. 55, gave him his costs. In that case the issue upon merits had been finally determined by the verdict of the jury and the judgment in the action, and the appeal to this House was plainly as to costs only; but it was not suggested that it was incompetent. In *Metropolitan Asylum District (Managers)* v. *Hill* (22) it was held that an order of the Court of Appeal which imposed, as a condition for a new trial, the payment of the costs of the first trial was not an appeal in respect of costs only and ought, therefore, to be entertained; and LORD SELBORNE stated the rule as follows (5 App. Cas. at p. 584):

> "The rule, subject to certain exceptions, is established that an appeal is not to be allowed in respect of costs only; which means that when the merits of a question have been determined, and when a court has thought fit to give or refuse costs, in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money but also of judicial time, for the mere purpose of reviewing that discretion."

No doubt the appeal in that case was not in respect of costs only, but was an appeal against a refusal to make an unconditional order for a new trial; but the language of LORD SELBORNE is interesting as showing the origin and meaning of the rule under discussion. In *Huxley* v. *West London Extension Rail. Co.* (6) an appeal as to costs only was entertained, the question argued being whether there was " good cause " for depriving a litigant of costs under Ord. 65, r. 1, but the decision of the Court of Appeal on this point was affirmed. Lastly, in *Rieken* v. *Yorke Peninsula District Justices*, *Keam* v. *Adelaide District Justices* (23), the Judicial Committee disallowed an appeal against an order as to costs on the ground that the court in Australia had exercised a judicial discretion and that there had been no mistake of law.

As reliance had been placed upon a decision of the appeal committee established by LORD ELDON in the year 1812, it may be convenient to refer to a few decisions of that committee to which my attention has been called by the judicial department of the House. In *Robertson* v. *Tait* (24) an appeal as to costs only was dismissed as incompetent, and LORD ST. LEONARDS, L.C., said:

> "The rule, I apprehend, both here and in the courts below, is that you cannot appeal for costs generally. If the question of costs involves a serious question of law, then, although you only go for costs, the appeal may be

A sustained, because in that appeal it may be necessary to decide a question of law. Now here what has been stated shows . . . what the general rule is; but it is equally clear that it is not a binding or positive rule."

In *Marquess of Ailsa* v. *Kerr* (25) an appeal as to costs only was dismissed, LORD Cranworth, L.C., saying:

B "You cannot have an appeal on the subject of costs where, the decree being otherwise right, the discretion of the court is exercised wrongly upon the subject of costs . . ."

In *Sawers* v. *Monteith* (26), on an appeal against a discretionary order as to costs, LORD HATHERLEY said: "The appeal upon costs only we do not proceed with." Again, in *Thallon* v. *Kinnear Moode & Co.* (27) an appeal against a discretionary order as to costs was dismissed as incompetent. Lastly, in *Caledonian Rail. Co.* v. *Barrie* (28) the respondent petitioned against the competency of an appeal on two grounds—first, that it was an appeal on costs only and, secondly, that under the statute which was there in question an appeal would only lie on a question of law. The appeal committee dismissed the appeal, LORD MACNAGHTEN saying (as appears from the shorthand note): "Their Lordships are of opinion that the objection is a good one and must prevail." It does not clearly appear on which of the two grounds the appeal was dismissed; and, in any event, the order as to costs made by the court below was a discretionary order, the Court of Session having a very wide discretion as to costs. There is, therefore, not much to be learned from this decision.

I have gone through this long succession of cases only for the purpose of ascertaining what is the precise rule which has been laid down by this House; for I agree that, if a rule of practice exists, it ought not now to be disturbed, and that the rule (whatever it may be) was not abrogated by s. 3 of the Appellate Jurisdiction Act, 1876. The result of my examination appears to me to be (i) that there is no universal rule that an appeal as to costs only will not be entertained by this House, but the true rule is as stated by LORD NORTHINGTON in *Cowper* v. *Scott* (11), by LORD ELDON in *Tod* v. *Tod* (4), and by LORD SELBORNE in *Metropolitan Asylum District* (*Managers*) v. *Hill* (22), as well as by SIR JOSEPH NAPIER in the Judicial Committee and by LORD ST. LEONARDS and LORD CRANWORTH in the appeal committee; and accordingly (ii) that in this House, as in the Court of Appeal, an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a bonâ fide appeal on merits; but (iii) that when it is alleged that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been seen) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent. If this be the true view, then it is plain that the appeal in the present case, in which the exercise by the trial judge of his statutory discretion as to costs has been set aside by the Court of Appeal on legal grounds, ought to be allowed to proceed. I, therefore, move your Lordships that the preliminary objection to this appeal be disallowed and that the costs of and consequent upon that objection be paid by the respondent in any event.

**VISCOUNT HALDANE** (read by LORD CARSON).—The point with which we are at present concerned in this case is whether an appeal lies to this House from a judgment of the Court of Appeal. That court had varied a judgment of BRANSON, J., in favour of the respondent, the defendant in an action, tried by the learned judge without a jury, for damages in respect of alleged breach of contract and fraud. BRANSON, J., had deprived the respondent of costs, amounting to a large sum, in the exercise of what he considered to be the discretion he could exercise. The Court of Appeal altered this, directing that the judgment in favour of the respondent should carry costs. Assuming for the purposes of the present question

that the appellants may develop a substantial case against the decision of the trial judge depriving the successful defendant of his primâ facie title to his costs, there remains a preliminary question which has to be decided at this stage of the appeal to your Lordships' House. It is whether the appeal, which is limited exclusively to the question of these costs, is one which, according to the principle that regulates our practice, can be entertained at all. When a trial takes place without a jury the costs, under [the repealed] s. 5 of the Supreme Court of Judicature Act, 1890, and Ord. 65, r, 1, are in the discretion of the trial judge, and under s. 49 of the Supreme Court of Judicature Act, 1873, there is to be no appeal from the exercise of this discretion except by leave of the judge who made the order. Nevertheless the respondent appealed against the order without leave, and succeeded in the Court of Appeal, upon the ground that the judge had no right in law to make it for the reason he did. BRANSON, J., in deciding not to allow costs to the defendant, relied on the circumstances that the verdict and judgment in another action against the defendant, in which the plaintiffs were different persons from the appellants, the plaintiffs in the present case, established facts which justified the liquidator of the appellant company in the execution of his duty in bringing the present action. But the Court of Appeal, holding that BRANSON, J., was not entitled to take into account the proceedings in a different case with different parties, considered that the learned judge had not proper materials before him on which he was at liberty to exercise his discretion under the rule as to costs.

The question we have to deal with presents this peculiarity. The appeal to the Court of Appeal was brought without leave. This may have been legitimate to the ground that the judge was said to have been without a reason on which to proceed legitimately in the way he did. But it seems curious that if that were so an appeal to this House raising what seems to be a precisely analogous question should be incompetent. If it is so, this must be for some special reason which has been definitely established by this House in relation to its own proceedings, and which goes beyond the principle applied in the Court of Appeal. It seems as though it must be shown that this House is precluded by its established decisions from entertaining an appeal which relates exclusively to costs given by the court below in the exercise of its discretion, even when the exercise of that discretion has arisen out of error about matter of law. This question is one the answer to which must be collected from a study of the authorities. It is not enough that s. 3 of the Appellate Jurisdiction Act, 1876, gives in general terms a right of appeal from the Court of Appeal to this House. The general words employed in this section may not be sufficient to interfere with the special practice of this House if such a practice is established. What the section was directed to was to get rid of the repeal of appellate jurisdiction effected by a statute of 1873, and not to the alteration of the settled practice where jurisdiction existed.

When the authorities are examined they disclose, what is apt to happen unless a very definite principle is being enunciated, a certain vagueness in judicial statement. Where a rule is laid down it is sometimes qualified by exceptions which are vaguely expressed. If, however, the cases are read as a connected series of utterances the result seems to me to admit of two different contentions. One is that it is established that when an appeal to the House of Lords resolves itself into a question only of costs the House will refuse to entertain it. It is added that this refusal is not confined to cases where discretionary costs have been dealt with below in accordance with an exercise of a discretion conferred and not infringing any principle of law. It is said that costs can be dealt with where they are ancillary to a variation of the substance of a judgment, but that otherwise there is no power to deal with them unless the case comes within certain nominate exceptions referred to in the course of the discussion. In effect these are said to be: (i) instances in which the order as to costs has been made

A personally against parties who have as matter of law a right to be exempted from them, such as trustees and mortgagees; (ii) instances in which costs have been ordered to be paid out of a particular property to the prejudice of persons interested in it and not before the court; (iii) instances in which a statutory or analogous legal title has been disregarded. All of these are exceptions in which a substantive right is said to have been violated, as distinguished from cases in B which it is claimed that there has been what is merely a non-judicial, and, in that restricted sense, improper, exercise of the function of the judge to the appellant's disadvantage. A mere error in law not of a special character is accordingly in this view not enough to give ground for an appeal.

The observation at once occurs, that the exceptions which the authorities C relied on for this conclusion illustrate are upon this interpretation of the restriction curiously limited in nature and unconnected in character. So far as they go they certainly do not give ground for the assertion of a more general principle, such as that this House will make an exception to the rule against hearing an appeal against a mere award of costs where any general principle of law has been disregarded. Speaking for myself, after examination of the authorities, I do not D think that they establish the list of exceptions collected above as an exhaustive list. If an order as to costs were, for example, made without jurisdiction, I do not think that they show that there could be no appeal to get rid of the illegality committed. Surely the burden lies heavily on those who assert that this House has precluded itself by its decisions from entertaining such an appeal and from dealing in this case with such a decision of the Court of Appeal based on want E of jurisdiction, as freely as that court dealt with the decision of BRANSON, J.

The second and alternative interpretation of the scope of the authorities admits of this. It concedes that the settled practice of this House, and indeed of the higher courts of appeal in England generally, is to refuse to admit appeals as to costs alone where these have been disposed of by the court below as matter of discretion. But as to what is an exercise of mere discretion and what is in F reality a declaration based on imagined legal principle is not so clear. In 1749, when LORD HARDWICKE was laying the foundations of the modern system of equity procedure, he laid down a principle which admits of costs under certain conditions being made the subject of appeal. He said of the rule that there cannot be an appeal for costs only, that it was "no printed rule," and that while it was for the general convenience that the rule should be maintained, a sound distinction where G it could be made ought to be allowed. That was in *Owen* v. *Griffith* (10). I cite the case, not as fully defining the principle as it exists to-day, but as showing that in the days when it was being developed its now rigid character was emphasised. In inquiries into the origin and scope of rules of practice of this kind a genetic method seems essential.

Pursuing this method, the conclusion to which the language of the leading H authorities seems to point is that where a discretion as to costs has been exercised on material that is illegitimate or is non-existent, or in violation of some principle of substantive right, an appeal will be entertained. Turning first to the question as it stands to-day in the Court of Appeal, I think that this is established there. That it should be so is important, for the restriction on appeals for costs as stated in the decisions of this House is not stated as though it were the outcome of a I principle which is peculiar to the House. In *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29) the plaintiffs sue to recover money paid on a consideration that had failed. The learned judge who heard the case gave judgment for the defendants, but as they would not accept suggestions made by him for a settlement he deprived them of their costs. They appealed, and the Court of Appeal said that there were no materials before the judge upon which he could legitimately exercise a discretion to this effect, and that accordingly he had no power to make the order.

LORD HALSBURY, who presided at the hearing, said ([1903] 2 K.B. at p. 765): A

"No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied."

Why is this principle not applicable to appeals to this House? No doubt your Lordships have power to define the conditions on which such appeals are to be allowed. But have you done so in such a fashion as to exclude appeals as to costs when the discretion has been exercised in a way which is alleged to be contrary to the law? Certainly LORD HARDWICKE did not say so. In *Huxley* v. *West London Extension Rail. Co.* (6) the question which arose related to another part of the order which enabled the trial judge to direct that where he found "good cause" the costs were not to follow the event, as was to be the normal course where the trial was with a jury. It was said here, that where the discretionary power to deprive of costs for good cause had been duly exercised, that exercise was not to be subject to any review. And it was also said by the House that not any reason which may have been assigned for disallowing the costs of a party who had been successful in getting a verdict must necessarily be accepted as good cause. If the trial judge gives effect to considerations which do not constitute "good cause" his decision is not protected from review. The House, therefore, listened to an appeal which was only concerned with costs. B C D

There are observations in *Metropolitan Asylum District (Managers)* v. *Hill* (22) which appeared to me to be only consistent with the view I have preferred, and in *The Orient* (21) that view was distinctly enunciated in the judgment delivered for the Judicial Committee of the Privy Council by SIR JOSEPH NAPIER (L.R. 3 P.C. at p. 702). In the hearing of that case JAMES, L.J., and MELLISH, L.J., both great authorities on the old general practice, took part. The decision of the Appeal Committee in *Caledonian Rail. Co.* v. *Barrie* (28) was cited in support of the contrary general proposition that the House will not entertain an appeal against costs only. That case is briefly reported in [1903] A.C 126, but it was not a decision of the House and no reasons are given, and it is not clear that the preliminary question may not, in reality, have turned equally on the provision of the Judicature Act of Scotland, which confines appeals to this House in cases commenced in the Sheriff's Court to matters of law alone. I find myself unable to treat this imperfectly reported case before the appeal committee as having been intended to overrule, or as having been capable of overruling deliberately, the principle underlying the other decisions to which I have referred. There are further decisions which support the view I have expressed, but on these I do not think it necessary to enter because they have been referred by the Lord Chancellor, in whose analysis of them I concur. I think, with him, that when the right to costs, or the existence of a discretion as to costs, depends on the decision of a question of law or procedure, an appeal on that question will be heard. The general rule against appeals as to costs is, as LORD HARDWICKE said as long ago as 1749, a "paper rule," in the sense that it is primâ facie statement capable of being displaced in this way. I, therefore, think that the respondent is not entitled to succeed upon his present contention. E F G H

**VISCOUNT DUNEDIN.**—Before forming my opinion in this case I had the great advantage of perusing the opinions of the noble Lords who heard the case on the former occasion. Those opinions being equally divided were a sure proof that the case was not easy of determination, and I, therefore, think that no apology is needed for saying that my opinion has not been arrived at without much thought and hesitation. The opinions to which I have referred have so thoroughly analysed the numerous decided cases that it would be quite useless to do so again. I shall, therefore, in the remarks I venture to address to your Lordships, assume I

A complete familiarity with the facts of the case and with the many decisions. I have myself come to the conclusion that it is not possible to say that this House has in terms laid down a rule which will settle this case. I do not think that that is a matter of great surprise because I think it is plain that the precise question could not have arisen before the Judicature Acts, and since then no case which raises the point has reached your Lordships' House. It follows that our duty now B is to lay down the rule which is to guide future practice.

It was natural that one should search with avidity for a precise decision which settled the matter. At one time during the discussion I thought I had found such a case in *Caledonian Rail. Co.* v. *Barrie* (28) but on further reflection I felt that this was not so. In the present case the Court of Appeal has altered the judgment of the trial judge as to costs because it considered that the trial judge had been C influenced by evidence which was not legally before him. They could not, no leave to appeal as to costs having been either asked for or given by the trial judge, under the terms of [the repealed] s. 49 of the Judicature Act, 1873, simply apply their own discretion to the point whether the costs should be allowed or not. In *Barrie's Case* (28) the Inner House of the Court of Session, who have, by Scottish law and practice, just as full discretion as the judge or judges whose D judgments they are reviewing, did look, as they were entitled to look, to certain evidence, and on their view of it came to the conclusion that the judge from whom the appeal came had been right. The result, so far as appeal to this House is concerned, would have been the same if they had held he was wrong.

The nearest approach to a general rule, indeed, so far as expression is concerned E it might be taken as a general rule, is, in my opinion, what LORD WATSON said in *Metropolitan Asylum District (Managers)* v. *Hill* (22) (5 App. Cas. at p. 586):

> "I quite concede the propriety of the rule that the court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the judges F who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and conduct of the case; because it must be kept in view that the right to costs does not in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties."

G It would, however, have been, I think, impossible in view of the numerous judgments and the varying forms of expression contained therein to pick out the dictum of one judge and say it settled the rule as laid down by this House. It follows, in my view, that your Lordships have now for the first time to lay down the rule by an authoritative judgment.

Before stating what I think the rule should be I wish to state a preliminary H proposition. It has not strictly to do with the rule, but I think it is necessary before going to the rule. That proposition is that if in any case the merits are raised by a competant appeal before this House, raised bonâ fide and not merely colourably with a further intent, then, however infinitesimal the pecuniary value of the merits may be in comparison with the pecuniary value of the costs, yet I appeal will lie and the costs may be dealt with with a free hand.

I come now to the rule when the appeal is for costs alone. It is to be remembered that the appeal is always from a court of appeal, and it is that judgment which is to be held appealable or not. What has happened in the former stages is, for the moment, immaterial. Further, I am using the words "costs alone" as meaning when the costs are the only stake. I am not for a moment saying that these words have always been so used by others, but I am using them in that sense and in so doing I am, I think, doing the same as LORD WATSON when he spoke of nothing but the payment of costs being involved. The rules I would wish to lay

down are these. Appeal will lie: (i) If an express statutory provision applies and it can be shown that the Court of Appeal has disregarded it. An illustration may be found in *Tod* v. *Tod* (4). (ii) If a rule of law and not mere discretion could decide the question. Illustration: *Lord Advocate* v. *Dunglas* (30) and *Huxley* v. *West London Extension Rail. Co.* (6). (iii) If the Court of Appeal has based their judgment on a point of law which may or may not be erroneous. Illustration: the present case. In all other cases no appeal will lie. I do not fancy there is any controversy as to the soundness of my first two rules. It is the third that is controverted. I confess I think the justification of the third is that without it there would be grave injustice done. The position under the Judicature Acts of the Court of Appeal is very peculiar. When an appeal comes to them as to costs awarded by the discretion of a judge, they cannot exercise their discretion instead of his unless leave to appeal from his order as to costs has been given by him. By a long series of decisions, the Court of Appeal has held that that does not prevent them upsetting what the judge has done if they can find that he had no proper materials on which his discretion was exercised. They having so found, it strictly becomes the duty of the Court of Appeal to refer the matter back to the judge for a proper exercise by him of his discretion as to costs. It may be doubtful whether this view is sound, but it has been acted on so consistently and so long that being, after all, a question of procedure your Lordships would not now wish to interfere with it. Nothing would suit the appellants better than if you could, for the judgment of the Court of Appeal would simply disappear and BRANSON, J.'s, judgment would stand. But, as it is, it would surely be very unjust that the respondent here could get rid of the trial judge's judgment upon the point of law that he has considered matter which it was illegitimate for him to consider and that then that view could not be overruled if erroneous by this House. This House is then revising, not a discretion, but a legal opinion that no discretion had been exercised. I am, therefore, of opinion that the appeal in this case is competent.

**VISCOUNT SUMNER** (read by VISCOUNT DUNEDIN).—On both the occasions when this preliminary objection has been argued at the Bar, the question has been, as I understand, whether any rule of this House existed which limited the competence of appeals for costs and, if so, how that rule had been defined by your Lordships' predecessors. On neither was there question of laying down a new rule, except in so far as the application of an old rule to new circumstances may itself be said to renew it. I think it is necessary to note this, because there is a singular lack of decided cases on the point in this century, and the precise issue raised in this appeal could not have arisen before the orders and rules of 1875, and could not previously have been contemplated even constructively. This appeal really rests upon authorities decided in the Court of Appeal upon the meaning and effect of the Judicature Act and the order and rules made under it on the subject of costs, where there has not been a trial by jury. There has been no case in this House upon that effect of the rules, for I am convinced that *Huxley* v. *West London Extension Rail. Co.* (6), whatever bearing it may have, is not now decisive. If it were, why have the older authorities been reviewed at all? To this case I must return later.

After the first argument I examined as exhaustively as I could the cases before this House and the appeal committee, both reported and unreported, which seemed to touch the point, and also the cases on costs in the Privy Council, and I submitted to your Lordships a detailed statement of them, on whichever side they appeared to be, with the conclusions that I drew. These have not found any favour with your Lordships, and it would only be tiresome to examine all the cases again. As, however, the second argument has only confirmed my former view, and as it would be discourteous to dissent from your Lordships' better judgment without assigning reasons, I ask leave to trespass on your Lordships' time with a statement of the

A results of my examination of the cases and some observations on the present position of this appeal.

A hundred years ago the practice of the House as to appeals for costs only was not new, but it had not been formulated in published reports and decisions, still less in any regulation of the House itself. The general subject, especially as it was dealt with in Chancery, was familiar, and the distinction between costs, as to which B certain persons had vested rights, and costs, which were entirely in the discretion of the court, was well known. Still the question whether, and if so, in what circumstances costs, which were in the discretion of the court constituted appealable subject-matter, was not and could not be a matter of general principle. In the absence of statutory regulation it was a matter of practice to be settled by the tribunal of the proposed appeal alone. In the case of an appeal to the House C of Lords this practice derived its authority from the House. The rules adopted by the Privy Council or on a re-hearing in Chancery might be known to be like those adopted by the House, and to the extent of that similarity might be contemporary evidence to show what the rule of the House was, but they could not even indirectly govern or prescribe it. It is not as though a uniform and consolidated body of rules had been laid down for the three tribunals, so that D a case in the one would be any authority as to the practice of another. If this is right, the crucial examination of the decided cases is considerably limited in its scope. Looking then at the opinions expressed by noble and learned Lords and the decisions of the House thereafter arrived at, there is abundant evidence that the formula "no appeal as to costs only" was regarded as a sufficient, if loose, description of the rule, and that, understanding the costs in question E to have been costs in the discretion of the court below, there is no adequate authority for treating that rule as doubtful or as admitting of fresh exceptions. The reported cases show very early, that "costs" in this formula did not mean all or any costs, but only costs that had been in the discretion of the court below. Step by step costs given by statute, costs of trustees, and costs of incumbrancers by way of mortgage or otherwise, were decided to be outside the rule. They were F the subjects, respectively, of rights by law vested in certain parties antecedently to and independently of any court's exercise of its discretion in their favour. On similar grounds the immunity of the Crown from having to pay costs constituted another vested exception, but these cases lend no aid to the contention that costs become an exception to this rule of incompetence, whenever the discussion of the order below involves what is called a "question of law." I think this has never G been decided, and the dicta most favourable to the appellant fall far short of it. LORD ST. LEONARDS leaves it in doubt whether it is upon the emergence of any question of law or only of a serious one, that the competence of an appeal as to costs depends: *Robertson* v. *Tait* (24). LORD CRANWORTH'S language would seem to show that, for a wrong exercise of discretion as to costs, there can in no case be an appeal *Marquess of Ailsa* v. *Kerr* (25) and LORD SELBOURNE, on the H other hand in *Metropolitan Asylum District* (*Managers*) v. *Hill* (22), appears to be content with the vague statement that discretion is not interfered with "in the absence of any settled principles upon the subject," whatever that may mean. His words should be read in connection with those of LORD BLACKBURN and LORD WATSON in the same case, by which I think they are considerably limited. On the I facts of that case, however, the question was not one of disregard of a settled principle as to the grant or refusal of costs, but of an order regarding the allowance of an appeal on the merits, which the Court of Appeal had clearly no jurisdiction to make. The House has so often declared in terms that an appeal as to discretionary costs is incompetent and will not be proceeded with, and has so often dismissed appeals accordingly, that the appellants' argument ought not to be that *Huxley's Case* (6) was a case as to discretionary costs and is, therefore, in point, but that their own appeal is one as to jurisdiction, like *Huxley's Case* (6) and is governed by it for that reason, which I have not understood them to allege. With the very doubtful

exception of *Brodie* v. *Sinclair* (15) I have not found any case, in which your Lordships' House has entertained or allowed an appeal as to discretionary costs only, without some addition of the merits of the cause or of a question of jurisdiction or vested legal right. In *Brodie's Case* (15) the appellant had succeeded at the trial, though not as to all the items, and had been ordered, nevertheless, to pay all the unsuccessful defender's costs. Some rule of Scottish law was apparently vouched in justification of this singular order. LORD BROUGHAM, L.C., after inquiry, satisfied himself that there was no such rule, and accordingly the appeal succeeded. Here, again, the court below had disregarded the pursuer's legal right, which was not to be compelled to indemnify another for outlay neither incurred at his request nor necessitated by his breach of the law. The rule has been repeatedly stated (e.g., *Fitzgibbon* v. *Scanlan* (13)), that, if a question on the merits be appealed, provided it be raised genuinely and not merely colourably, the House will hold itself free to modify the order made as to costs below, even if it dismisses the appeal on the merits. I cannot think that such a rule was needed, or would have been laid down, if the real mind of the House was that even discretionary costs could be made the subject of an appeal by themselves, if any question of law was added or involved. If this was the latent rule of the House, it already included their patent but narrower rule, and this express statement of it was merely otiose and confusing.

In 1835 (*Inglis* v. *Mansfield* (16)) LORD BROUGHAM, L.C., is reported as having said that the Privy Council rule and the rule in Chancery, too, were then the same as that in the House of Lords. How this may have been it is hard to tell, for, scanty as are the reported decisions on the subject in the House of Lords before that date, in the Privy Council I think there is hardly one. The later decisions we must read for ourselves. I wish to make one general remark as to the Privy Council cases, which is equally applicable to the review of causes in Chancery. In the latter court always, and in the Privy Council often, the appeal is a first and only appeal. In the case of the Privy Council the appeal is not infrequently from Vice-Admiralty Courts abroad or from courts of ecclesiastical jurisdiction in England. It may well be that, for that reason, the Judicial Committee's general rule against appeals for costs only should be less strict than in the case of your Lordships' House, which is always a tribunal at least of second appeal. I cannot help thinking that this is a material consideration. Test it thus. If the respondent's appeal had failed in the Court of Appeal, how would a second appeal to this House have been regarded then?

*The Orient* (21) has been much relied on by the appellants. It is true that it is a case in which the immediate benefit to be derived from the appeal was to get an order for payment of costs, but I do not think that any other matter than a right of costs was involved in it. SIR JOSEPH NAPIER's words show that the appeal was taken out of the general rule against allowing appeals for costs only, because there had been a mistake upon some matter of law which governed or affected costs or involved the application of principles of law. The matter of law there in question was not simply failure to give costs. It was a substantive error in declining to exercise jurisdiction to decide the issue as to recovery of full satisfaction for the matter of the plaintiff's claim in a previous personal action at law. This could only have been decided in favour of the appellant, and he would have thereby gained the advantage of being able to plead res judicata, if the matter were ever raised again. As the law then stood it was his vested legal right to have all the pleaded issues decided one way or the other: *R.* v. *Johnson* (31). As the report in 40 L.J.Adm. at p. 30 shows, the respondent's main argument was that, as the alleged satisfaction was made in an action in personam and the Admiralty proceeding was in rem, neither the special plea nor the general issue sufficed to bring the common law proceedings before the Admiralty judge as a matter requiring adjudication. The dispute was, therefore, as to the judge's jurisdiction, the existence of which the respondents denied, and not as to his right to exercise it. Legal rights at that time constantly found expression in terms

A of pleading, and I think this discussion, technical as it looks, was really the natural way in which to raise the complaint that the appellant had not enjoyed the right secured to him by law and was not merely appealing about a failure to give him rather more costs than he actually got. It is thus as an appeal against the act of the Admiralty judge in declining jurisdiction to the appellant's prejudice that *The Orient* (21) was subsequently understood in *Rieken* v. *Yorke Peninsular* B *District Justices*, *Keam* v. *Adelaide District Justices* (23), though it is true that LORD COLLINS, in stating the grounds on which the appeal was dismissed, says both that the court below had exercised discretion and that there had been no mistake in law. This is equivalent to saying that the justices had not declined jurisdiction and that there was nothing appealable about their decision. He goes on to say that the Privy Council rule was the same as your Lordships, and so it was, if this C is the right construction of the decision.

So much as to the current of authorities, which fix the substance of the rule. Assuming that the form in which it should be stated is that there is no appeal as to costs only, I see no escape from the present objection merely by saying that this appeal, though an appeal as to costs, is not an appeal as to costs only. Nothing is gained by saying it is an appeal as to a question of law as well. I think D this expression only leads to confusion. One does not add a question of law to a question of costs; the two things are not in pari materia. One raises a question of law, which is a question of the law of costs. A question of law must be a question as to the law affecting some subject-matter, and so with a question of fact. The only subject-matter here is costs, and the only question of law is whether, in this case, the judge's discretion as to costs was exercisable in either of two E directions or in one only. Justiciable questions are not divisible into three kinds, questions of law, questions of fact, and questions of discretion. Judicial discretion as to costs goes to the judge's powers over questions of law and questions of fact, but the powers themselves alike are powers over costs and costs only. The question suggested here is whether the respondent's conduct in the first (the F firm's) action was in any sufficient way made evidence before BRANSON, J., on the trial of the second (the company's) action, which appears to be a question of fact, and to be decisive of the matter one way or the other, but in any case I do not know what arguable question about costs there could be other than mere questions of fact that would not be some sort of question of law on the legal subject of costs. In the Court of Appeal, however, the decisions have so copiously laid down limitations and directions for the exercise of a judge's G discretion as to constitute a body of jurisprudence, which tends to destroy that free exercise of his statutory powers, which the legislature conferred.

The relevancy of the inquiry into the effect of the reported cases on the present occasion is twofold. First, if it is laid down that the rule of the House always was such as to extend to appeals, which nowadays arise under Ord. 65, r. 1, H where a judge sitting alone has deprived a successful party of costs and has not given leave to appeal, then in future discussions of other cases, coming under the same class but differing in their features from the present appeal, it will be open and may be necessary to go back to the old authorities in detail and to seek in them, and probably with success, reasons for distinguishing such other cases and excluding them from any appeal. Secondly, in the minds of I some at any rate, the Appellate Jurisdiction Act, 1876, s. 3, presents a difficulty in the way of any rule limiting appeals at all, unless it can be affirmed that it is one which existed before that Act was passed, and can, therefore, be deemed not to have been affected by it. I do not understand your Lordships to decide that all matters as to costs are appealable. Some remain incompetent still, s. 3 notwithstanding. I take it, for example, that *Caledonian Rail. Co.* v. *Barrie* (28) must still render incompetent any order of the Court of Appeal as to costs which are in its own discretion, for it related to costs, which were in the discretion of the Court of Session. Hence the importance of discovering whether it really

can be said that the rule existing before 1876 extended to the present case, or whether it is not really a question of making a new rule now. My own view would be that in a matter of practice your Lordships are and always were masters, and that no general statute as to jurisdiction could be read as limiting the right to mould the cursus curiæ. This seems to have been the view, which underlies s. 11 of the Act of 1876. I think that the rule, both originally and all along, was a practice rather than a principle, a matter of self-defensive policy, like the maxim de minimis non curat lex or the Privy Council rule as to concurrent findings of fact, and these are clearly questions of the way in which the House exercises its jurisdiction. Such matters must be capable of modification, whenever your Lordships think it expedient from time to time. Particularly must this be so where a new regulation of practice opens your Lordship's doors to new subjects of appeal not hitherto entertained. The only question in this view would have been one as to the expediency of the change, but this has not been the matter in debate, and I will only say that I am not at present persuaded on this head. I should also like to point out, what I think may be very important in any further proceedings, that I do not understand your Lordships to pronounce any conclusion as to the validity of the practice, long as it has prevailed in the Court of Appeal, of entertaining appeals from a judge below, brought without his leave, against the exercise of his discretion as to costs when sitting without a jury. The principles on which this is done and the grounds on which it is supported are very conveniently stated by referring to what was said by Lord Halsbury, L.C., in *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29). This may stand for a numerous body of decisions. These decisions have not been put in the arguments on the present objection. Not unnaturally, counsel for the respondent, who had appealed to the Court of Appeal successfully, did not argue that the decisions under which this had been done were wrong, but this does not alter the fact that they are not binding on this House, have never come before it for approval or the reverse, and will be open to review on future occasions. The fact that counsel did not dispute them in this case cannot, of course, make your Lordships' present decision equivalent to an affirmation of them.

*Huxley* v. *West London Extension Rail. Co.* (6) is, no doubt, a case of importance in this connection, but I think it must be clear that its value lies in analogy only. It is not a decision on the rule in the *Civil Service Co-operative Society's Case* (29). I see no difficulty in reconciling the fact that the House entertained the appeal in *Huxley's Case* (6) with the existence of a rule, good or bad, that it will not entertain appeals as to costs only. The question being: "Was there good cause?", the decision did not touch the question: "Was there good enough cause?" The ground of the appeal was that the Lord Chief Justice had acted without jurisdiction, surely an appealable matter apart from the mode in which he dealt with the costs. If he acted without jurisdiction the litigants' legal rights were invaded, just as in *The Orient* (21) they were disregarded. Order 65, r. 1, has the force of law, and *Huxley's Case* (6) arises under the second proviso, which it contains. The structure of the proviso is that, where the matter has been tried by a jury, the costs shall follow the event and be independent of the judge's order, unless the occasion arises, which alone gives him jurisdiction to intervene, that is the existence of "good cause." The question of its existence, since his jurisdiction depends on it, must be appealable; a judge cannot give himself jurisdiction by finding that he has it when, in fact, he has not. The rule, where the trial is without a jury, is laid down on totally different lines. The costs are then in the discretion of the court and there is no express statement of anything which limits it or is the foundation on which jurisdiction depends. Costs, which are in the discretion of the court, are primâ facie costs which are got from the judge according to his view of the case before him, and they are not the subject of standing legal prescriptions vesting in a litigant a prior legal right to certain

costs at all. If one comes to think of it, costs which are in the discretion of the judge must also be in his indiscretion, and so the only question that remains outstanding is the question of jurisdiction. In saying this, I am painfully aware that I am departing from the line which has long been followed in the Court of Appeal. There the cases have been steadily assimilated, whether the trial was by judge and jury or not, and the extent to which under this process the exercise of the judge's discretion has now been prescribed to him by decisions of the Court of Appeal as matters of law may well be collected from the judgment of ATKIN, L.J., in *Ritter* v. *Godfrey* (3) ([1920] 2 K.B. at p. 54). Further, by the words of the principal Act itself, the judge's order as to such costs is made expressly, and primâ facie absolutely, unappealable without his leave. There is no doubt here about jurisdiction, for the subject-matter is simply costs, whether an order for costs is made or is refused, and those costs are entirely within the judge's discretion since he tried the cause. His jurisdiction is complete, if the cause has proceeded before him. "The necessary hypothesis of the existence of materials, upon which the discretion can be exercised," is merely a condition precedent to the exercise of a discretion, which the judge possesses, if he proposes to exercise it otherwise than in one way. In the face of a rule which places costs in the judge's discretion, it is impossible to argue that the successful litigant has by law a right to costs, in the sense in which that is said of trustees' costs or costs given by statute. Now this condition is only implied, if it exists at all, but the implication, according to LORD HALSBURY, L.C., is not only that the right to exercise the discretion otherwise than in one way is conditional, but also that the question of the existence of that condition is itself appealable notwithstanding the statutory words. These questions are quite different from those which arose in *Huxley's Case* (6). How they should be answered is not a question which now arises for decision, but for the purpose of emphasising what I have ventured to say about the complete distinction between *Huxley's Case* (6) and the issue in this appeal, I would point out two things. First, an implied condition, unlike an expressly limited jurisdiction, even if it can be implied at all, may nevertheless not be appealable matter, for the Act may mean the judge himself to be the sole judge of the existence of the condition, as he is of the other matters that guide him in the exercise of his sole discretion. The second is that to imply such a condition as an appealable question, if it is merely rested on the proposition that the judge must act judicially, is a construction deserving of close scrutiny. A judge, sitting in the seat of justice and acting as a judge, may sometimes deal with costs, as with other things, injudiciously, but in the matter of costs which are in his discretion an injudicious order is not open to review. If, then, the statement that he must act judiciously really means more than this, it is no doubt true, but in common experience it is an injunction never disregarded. Certainly during the argument we were presented only with somewhat fantastic suggestions of non-judicial conduct, under the express language of Ord. 65, and such cases, if they occur, are but a dubious ground for implying rules about self-misdirection and the existence of evidence fit to be considered by a reasonable man, which really belong to trials by jury.

I should desire to add two observations on another aspect of the case. The respondent appealed to the Court of Appeal claiming that BRANSON, J., had gone outside his discretionary power and had fallen into an error of law in so doing, which was appealable. He won. He now says that by the rules of your Lordships' House the matter is not further appealable. It is now contended that grave injustice would be done if we refused to entertain the appeal on the appellants' allegation, for this purpose deemed to be capable of being established, that the Court of Appeal in its turn was guilty of error of law and that the trial judge was not. As this involves hearing all the facts of the appeal, it makes any rule which has to be enforced by an objection in limine quite useless, for the merits will always have to be fully heard on the appellants' allegation, that, when they are heard, the error in law will appear. Further, though it may be surprising for this

House to have a rule differing from that adopted by the Court of Appeal, or to refuse to review that courts' decision on the same ground as that on which it undertook the task of review, the question is not whether our rule is surprising, but whether it exists. For the rest, I am frankly unable to understand how the fact that the respondent sought the Court of Appeal and won there can assist the appellants in showing that they, in their turn, must have a corresponding right of appeal to your Lordships. With great respect I think that the objection should have been allowed, and that in any case the decision should be no more than this, that your Lordships, in the exercise of your power over the practice of this House, think fit to proceed with the appeal.

**LORD ATKINSON.**—I think the respondent's objection to the hearing of the appeal fails. I concur with the judgment of the Lord Chancellor on this point. He has dealt with the authorities touching it so exhaustively that it is quite unnecessary for me, agreeing as I do with the conclusion at which he has arrived, to deal with them afresh at any length.

I base my opinion mainly upon the principle upon which the two following cases have been decided, namely, *Huxley* v. *West London Extension Rail. Co.* (6) and *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29). The first of these two was an action brought by the appellant Huxley against the railway company for damages alleged to have been sustained by him through the negligence of the latter while carrying him as a passenger on their line. He claimed to receive £3,000. The defendants pleaded that there was no negligence on their part, that there was contributory negligence on the plaintiff's part, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendants, if any, and lastly that the plaintiff was not injured as alleged. At the trial before Lord Coleridge, C.J., and a special jury, a verdict was returned for the plaintiff for £50. The Chief Justice, though applied to by the company's counsel to exercise the power conferred upon him by Ord. 65, r. 1, and to deprive the plaintiff of his costs, declined to exercise any jurisdiction in the matter, upon the ground that the later decisions of the Court of Appeal (especially that in *Jones* v. *Curling* (32)), had made the principles upon which this jurisdiction was to be exercised unintelligible to him. The plaintiff, accordingly, entered up judgment for himself for £50 and costs. I think it would be illuminating to consider at this stage what was the nature and scope of the judgment of the Court of Appeal in *Jones* v. *Curling* (32), which the Chief Justice found so unintelligible. The action in that case was brought to recover possession of six parcels of land. The defendants, availing themselves of the provisions of Ord. 19, r. 15, which corresponds with Ord. 21, r. 21, of the rules of 1883, pleaded as a defence that they were in possession of all the closes claimed. The jury found for the plaintiffs as to four of these closes, numbered respectively 1, 2, 3, and 5 and for the defendants as to closes 4 and 6. The respective portions recovered by the plaintiffs and defendants were about equal in area, the plaintiff's portion being valued at £4,950. Coleridge, C.J., before whom the case was tried, made an order that the costs of both parties should be added together and divided, apparently equally, between the plaintiffs and the defendants. This order was obviously not an order that the costs should follow the events, but rather an order that on the ordinary system of taxation they should not follow the event. The appellants appealed to the Court of Appeal. Brett, M.R., is reported to have expressed himself thus (13 Q.B.D. at p. 267):

> "Now from this order [as to costs] an appeal has been brought to this court, and the first question for us to decide is whether we can entertain any appeal, and if so, to what extent? I am of opinion that this court has a right, and is bound, to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs . . . The condition which gives the judge upon a trial before himself and a jury jurisdiction to make an order as to costs is,

whether there was a good cause or not existing, and I am of opinion that that is a subject-matter of appeal. Whether there was a good cause or not is a question of fact, and the Court of Appeal must consider whether in their judgment that fact did exist, and if they disagree as to this with the judge who tried the action they must allow the appeal."

BOWEN, L.J., expresses his opinion on the matter with his well-known felicity of language. Referring to Ord. 65, r. 1, he said (ibid. at p. 271):

"The question of costs is dealt with by Order 65, r. 1. That rule begins with placing in the discretion of the court the costs of all proceedings in the court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the judge and are to follow the event, except in one case, which is, if the judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take their ordinary course, there can be no good cause, and if there is no good cause then the judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the judge depends. When, however, the jurisdiction is established, then I think there is no appeal unless the judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all. . . . It being open for us to decide whether there was good cause here for making the exceptional order by which the costs do not follow the event, we are driven to consider what is good cause within the meaning of this rule. . . . 'Good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make."

FRY, L.J., said (ibid. at p. 274):

"It appears to me that the question whether the facts exist which give the judge the discretion must be the subject of appeal. It is not withdrawn from appeal because the discretion, if it exist, is not the subject-matter of appeal. Then the question is whether good cause in this case has been shown. I will not attempt to give any definition of what 'good cause' is, but it plainly must be something which renders it reasonable that the judge should interfere with the rule that costs should follow the event."

He then points out that the judgment or verdict in the case was distributive, the event with which it dealt not being single. That being the case, upon taxation the costs would therefore follow the distinct issues, and he concludes thus:

"Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself good cause for interfering with the rule that the costs follow the event? I am bound to say that it appears to me not to be so. I am of opinion, therefore, that there was no good cause shown, and consequently that the Lord Chief Justice had no jurisdiction to make the order, and that the order must be set aside."

In *Huxley's Case* (6) the Court of Appeal made an order that the defendants should have liberty to renew their application to LORD COLERIDGE, C.J., and that if he declined to exercise his jurisdiction under Ord. 65 r. 1, they should apply to the Divisional Court. A stay of execution was given in the meantime. On Dec. 18, 1885, the defendants accordingly renewed their application for an order depriving the plaintiff of his costs. On Jan. 3, 1886, the Lord Chief Justice heard the arguments, and on April 5 following he made an order that the plaintiff be deprived of his costs for the reasons given in the report of the case in 17 Q.B.D.

373. The Lord Chief Justice delivered a judgment which covered nine and a half printed pages of the report. On p. 374 he states, as I understand it, what are the facts which he considered amounted to "good cause" for depriving the plaintiff Huxley of his costs. The statement runs thus:

> "In the case of *Huxley* v. *West London Extension Rail. Co.* (6) the plaintiff had preferred an extravagant and extortionate claim for compensation, £3,000, not merely in the formal statement of claim but in the particulars delivered in the action; he had supported it by fraudulent statements and dishonest acts; and endeavoured to substantiate it before the jury by evidence which they very properly disbelieved."

The plaintiff Huxley appealed to the House of Lords against this order of the Court of Appeal. The appeal was heard by the following six members of this House, namely, Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Fitzgerald, Lord Macnaghten, and Lord Herschell. Four of these noble Lords gave long judgments. Lord Macnaghten stated he agreed with the conclusions at which his learned friends had arrived, and Lord Herschell expressed his concurrence with the opinion Lord Watson had delivered. The House entertained the appeal and decided it on the ground that the statement as to Huxley's conduct in instituting and supporting his action, as stated by Lord Coleridge, C.J., constituted "good cause" for his depriving Huxley of his costs. The judgments delivered in the case are very valuable, inasmuch as they deal with the proper construction of Ord. 65, r. 1, and indicate what was the true meaning and reach of the words "good cause" used in the order, and next the important question whether Huxley's appeal was to be dealt with and regarded as an appeal on "costs alone" or the same thing "costs only." Lord Watson, while stating that he would not attempt to give a general definition of "good cause," said he might give an incomplete definition of it, and indicated what they, in his view, mean in the order and what they embrace. In his view, he said

> "they at all events embrace . . . everything for which the party is responsible, connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense."

And he lays it down that as long as the judge or court deals with considerations of this kind, the sufficiency or insufficiency of those considerations as affording a reason for disallowing costs are matters of which they are the constituted arbiters. They are acting within their jurisdiction and their decisions are final and conclusive. On the other hand, he said, if they give effect to considerations which do not constitute "good cause" within the meaning of the rule, they exceed the limits of their jurisdiction, and on that ground their decisions are not protected from revisions. Lord Halsbury's judgment is practically to the same effect. The judgment of the Court of Appeal dealt solely with the question whether Huxley's conduct and action, as described by Lord Coleridge, amounted to proof of "good cause" for depriving him of costs within the provisions of Ord. 65 r. 1. There was not, in the Court of Appeal, any suggestion that the verdict found for Huxley should on any ground be set aside or modified or that the damages awarded to him should on any ground be diminished. The appeal dealt solely with the question of the existence of "good cause" under Ord. 65 r. 1, for depriving a successful litigant of his costs. The only relief asked for from the Court of Appeal or this House was that he might be declared entitled to these costs. The appeal to the House of Lords was likewise an appeal dealing solely with costs, i.e., an appeal to get rid of the order of the Court of Appeal which deprived Huxley of costs.

It is difficult to see how an appeal that only aims at annulling an order which deprives a litigant of his costs, because of his own conduct and not because of the merits of his action, is not an appeal dealing solely with costs. As an example of the practical application of those principles I refer to the second of the

above-mentioned cases, namely, the case of the *Civil Service Co-operative Society, Ltd.* v. *The General Steam Navigation Co., Ltd.* (29). There the defendants chartered to the plaintiffs a steamer to bring a party of sightseers to Spithead and other places to see the review of the fleet to be held on the occasion of King Edward VII's coronation. The review was first postponed to June 25. The amount to be paid to the defendants was the lump sum of £1,500. The plaintiffs paid them £250 on the signing of the charter, and the balance £1,250 on June 18. On June 25, when the review was postponed, notice was given by the plaintiffs to the defendants that they would not require the use of the ship. Before the postponement the defendants had expended £500 in fitting out the steamer. The review did not, in fact, take place till the month of August. The plaintiffs sued the defendants to recover the sum of £1,500 as money paid on a consideration which failed. At the trial before a judge alone, BIGHAM, J., as he was then, it appeared that there had been some negotiations between the parties for a settlement of the dispute, and the learned judge expressed a desire that the matter should be left to him to say what, in the circumstances and apart from the strict legal rights of the parties, should be done. The defendants declined to take this course, and refused to accept another suggestion of the learned judge, namely, that they should be content to retain the amount of the expenses they had received and their costs. In the result the learned judge gave judgment for the defendants, but ordered that each of the parties should bear their own costs. The plaintiffs appealed against the judgment in favour of the defendants, contending they were entitled to recover the sum they had paid, and the defendants appealed from the order of the learned judge that each of the parties should bear their own costs. The appeal was heard before the LORD HALSBURY, L.C., sitting in the Court of Appeal, LORD ALVERSTONE, C.J., and COZENS HARDY, L.J. The plaintiff's appeal against the order of the learned judge was dismissed, and on reference to the defendants' cross-appeal against the award of costs, the Lord Chancellor is reported to have said ([1903] 2 K.B. at p. 765):

> "No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly, according to law, resisted the suit, and finally succeeded. In the judgment of BIGHAM, J., and in the judgment of this court, they are right; and it practically comes to this, that the learned judge has deprived the persons sued of what, primâ facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs."

It is, I think, perfectly clear from these authorities that if a judge in a case tried before him and a jury should, by the exercise of the discretion given to him by Ord. 65, r. 1, deprive a successful litigant of his costs, the materials upon which he exercises that discretion, if it is to be properly exercised, must be materials proved in that case to exist. It is not enough that they should be imagined, or suspected, or without proof believed by the learned judge to exist,

nor is it enough if they should exist in a suit different from the suit tried, and the judge should mistakenly suppose that they had been established in this latter suit and act upon that false assumption. That, it appears to me, is what has occurred in this case. Besides, it should always be remembered that the discretion which is to be exercised under this order and rule is a judicial discretion. It is not a judicial exercise of this discretion to order a litigant who has been completely successful in a suit and against whom no misconduct is alleged to pay the costs of the proceeding: *Kierson* v. *Joseph L. Thompson & Sons, Ltd.* (33). Irrelevant matters cannot be relied upon by a judge as constituting "good cause" for depriving a successful litigant of his costs, such as his putting forward, in his defence to a money demand, of the Gaming Act (*Granville & Co.* v. *Firth* (34)), or the Statute of Limitations (*Elms* v. *Hedges* (35)), or the expression by the jury of their opinion as to how the costs should be borne. The rule that no appeal should lie to the House of Lords on a question of costs alone is not a statutory rule. It is merely a rule of practice. It was shaped, adopted, and applied long before our expeditious and effective Court of Appeal was created. Upon what rational principle this rule, if it be a desirable one, is to be applied to appeals to the House of Lords, and not to appeals to the Court of Appeal, it is difficult to see. The judgments of this House, delivered in the *Huxley Case* (6), if they do not disregard it altogether, would appear to me to deprive it of all coercive authority. For these reasons I am of opinion that the appeal on the preliminary point fails and that the objection raised should be disallowed.

**LORD SHAW** (read by Lord Carson).—There is no question before your Lordships House as to the merits of the action between these parties. It is admitted by both of them that these merits are finally disposed of and that the sole difference between them is as to costs.

I wish to make this general statement in the most absolute terms. A consideration of the decisions founded upon by learned counsel shows, first, that a question of costs which is incidental to a consideration of a judgment upon the merits may be entertained when, but not unless, the merits are brought before this House and made the subject of consideration. In the second place, there may be cases figurably, and, indeed, definitely, alluded to in the judgment of this House to which reference will presently be made in which, even although the merits be brought formally upon appeal, yet the House may discern that that is but a colourable attempt to introduce costs and nothing but costs to their Lordships' consideration. Such an attempt being colourable, stamps the case as one in which no merits are before this House; the remainder of the case being costs alone the appeal is thrown out on the simple ground that in substance costs, and nothing but costs, were brought before your Lordships. Such an appeal will not be entertained. In these circumstances the respondent in this case makes an objection founded upon the practice. The first reason stated in his case is that the appeal ought to be dismissed "because the present appeal is one brought as to costs only, and is therefore one which, in accordance with the established principles of your Lordships' House, cannot be sustained." The meaning of that I take to be that the appeal is excluded from consideration by the established practice. I think that reason to be sound, and I am of opinion that the appeal should accordingly be dismissed. The argument upon this subject contained a full reference to many authorities and was long and elaborate. It is clear to me that an attempt is now being made to subvert or invade in a most substantial sense our long-settled practice.

The respondent was in the employ of a firm, Donald Campbell & Co., and was the manager of their Eastern department. Their business was formed into a limited concern, namely, Donald Campbell & Co., Ltd.; the respondent became director of that company and he was a large shareholder in it. It did not prosper, and in a short time went into liquidation. Acute differences ensued on the subject

of the respondent's dealings, and, in particular, as to his relations with one Boris Said. The firm sued the respondent by a writ issued on May 31, 1921; then, a few days afterwards, namely, on June 3, 1921, the company issued a writ against him. The two actions were consolidated and tried before DARLING, J., and a jury, and resulted adversely to the plaintiff. The Court of Appeal ordered a new trial in both actions. On appeal to this House it was decided that there should be no new trial in the action by the firm and that a verdict in the firm's favour for £2,943 2s. 0d. should stand. With regard to the company's action, however, which was an action for an account, it was decided that it should be re-tried. It was re-tried, and confessedly the trial was most satisfactorily conducted. To use the language of ATKIN, L.J.:

> "That second action was tried before BRANSON, J. It was tried before him for eight or ten days, and he gave a judgment as to issue on liability, and, if I may say so, a more satisfactory judgment I have never read in a complicated case. It seems to me that the learned judge went very carefully into all the facts, considered very carefully the contention of both parties, and, having very carefully considered and weighed them, eventually came to a decision in favour of the respondent. An action tried in that way should have the usual result that the parties are satisfied that justice has been done, although they do not go away satisfied with the result, because it is very seldom possible to convince an unsuccessful plaintiff or defendant against his will. Nevertheless, both parties are obviously satisfied with the way in which the case has been tried, and there is no further appeal from the findings of the learned judge on the question of liability. The question that is before us now is the question as to costs. The learned judge has deprived the respondent of his costs."

I do not propose to discuss whether BRANSON, J., was right in so depriving the respondent of his costs, or whether the learned judges of the Court of Appeal were right in reversing that judgment and finding the respondent entitled to costs. In substance the Court of Appeal held that in exercising his discretion as to costs the learned judge had been moved towards that decision by facts established, or held to be established, when certain evidence was led in the previous consolidated action; the Court of Appeal held that he should not have been so influenced. The material was no doubt before him in this sense, that the consolidated action and its procedure were referred to, but the Court of Appeal consider that BRANSON, J., overstepped the legitimate limits by allowing the evidence to enter into or influence his mind and did not properly exercise his discretion. In these circumstances they confined within what they reckoned to be proper limits the true subject for consideration in the exercise of a discretion as to how costs should be awarded, and they did, in their turn, exercise a discretion as to costs, and made a pronouncement upon them in favour of the respondent. I shall, before I close, revert to this subject of discretion. It would be improper to indicate which of these judgments was right, but the brief narrative has only been given in order to lead up to the fact now definitely manifest, namely, that from the day when BRANSON, J., gave judgment in favour of the respondent, the merits of this action were not only finally determined but completely passed from. The judgment stands without suggestion by either side that it can be gone back upon, and with a confession that the appeal to this House is on costs alone. Neither in substance nor in form or colour are the merits brought before this House, and it is to that clear and clean case that the authorities as to practice have to be applied.

In *Fitzgibbon* v. *Scanlan* (13) LORD ELDON, L.C., said (1 Dow. at p. 270):

> "In regard to the matter of costs, although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters."

That is a clear distinction between costs alone and other matters, namely, the merits. As to costs alone "an appeal would not be received." It is reported that LORD REDESDALE concurred with the Lord Chancellor "in every particular." The case was decided in 1813. *Tod* v. *Tod* (4) completely confirms the same view as to practice, but it illustrates the matter from another aspect. A summons of reduction of a certain election of magistrates to a Royal Burgh in Scotland was raised in the Court of Session. The merits of the discussion need not be entered upon, but the Lord Chancellor said, upon the point of practice, as follows (2 Wils. & S. at p. 549): "This House never does entertain an appeal for costs where costs are in the discretion of the court below." That is a statement of the general practice. He then, however, added:

> "But when the legislature, by a statute, has expressly required that the Court of Session, in the case of an action that is brought under the authority of that statute, and in the case of a summary complaint which is brought under that statute, the court shall make the party who fails pay the full costs of suit, it does appear to me that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute."

The Lord Chancellor concludes with this clear pronouncement:

> "If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie."

In 1835 occurred *Inglis* v. *Mansfield* (16), a case on appeal to this House from the Court of Session. LORD BROUGHAM, L.C., put the matter thus:

> "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the court called upon to review the case, the court of review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the court below, consider the question of costs as if it is fairly raised."

It appears to me, confining the decision to the practice of this House, that that judgment makes clear the distinction in our practice that costs alone you cannot appeal for: they will only be considered by this House when merits are brought up for consideration, and they will not even then be so considered if the bringing up of the merits is a colourable device for getting costs considered. I am humbly of opinion that all this is still law.

*Home* v. *Pringle and Hunter* (19) was decided in 1841. LORD COTTENHAM, L.C., dealt with the question of costs on the same lines. He said (8 Cl. & Fin. at p. 293):

> "If I had been sitting in the court below, considering the failure of the case made against the trustees, and the unjustifiable charges brought against them, I should perhaps have thought it just that they should be indemnified in costs, by directing the pursuer to pay them. But in this House the case is different. A court of appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone."

The House decided accordingly.

Although I am citing the authorities presented to the House in their order, it seems clear to my mind that the general practice of the House was a practice not begun with those cases, but that the dicta of these three Lord Chancellors confirmed a rule of long and well-established standing. It is so treated in

MacQueen's work on the Practice of the House of Lords and Privy Council. An appeal, says he, will not lie on costs alone, but it does not follow that the article of costs may not be taken into consideration when there is an appeal respecting other matters, and then he quotes Lord Brougham's judgment already cited.

In *Wilson* v. *R.* (20) an appeal had been presented to the Judicial Committee of the Privy Council from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the customs laws. One of the appellants was proved not to be the owner of the goods, though so proceeded against. He, however, was cast in costs by the court below. He made no appeal on the merits, the decision being in his favour. He, however, did appeal, and Cairns, L.J., said:

> "With regard to one of the appellants, Cole, it was attempted to maintain his right to appeal, on the ground that, although he had been absolved from penalties in the court below, he had not been awarded the costs of the proceeding against him. Their Lordships are of opinion that, with regard to the appellant, Cole, the appeal is strictly and simply one of costs, under circumstances in which their Lordships have at all times laid down as a rule, that an appeal for costs could not be entertained."

The rule thus enunciated by Lord Chancellors of the greatest eminence and covering a period of practice of over half a century is, however, argued to have been either changed or evaded by *The Orient* (21), decided in 1871. It was a case of damage instituted on behalf of the owners of a brigantine *Georgiana* against the brig *Orient* and her owners, the appellant company, as was assumed, their agents. A general denial was pleaded in answer, and a special defence was put in that the damage complained of had been already adjudicated upon in a court of law and judgment obtained and satisfied. At the hearing it was proved by a witness who was the principal defendant that the damage was occasioned by acts done by him on his own responsibility, but claiming certain rights as consignee. The Admiralty judge held that the suit could not be maintained, but declined to give the defendants their costs or go into this special defence, although his judgment was asked thereon by the defendants' counsel. It was held by the Judicial Committee that the defendants were entitled to have the judgment of the court as asked on the special defence, that the general traverse and denial was sufficient to justify the evidence, and that the appeal was not for costs alone. It is plain that the merits of the case, and not costs alone, were thus brought before the Privy Council, and it is also clear that the Council so thought. A perusal of the judgment of Sir Joseph Napier demonstrates this. In the course of his opinion, however, he said this (L.R. 3 P.C. at p. 702):

> "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

I am clearly of opinion that the argument ably submitted in the present case to this House misconstrues these words here employed, namely, "mistake upon some matter of law that governs or affects costs." It seems plain to me that that refers to a matter of law on the merits of the case: it does not refer to a decision upon costs or a matter of law about costs, but it refers to a matter of law upon the merits of the case consequent upon which decision on merits the question of costs could hang. That there was such a decision on the merits given in *The Orient* (21) is plain, and a most important decision as to practice it was, namely, as to whether the general traverse and denial was sufficient to justify certain evidence produced, and, furthermore, it is plain that a substantial question on the merits equivalent to a plea of res judicata had to be decided. Merits accordingly being thus brought

before the Judicial Committee, any question as to "costs alone" disappears. And it is to be noted that "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs."

It is argued that in *Metropolitan Asylum District (Managers)* v. *Hill* (22), observations fell from the court which essentially weakened the long-established rule of practice so frequently affirmed. I am humbly of opinion that this is not so. Upon the contrary, the rule was re-affirmed that an appeal must not be brought for costs or in relation to costs, "but an appeal against an order which imposes as a condition having a new trial that payment within a certain time of the costs of the first trial does not fall within that order." As LORD SELBORNE, L.C., put it: "The Court of Appeal conditionally discharged the order for the new trial, and in the alternative conditionally dismissed the appeal." It seems clear, accordingly, that the point before the House was whether the appellants "were entitled to retain the order which they had obtained from the court of first instance unclogged and unfettered by conditions." LORD BLACKBURN makes the distinction very emphatically when he says:

> "Your Lordships may possibly come to the conclusion that there ought to be a new trial absolute and simple, without any condition at all, or it may be that you will think it right for there to be a new trial with the condition which the Queen's Bench Division imposed, or with the condition which the Court of Appeal imposed, or it may possibly be that you will be of opinion that there should be a new trial with some other condition different from either."

LORD WATSON expressly concedes "the propriety of the rule that the court of last resort ought not to entertain an appeal which involves nothing except the payment of costs." He adds: "But it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined." Instead, accordingly, of *Hill's Case* (22) casting doubt upon the rule, it follows it and confirms it, and, as appears from the language of LORD WATSON just cited, applies it almost expressly to the present case now before the House, which is cited to be a case "where the whole merits of the action or cause have been determined."

In 1889 occurred *Huxley* v. *West London Extension Rail. Co.* (6). The case did not deal with the question now before your Lordships' House, but with the construction of a certain passage in Ord 65, r. 1, of the Rules of the Supreme Court 1883, which applies to the discretion exercised by the judge or court in trials with a jury, the prescription of the rule being that in such cases " the costs shall follow the event unless the judge . . . or the court shall for good cause otherwise order."

The judge trying the cause with a jury had refused to exercise his discretion or exercise any jurisdiction in the matter. The Court of Appeal sent it back to him, and he deprived the plaintiff of costs for the causes set out in his report. The questions before this House truly were whether the Lord Chief Justice by at first declining to determine costs had rendered himself functus officio, and what in practice and on merits was important, namely, what were the true procedure under, and the true construction of, the statutory order. The case does not appear to me to throw any light upon the point of practice before your Lordships.

It is different, however, with *Caledonian Railway* v. *Barrie* (28). The pure and broad question was there brought before a powerful committee of this House, consisting of LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY. It was an appeal against a judgment of the Court of Session in Scotland in an action directed against the railway company for injury to cattle being conveyed under a certain contract. The sheriff substitute assoilzied the company, but gave them no costs. On an appeal to the sheriff he cast the company in the costs of the case. It appeared that the company's behaviour was considered reprehensible ; it had denied to the cattle dealer any information as to the cause

A of the injury to the stock and had declined to allow any railway servant to be precognosced. The First Division of the Court of Session by a majority affirmed the sheriff. LORD ADAM said that the case raised "a question of principle" depending on the construction and meaning of the correspondence between the parties and their actings. The court accordingly applied their minds to the correspondence, &c., and held that the sheriff was right. LORD MCLAREN dissented, holding B that he was wrong. If there ever was a pure question of costs on which the House of Lords could have been induced to entertain the appeal, this was one. The successful party had been cast in the costs of the unsuccessful party. One judge of appeal had dissented and the other judge had admitted that he decided the case upon principle. The appeal committee before whom the case was argued and decisions cited held as follows: "That the appeal, being on the question of costs C only, was incompetent."

In *Rieken* v. *Yorke Peninsula District Justices*, *Keam* v. *Adelaide District Justices* (23) another attempt was made in the Privy Council to get the better of the rule. The judgment of their Lordships was delivered by LORD COLLINS, who cited *Wilson* v. *R.* (20), *Inglis* v. *Mansfield* (16), and *The Orient* (21) and held that the rule was firmly established.

D I have thus gone through all the relevant and important cases founded upon. They cover a period of over one hundred years. They appear to me to culminate in *Caledonian Rail Co.* v. *Barrie* (28). It appears to me to be settled by authority that this appeal, admittedly in no respect upon the merits of the cause but solely upon costs, must be rejected as incompetent. It falls within no exception to which a statute applies. When an Act of Parliament or a statutory order or a recognised E rule of law has prescribed that in a certain event there must be a certain result as to costs, then the courts must follow that prescription, but this becomes part of the merits of the case itself. There is no such case here. The exercise of discretion is a wide term. Suppose a decision demonstrably and confessedly resting upon elements derived illegitimately and improperly from material only imported into the case on account of some invidia in the judge's mind, and not F resting upon material in the cause, it may be that in such a case the House might think fit to break down or make that an exception to the rule. I do not suggest that the House would be foreclosed from doing so, although it stands to reason that such an invasion of practice would require to be founded upon extraordinarily strong grounds. But I see nothing in the present case to give a right to an appeal to this House on the challenge that it was a legal matter for the House to determine G as to what were the materials on which the judge who tried the case should have exercised his discretion. These materials were admittedly to be found within the four corners of the consolidated cases by the company and the firm. The case, in short, is the familiar one of a discretion being alleged to have been wrongly exercised by a judge: the phrase used is that he misdirected himself, the equivalent of which is simply that he went wrong. If he took something into account which H had entered into the case actually or by inference, but which he should not have allowed to enter his mind, and should have been blind to, then his discretion might have been erroneously exercised, and the Court of Appeal, according to its practice, was of course within its rights in correcting this error and exercising its own discretion without allowing such an error to creep in. The practice of the House I appears to me to be plain, that at that stage finality upon costs with all the points as to the elements of discretion applicable thereto is definitely reached. The Court of Appeal in England and either Division of Court of Session in Scotland are charged with that final responsibility. This House respects that finality as does the Judicial Committee of the Privy Council in regard to decrees upon costs alone pronounced by Indian and colonial judicatories.

I desire to add this. I think, but of course I cannot testify, especially upon the practice in England. But with regard to Scotland I can. I feel sure that legal practitioners and litigants in that country have looked upon the rule as so

settled and have accepted that finality of their Supreme Court accordingly. I do not doubt that the same thing has happened in England. Your Lordships are thus confronted with an appeal made not only to upset a course of decision, which has extended for over a century, but with a uniform practice of the two laws and countries in conformity therewith. I think that practice was right and that this case falls within it. I will add but one word, as to the argument submitted to this House in regard to the Appellate Jurisdiction Act, 1876. Section 3 of that statute is as follows:

> "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following, i.e. (1) of Her Majesty's Court of Appeal in England . . ."

It was argued in the present case, as it was in *Home Secretary* v. *O'Brien* (36) that the language is language of complete generality. It was held in the case cited that such language could not and was never meant to apply in the sense of extending the jurisdiction or practice of this House so as to make appealable an order of liberation pronounced upon a writ of habeas corpus, the practice of this House having been to respect the principle that once liberation had been granted by any court the cause is at an end. I do not think that the enumeration in general terms as to all orders of the Court of Appeal was made to or does apply to a complete inversion of the practice of this House as to declining to entertain appeals solely upon costs. The long-settled practice to which I have referred could only have been inverted or invaded by language directly and distinctly aimed and settled for that purpose. The principles set forth in *O'Brien's Case* (36) and in *Cox* v. *Hakes* (37) appear to me to cover the present case. I am humbly of opinion that the objection by the respondent to the competency of the present appeal is well founded and that it should be sustained and the appeal dismissed with costs.

The above was the opinion which I formed at the close of the first hearing. I have most carefully and respectfully considered the very able arguments of counsel at the second hearing and the views of your Lordships just delivered, and I adhere to my first opinion. In doing so the House will forgive me, I trust, while I merely note these supplementary points:—(i) This is a purely English appeal. Its decision turns out to be governed by the effect of Ord. 65 of the rules of the English Supreme Court and of the position and practice of the Court of Appeal under the English Judicature Act. It appears to be accepted that the Court of Appeal may rectify an error in law which it is satisfied the first judge fell into, but that it itself exercises no discretion. In case of the present decision of this House ever being cited in any Scottish attempt at appeal from the Court of Session, not on merits but upon costs alone, I think it right only to mention that in Scotland there is neither by enactment nor practice nor analogy any justification for holding that the long-standing practice with regard to Scotch appeals is now being invaded or altered. The Inner House of the Court of Session has itself a discretion as to the award, modification or refusal of costs. Quoad an appeal to the House of Lords, if a decision upon costs has been reached by the Inner House that decision cannot, solely on costs, be challenged in this House, and must stand as final. The matter has been so treated by writers on practice, such as the learned Professor Eneas Mackay. And its clear and absolute character has, I can personally testify, been so treated during the more than half a century of my own professional life. (ii) I venture to enter my special dissent from those opinions which have expressed either doubt or question of the decision of the powerful appeal committee which sat in *Caledonian Rail. Co.* v. *Barrie* (28). It is true that in the argument a reference was made to another question, namely, the effect of s. 40 of the Scottish Judicature Act (which confines the range of facts to those found in the court below). But that reference was an irrelevant and futile reference and had no bearing on the question of the competency of the appeal. The true question, namely: "Is there an appeal to the House of Lords on a question of costs alone,"

as the private records of the case show, was thoroughly argued and the whole catalogue of leading cases already alluded to was cited, and when LORD MACNAGHTEN, in throwing out the appeal, did so, he referred to the ground for doing so as one; and nobody can doubt that it was and was alone the one which is before your Lordships now. (iii) I venture to call attention to what happened in the Court of Appeal on the form of that court's judgment. It is as follows, namely, that such part of BRANSON, J.'s, judgment "as orders that no order be made as to costs be set aside and that judgment be entered for the [respondent] with costs." There is no record, and it is, I understand, not the fact, that any objection whatsoever was made by either party to the Court of Appeal itself, deciding the question of costs. If their judgment was taken as merely a correction of an error or self-misdirection, the legal course was to send the case back to BRANSON, J., to eliminate that error and apply his discretion to the case and make such a judgment on the whole case—without that error—as should seem right. Why was this not done ? It appears to me to be fairly clear that the reason was that it was accepted by both parties that the Court of Appeal should be allowed to arrange costs according to its discretion, that is to say, its idea of what a discretion on a review of the whole case should have come to. The astonishing fact remains that neither party in the case—by the reasons formulated in his appeal—has taken any point of objection to the decision of the Court of Appeal on costs standing pro forma as it does. The argument presented to your Lordships is rather of the nature of an astute afterthought unsupported by either reason or suggestion upon the papers. I do not enter further upon the topic lest I should trench upon the merits. (iv) On the general rule which excludes from this House appeals on costs alone, the invasion of that rule has, in my opinion, in the past been only allowed by reason of something like a statutory or other prescription—as already referred to—which arises ab extra and so compels by force of law the exception. But the case of the present appeal does not arise from a prescription ab extra ; it is founded on something psychological, discoverable by an analysis of what is alleged to have operated in the minds of the judges who settled the costs. It is here that I part company with those who invoke the suggestion of a failure of substantial justice. The cases are legion in which, even while assenting to the merits of the judgement, one or other or both of the parties think that substantial justice has not been done upon costs. And if the rule against excluding such questions from that salutary finality which has for generations made them find an end in the lower courts—if that rule be either invaded or abrogated, then the way may possibly have been opened to powerful litigants to the perpetration of much duress and injustice by, it may be, the ruinous protraction of litigation.

**LORD BLANESBURGH** (read by VISCOUNT DUNEDIN).—TURNER, L.J., when delivering the judgment of the Judicial Committee in *Attenborough* v. *Kent* (38) deals with appeals upon costs alone in terms which may usefully be recalled. His observations are invariably referred to as the basis of the rule on this subject which, as elucidated in subsequent decisions, obtains with the Board. The lord justice said :

> "Their Lordships do not wish to lay it down as a general rule, that in no case would there be an appeal in respect of costs and of costs alone : because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the court below has proceeded upon mistake or misapprehension. Their Lordships do not think that any general rule can be laid down which must apply to cases of this description. Such cases their Lordships desire to leave untouched ; but where there has been bonâ fide care and discretion exercised on the part of the judge who has decided the case, their Lordships have no hesitation in stating their opinion to be, that in such a case no appeal will lie in respect of costs alone."

I may, at a later stage, have to refer to this passage in its entirety. At the moment I am concerned only with its last sentence. Upon that, I hazard the observation

that in your Lordships' House also, the rule at least to the extent there stated is equally well established. And with a rule so limited, I know of no interference, legislative or other, which is or ever has been, threatened from any quarter. How far further, if at all, the rule in this House extends or should be permitted to extend: at what point an appeal which may superficially retain the appearance of an appeal as to costs alone ceases under these words to be correctly so described in any sense relevant to its competence: at what point an appeal within the meaning of any rational rule on the subject ceases to be an appeal as to costs alone and becomes something quite different: at what stage it ceases in the same sense to be an appeal as to costs at all—these are the questions and the only questions upon which in a case like the present there is room for difference of opinion.

There emerges, however, on this appeal, largely as the result of the conjoint effect of two decisions of this House, *Huxley* v. *West London Extension Rail. Co.* (6) and *Home Secretary* v. *O'Brien* (36), a separate question of perhaps equal importance. We are here concerned with an appeal from an order of the Court of Appeal in England. It is presented to your Lordships' House under and by virtue of s. 3 of the Appellate Jurisdiction Act, 1876. The appeal quite clearly comes within the words of that section, and the separate question here is whether the appellants are not under its unqualified provisions entitled at your Lordships' hand to a hearing of their appeal, whatever may be the true limits of any rule of the House applicable to appeals, not within the section. It will be a convenient introduction to the consideration of all these questions if an attempt be made in the first instance to determine with precision exactly what this appeal is and what it is not, and incidentally to ascertain what the jurisdiction was which the Court of Appeal exercised in making the order now appealed from and how it became possessed of that jurisdiction. Whether there is or is not a duty laid upon your Lordships' House to entertain this appeal will, I believe, largely turn on the position as made apparent by that preliminary inquiry.

After deciding the case in favour of the respondent, BRANSON, J., who tried the action without a jury, gave judgment for him, but, as the formal order expresses it, he made no order as to costs. In the circumstances, these words were superfluous. The operation of the learned judge's order would have been the same had it been silent as to costs. Its result intended and effective was that the costs did not follow the event for the reason that the learned judge, purporting to exercise his judicial discretion in the matter, decided that they should not. He explains his decision and the reasoning which led him to it in terms which do not admit of misunderstanding. But for one circumstance the respondent was, so the learned judge intimated, entitled to his costs of action, as in ordinary course. But for that circumstance he would have exercised his discretion by ordering the plaintiffs to pay them. The appellants, however, had called his attention to certain things touching the conduct of the respondent in an action at one time consolidated with this action, but to which the plaintiffs were not parties. To these circumstances, which he accepted as having been proved before him, the learned judge held that he was in law entitled to have regard in dealing with costs: and taking them into account, and them alone, he exercised his discretion by making no order as to costs at all with the result that the respondent was thereby deprived of a very large sum to which it is quite clear the learned judge would otherwise have considered him entitled. It is true that that large sum was costs. But that, so far as the principle of the thing is concerned, is the merest accident. The legal question whether the learned judge was justified in taking into account the circumstances which he did, might, in another case, just as easily arise with reference to a right to any kind of property made dependent upon the exercise of a judicial discretion.

In relation to costs the learned judge's powers are derived from Ord. 65, r. 1. That order, so far as material, is in the terms following:

A "Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules
B hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order."

The action, as I have said, was not tried with a jury, and your Lordships have
C present to your minds the difference which exists under that rule in the matter of costs between an action tried with a jury and one, like the present, tried by a judge alone. In the first case, the costs follow the event unless "for good cause" it is otherwise ordered. In the second case, the costs all through are in the discretion of the judge, and the successful party, whether plaintiff or defendant, gets no costs unless the judge awards them. But while that is the distinction
D there is in a case like the present no practical difference between the two. Had this action been tried with a jury and had the jury's verdict been for the defendant, the learned judge would have found in the circumstances to which I have already alluded, the presence of the "good cause," which would have enabled him in his discretion to "otherwise order." And his order, then discretionary, would, as now, have said that there was to be no order as to costs. The result and the mental
E process by which it was judicially reached would have been the same in each case. I desire particularly to emphasise this statement, and for the reason that, had the learned judge's order as to costs here followed the verdict of a jury instead of, as it did, a judgment of his own, the question whether in law he was entitled to make the order would without doubt have been open to final review in this House. Such is the result of *Huxley* v. *West London Extension Rail. Co.* (6). In my eyes
F it is not the least of the respondent's difficulties in this preliminary discussion that he is confronted with the problem, which I have myself found insoluble, of stating, as he must, your Lordships' rule as to appeals for costs alone in a form under which the "good cause" cases will be taken and appeals like the present will be left. From the learned judge's order, so far as it deprived him of costs, the defendant appealed to the Court of Appeal, and it is now essential to see exactly what the
G objection was which he there took to the order made. On its nature the competence of the court to entertain the appeal turned. And, first of all, the objection had nothing to do with the manner in which the learned judge had exercised his discretion. It has never been denied in these proceedings that the actual exercise of a proper discretion in relation to costs remained in this case a matter for the learned judge and for no one else. Section 49 [repealed] of the Judicature Act,
H 1873, which is the governing section, provided

"that no order made by the High Court of Justice . . . as to costs only which by law are left to the discretion of the court shall be subject to any appeal except by leave of the court . . . making such order."

I Such leave in the present case was never either asked for or given. And, the object of the section being that except with such consent the Court of Appeal shall not review a judge's discretion with reference to costs—*Bew* v. *Bew* (39) ([1899] 2 Ch. at p. 371)—it follows, that in the present case any such review was entirely beyond the competence of the Court of Appeal. Nor did that court undertake any task of the kind. How, indeed, could it have, when the merits or otherwise of the respondent's conduct in relation to the litigation were never before it. The order of the Court of Appeal took the form it does, only, I feel sure, because the learned judge had in effect intimated how he himself would have dealt with the

costs if the circumstances to which he had had regard were not open to his consideration. But for that intimation the Court of Appeal would have been bound to refer the case back to the learned judge for him to exercise his discretion afresh on a consideration of the materials to which in the view of that court he was confined. In the circumstances that would have been a needless formality. The order accordingly gave to the defendant his costs at once. But in so giving them there was no exercise by the Court of Appeal of a discretion of its own. Sure it is that this appeal, whatever else may be said of it, is not, in any sense, an appeal from the exercise by the Court of Appeal of any discretion at all. It is not, I submit, open to your Lordships to refuse to entertain it for any such non-existent reason.

The point is of first importance. On that very ground the present case is at once distinguished in principle from many which have been referred to, and notably from one on which great reliance was placed by counsel for the respondent—I mean *Caledonian Rail. Co.* v. *Barrie* (28). There the learned sheriff substitute had exercised his discretion as to costs on the facts which were all before him. On appeal, the sheriff principal first, and the Inner House in turn exercised on their view of the same facts, but in another way, what they treated as being and what was apparently on all hands accepted as being their own discretion. There was then an appeal to this House, and if its rejection by the appeal committee was in fact based on the ground that it was an appeal from the exercise of that last discretion one can feel no surprise at the result. For *Barrie's Case* (28) is only another illustration of the Privy Council rule as above expounded by TURNER, L.J.: an illustration of a rule of this House as accepted on all hands. Very different was the case raised here in the Court of Appeal and decided by that court. It was that the learned judge, bound by law to deal with the costs of the action in the exercise of a judicial discretion, had, so far from doing so, avowedly based his order upon circumstances which in the submission of the defendant were not before him and to which in law he was not entitled to have any regard at all—that, in other words, on the learned judge's own avowal, the only discretion he had exercised was no discretion whatever. That contention of the defendant he was entitled to raise by appeal. LORD HALSBURY, L.C., in *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29) ([1903] 2 K.B. at p. 765), said:

> "No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. . . . That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs."

The deprivation of a party of his costs, if upon a ground not warranted in law is a determination of the judge in point of law, see per PHILLIMORE, J., *Westgate* v. *Crowe* (40) ([1908] 1 K.B. at p. 27). Accordingly, the order of BRANSON, J., as to costs, objected to, as it was, on the ground stated by LORD HALSBURY, L.C., in the judgment just cited, was an appealable order under [the repealed] s. 19 of the Judicature Act, 1873, just as for a reason completely analogous is appealable the question, whether there exists in law "good cause" enabling a judge after verdict of a jury and in the exercise of his discretion to order that the costs shall not follow the event but shall be dealt with in some other way.

Thus is brought to view the exact question which your Lordships on this preliminary point have first to decide. Is there any existent rule of this House as to appeals for costs alone, be its terms what you will, which is effective to stop in limine this particular appeal of the appellants from this order of the Court of Appeal made, in the circumstances and on the grounds stated ? Excluding, as I do, from consideration any possible suggestion that the appeal is an abuse of your Lordships' procedure—no one in the circumstances of this case has made or could have made such a suggestion—I venture to assert in answer that for two reasons quite independent of each other, there can be no such rule. First, this appeal is in this matter of costs indistinguishable in principle from the appeal as to the presence of "good cause" which was entertained and decided by the House in *Huxley* v. *West London Extension Rail. Co.* (6). In such cases, as had been observed by Esher, M.R., in *Jones* v. *Curling* (32), the Court of Appeal is bound to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs. In *Huxley's Case* (6) this House entered upon the same inquiry—its reason for doing so being, I think, correctly expressed in the headnote in the words

> "that if [the court or judge] give effect to considerations which do not constitute good cause within the meaning of the rule they exceed the limits of their jurisdiction and on that ground their decisions are not protected from review."

Equally so here. The question is and is only whether or not the learned judge did not for an analogous reason exceed his jurisdiction. As Lord Blackburn observed in *Metropolitan Asylum District (Managers)* v. *Hill* (22)

> "it is not because the condition involves the payment of costs, that, therefore, the question whether there is to be a condition or not, is to be considered a mere dispute about costs."

The real question here raised is only accidentally concerned with costs. But there is another reason which leads to the same result. It is that under s. 3 of the Appellate Jurisdiction Act, 1876, the House has the duty imposed upon it of hearing this appeal. In my judgment, that conclusion results from the decision in *Home Secretary* v. *O'Brien* (36), as embodied for this purpose in the following passage from Lord Dunedin's judgment ([1923] A.C. at p. 620):

> "The generality of expression of a clause which gives an appeal . . . to the Court of Appeal is indistinguishable from the generality of the clause which gives an appeal from the Court of Appeal to this House. It follows that the considerations urged in the case of *Cox* v. *Hakes* (37) which case decided that appeal was not competent, are equally applicable when the question is whether appeal in such a case as the present lies from the Court of Appeal to this House."

The converse here is the case. By common consent, for counsel for the respondent in terms adhered to that position in his reply, an appeal in this case lay to the Court of Appeal under s. 19 of the Judicature Act, 1873 ; by s. 3 of the Appellate Jurisdiction Act, 1876—a clause of equal generality—an appeal is given to this House. Why then does no appeal lie in this case ? The only answer I have heard made is that just as in *O'Brien's Case* (36) the words, although wide enough to cover an appeal from an order for the issue of a writ of habeas corpus, could not have been intended to include such an appeal, so here the words of s. 3 must be read so as to exclude the competence of an appeal which impinges upon your Lordships' rule against hearing an appeal for costs alone. I cannot think that *O'Brien's Case* (36) can be invoked to support that answer. I cannot think that the exception there introduced—on the high ground that if it were not, the sections would have retraced what had been "the evolutionary development of the constitutional liberty of the subject"—a backward step which a majority of your Lordships were satisfied Parliament had no intention of taking, can justify

a similar exception in favour of a mere rule of procedure so undefined in its scope that it offered no hindrance to the free discussion in this House of *Huxley* v. *West London Extension Rail. Co.* (6) an appeal indistinguishable from the present, as I hope I have shown. On this ground also, I am of opinion that this preliminary point should be determined in the appellants' favour.

I come now to the question of the actual ambit of the rule. On that I have little to say. I have had the advantage of reading in print the judgment of the Lord Chancellor, and with that judgment upon this matter I am in entire agreement. I would venture upon it to add only these observations of my own. First. The rule has never been described as one peculiar to your Lordships' House. LORD BROUGHAM, in his statement of it in *Inglis* v. *Mansfield* (16) says it is common to this House, the Privy Council and the Court of Chancery. The Lord Chancellor has, I think, clearly shown that to extend it beyond the limit which he sets for it would carry the rule in this House beyond that of the Privy Council, the Court of Appeal in Chancery or the Court of Appeal as now constituted. His review of the authorities, I think, also establishes that this appeal would to-day be cognisable in the Privy Council, and it was, of course, entertained, from the respondent's point of view, by the Court of Appeal. No case, since the passing of the Judicature Act, has disclosed the existence in this House of any rule which would make it incompetent here. *Huxley* v. *West London Extension Rail Co.* (6) and less pointedly *Metropolitan Asylum District* (*Managers*) v. *Hill* (22) show that no such rule was then operative. These cases, on the other hand, with *Caledonian Rail. Co.* v. *Barrie* (28), as reported, on the other, prove to my mind that the existing rule in this House is really in accord with the statement of the Privy Council rule as contained or implied in the words of TURNER, L.J., with which I commenced this judgment. Since *Barrie's Case* (28) the question has apparently not been raised in this House, and from that fact and from the further fact that no attempt was made in such cases as *Jones* v. *Curling* (32), and the *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29), to test in this House the decisions of the Court of Appeal, it has been suggested that since *Barrie's Case* (28) the sense of the profession has been that the avenue to this House has been closed. But, if so, the profession misunderstood *Barrie's Case* (28) and, next *Jones* v. *Curling* (32) was a "good cause" case. The *Civil Service Society's Case* (29), as the extract from LORD HALSBURY'S judgment in it above cited shows, was identical with the present. And truly there was no further appeal in either. But whatever may have been the reason for that omission in the *Society's Case* (29)—poor prospects seem a sufficient explanation—your Lordship's rule ought to have had nothing to do with the absence of an appeal in *Jones* v. *Curling* (32), for as *Huxley* v. *West London Extension Rail. Co.* (6) subsequently showed, it would have imposed no barrier whatever to the appellant's progress to this House. Secondly. The wider statement of the rule would seem to exclude from your Lordship's competence an appeal for his costs either by a trustee or mortgagee; and some colour for the suggestion that these costs are to be regarded like any other costs is to be found in the judgment of LORD COTTENHAM in *Home* v. *Pringle and Hunter* (19). Counsel for the respondent, if I recollect aright, in his opening argument on the first discussion of this preliminary point contended that such costs were within the supposed rule, and most certainly no statement of the rule brought to your Lordships' notice has in terms excluded them. But no rule of practice could ever be supposed to go so far as to embrace within its operation questions touching the contractual right of trustees and mortgagees to their costs, and I can hardly suppose that any of your Lordships would desire to lay down or support a rule of practice for this House which would deprive either a trustee or mortgagee of the privilege of having enforced here, if they have been denied elsewhere, his rights in this matter, as defined once for all by LORD SELBORNE in *Cotterell* v. *Stratton* (41) (L.R. 8 Ch. App. at p. 302), and by SIR GEORGE JESSEL, M.R., in *Turner* v. *Hancock* (42) (20 Ch. D. at p. 305). But how eloquent upon

A the extreme vagueness of the rule, if carried beyond its admitted purview, is this necessary but hitherto unexpressed exception to it? Thirdly. It is suggested that the rule of this House on this subject may properly be more strict than the rule either of the Court of Appeal or of the Privy Council, inasmuch as an appeal to your Lordships is always at least a third hearing. To my mind, this suggestion would be more convincing if the rule were applicable only where the findings B below had been concurrent. But there is no such limitation upon its operation. Fourthly. The rule as defined by the Lord Chancellor protects the House from every mischief in relation to appeals for costs alone, against which it needs protection. Any extension of the rule beyond that point can, I suggest, only be justified by clear and irresistible authority, for it is surely highly inexpedient that except to that extent the right to receive or the liability to pay costs representing C frequently and in this case very large sums should be placed beyond your Lordships' cognisance not by statute, but by your Lordships' own act. In the result, I am of opinion that this preliminary objection, from whatever angle it be regarded, should not be sustained, and I concur in the motion which the Lord Chancellor has made.

*Preliminary objection disallowed.*

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The hearing of the appeal on its merits was proceeded with on May 13, 19, 20 and 24.

*Stuart Bevan*, *K.C.* and *Barrington-Ward*, *K.C.* (*E. F. Spence*, *K.C.* with them) for the appellants.

E *Jowitt*, *K.C.* and *Astell Burt* for the respondent.

The House took time for consideration.

July 29. The following opinions were read.

**VISCOUNT CAVE, L.C.**—The preliminary objection to this appeal having been overruled, your Lordships are now called upon to dispose of the appeal. In F expressing my opinion on the preliminary question, I have sufficiently stated the facts; and for the present purpose it is enough to remind your Lordships that BRANSON, J., who tried this action without a jury, gave judgment for the defendant (the present respondent) without costs, and that, on an appeal by the defendant, without the leave of the judge, against so much of the judgment as related to costs, the Court of Appeal set aside the judgment of the trial judge and directed G that judgment be entered for the defendant with costs. The question to be determined is whether the order of the Court of Appeal was right.

In order that this question may be answered it is necessary to consider first the nature and extent of the jurisdiction of the Court of Appeal to review an order of the first court as to costs. It is true that no question of jurisdiction was raised in the appellants' case on this appeal; but the jurisdiction of a court does H not depend on the pleadings or admissions of the parties to a suit, and, however such a question may emerge, it is (I think) impossible for this House to pass it by and to give its decision on the basis of the existence of a jurisdiction which may or may not have been conferred. I propose, therefore, first to deal with this question.

I The jurisdiction of the Court of Appeal to review an order of the trial court as to costs depends on statutes and on rules of court which have the force of a statute; and the enactments which were in force when the judgment in question was given were s. 49 of the Judicature Act 1873 (now represented by s. 31 (1) (h) of the Judicature Act, 1925), s. 5 of the Judicature Act, 1890 (see now s. 50 (1) of the Act of 1925), and Ord. 65, r. 1, of the Rules of the Supreme Court. The terms of these provisions are as follows:—

"Judicature Act, 1873, s. 49: No order made by the High Court of Justices or any judge thereof by the consent of the parties, or as to costs only which by

law are left to the discretion of the court, shall be subject to any appeal except by leave of the court or judge making such order. A

Judicature Act, 1890, s. 5: Subject to the Supreme Court of Judicature Acts and the rules of court made thereunder, and to the express provisions of any statute whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid. B

R.S.C., Ord. 65 r. 1: Subject to the provisions of the [Judicature] Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order." C D

At first sight these enactments would appear expressly to deprive the Court of Appeal of any jurisdiction to make the order now under appeal. Section 5 of the Act of 1890 provides that, subject to the Judicature Acts and rules of court, the costs of all proceedings in the Supreme Court are to be in the discretion of the court or judge. Rule 1 of Ord. 65 repeats this enactment, but provides that in the case of a trial with a jury the costs shall follow the event unless the court shall for good cause otherwise order; and the effect of this exception in the case for trial with a jury is to confirm and strengthen the absolute discretion which in an action tried without a jury is conferred upon the court. It follows that in a non-jury case the costs are "by law left to the discretion of the court"; and if so, then by the express terms of s. 49 of the Act of 1873 an order as to those costs was not subject to any appeal except by leave of the court making the order. The legislature had directed that in this matter, as in others with which your Lordships are familiar, the order of the first court should be final. E F

But very little time had elapsed after the passing of the Act of 1873 before an inroad was made upon the operation of s. 49, and the breach then made in that section has grown to such an extent that it is (I think) necessary now to review the whole position. In making this review I do not propose to deal with those cases (such as *Foster* v. *Great Western Rail. Co.* (43), and *Re Mills' Estate* (44)), in which a tribunal was held to have awarded costs without any jurisdiction to do so, or with those other cases (such as the *City of Manchester* (45), and *Bew* v. *Bew* (39)), in which a judge had taken the mistaken view that he had no discretion as to costs, for in such circumstances a Court of Appeal may rightly intervene to decide the question of law. Nor is it necessary to refer to the cases which have arisen as to costs awarded under the County Courts Act or the Arbitration Act, to which s. 49 of the Judicature Act, 1873, and the corresponding section of the Act of 1925 have no application, or to the "good cause" cases, which relate to the costs of a trial with a jury. I propose to confine my attention to the reported cases, few in number, in which the Court of Appeal has allowed an appeal from the exercise by a judge of the Supreme Court of his discretion as to the costs of a trial without a jury, no leave to appeal having been obtained. G H I

The first of these cases is *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29), in which the trial judge (BIGHAM, J.) had given judgment for the defendants, but, because the defendants had refused to refer the dispute to him as arbitrator, had ordered that the parties should bear their

A own costs. The defendants having appealed against the order as to costs, the Court of Appeal entertained their appeal and reversed the order, LORD HALSBURY, L.C., stating his reasons as follows :

> "No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary B hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of BIGHAM, J., and in the judgment of this court, they are right; C and it practically comes to this—that the learned judge has deprived the persons sued of what, primâ facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. This is not exercising a discretion upon materials properly before the judge; D but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion."

LORD ALVERSTONE, the other member of the court, agreed, saying that

> "if it appears that a judge has not exercised his discretion or has decided upon grounds which are not open to him, this court can still deal with his E decision"

and he relied on *Granville & Co.* v. *Firth* (34), which, being a "good cause" case, was not in point.

In *Frederick King & Co., Ltd.* v. *Gillard & Co., Ltd.* (1), in which the defendants were sued for passing off their goods as the goods of the plaintiffs, KEKEWICH, J., had given judgment for the defendants, but had refused to order the plaintiffs to F pay the defendants' costs on the ground that the wrappers in which the goods in question were sold contained untrue statements as to certain medals and awards. The Court of Appeal, while dismissing the plaintiffs' appeal on the merits, allowed a cross-appeal by the defendants as to costs on the ground that, even if the untrue statements on the wrappers were calculated to deceive the public, the wrong so done was a collateral matter and was not directly connected G with the plaintiffs' case. STIRLING, L.J., added that the case was very near the line, and that, if the learned judge had exercised his discretion on the ground taken by him combined with other facts of the case, it would have been difficult to interfere.

In *Edmund* v. *Martell* (2), an action by the landlords of a dwelling-house against the tenant for waste by converting part of the premises into a shop, SUTTON, J., H gave judgment for the defendant on the ground that the waste committed by her was of the species known as ameliorating waste, but he made no order as to costs because he thought that the defendant should have approached her landlords before making the alterations. The decision of the learned judge as to costs was reversed by the Court of Appeal, who held that the defendants' failure to approach her landlords was not relevant to the question to be determined between I the parties, and that the judge had "not really exercised his discretion at all in the matter." It is noteworthy that in this case also LORD ALVERSTONE, C.J., relied on *Granville* v. *Firth* (34), a "good cause" case.

Lastly, in *Ritter* v. *Godfrey* (3), an action against a medical practitioner for negligence, MCCARDIE, J., who tried the action without a jury, found for the defendant, but refused to order the plaintiff to pay the defendant's costs of action on the ground that the defendant, in repudiating the plaintiff's claim, had written some letters of an unsatisfactory and, indeed, of an insulting

character. The defendant having appealed as to costs, the Court of Appeal took the view that the correspondence did not afford ground for the exercise of the judicial discretion to refuse to award costs to a successful defendant, and on that view set aside the judgment of the trial judge and ordered that judgment be entered for the defendant with costs. LORD STERNDALE, M.R., who concurred in this decision with much doubt, stated the principle as follows ([1920] 2 K.B., at p. 52):

"This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine."

ATKIN, L.J., took a more decided view, saying ([1920] 2 K.B. at p. 60):

"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains . . . I am aware of the inconvenience of fettering by rules the exercise of what in terms appears to be an unfettered discretion. But it is too late to contend for an arbitrary discretion over costs: some rules undoubtedly there are that control the discretion: and it seems hard to require a judge to exercise his discretion according to rule, and yet not to be able to state what the rule is. Nor if the rule is to be formulated does it appear helpful to cast it in the negative form of a string of prohibitions leaving the guiding principles to be deduced from them."

EVE, J., took a similar view, holding that a judge, however much he might disapprove of the defendant's behaviour, was not entitled to refuse him his costs unless he had material upon which he was prepared to hold judicially that the defendant had thereby created a mistaken belief in the plaintiff's mind, or that his misconduct was the real cause of the action being brought.

These authorities appear to me to indicate a progressive tendency on the part of the Court of Appeal to review the exercise by trial judges of their discretion as to costs, with the result that the court has travelled far from the categorical terms of s. 49 of the Act of 1873. The decision in the *Civil Service Co-operative Society's Case* (29) may, no doubt, be supported by the consideration, which obviously weighed with LORD HALSBURY, L.C., that the trial judge in that case had taken action, not upon materials which emerged in the trial itself, but upon his personal view that no trial should properly have been insisted upon, and in such circumstances there may well have been ground for holding that he had not really exercised his discretion. But the fraudulent conduct of the plaintiffs in *Frederick King & Co., Ltd.* v. *Gillard & Co., Ltd.* (1) and in *Edmund* v. *Martell* (2) the circumstance that the defendant had altered the character of the plaintiffs' property without consulting them, were surely sufficiently connected with the matters in dispute to entitle a judge having a wide discretion to take them into account when awarding costs ; and the same may, I think, be said of the conduct

of the defendant in *Ritter* v. *Godfrey* (3) towards persons who had suffered a real sorrow while one of them was under his care. Further, the language used in the last-mentioned case by ATKIN, L.J., and EVE, J., who expressed the opinion that the trial judge in a non-jury case "must" give the successful defendant his costs except in certain cases which they defined, is difficult to reconcile with the statutes and rules which give him an absolute and uncontrolled discretion. Indeed, the rules laid down in that case by those learned judges bear so close a resemblance to those which would guide a judge in determining whether there was "good cause" for depriving of his costs a successful defendant in an action tried with a jury, that, if they are held to be binding, little or no difference will be left between the power of a judge over costs in an action tried with a jury and that which the statute gives him in the case of a trial without a jury. A gloss upon the statute which leads to so complete a frustration of its purpose surely calls for very close and critical examination in your Lordships' House ; and, although some of the cases cited have stood unchallenged for a good many years, I do not think that it is too late for this House, which now for the first time has seisin of the matter, to review them. The protest of NORTH, J., in *Walter* v. *Steinkopff* (46) ([1892] 3 Ch. at p. 500), and the doubts expressed by STIRLING, L.J., and LORD STERNDALE have kept the question open ; and in any case the matter is one, not of mere procedure, but of statutory right, and no course of decision can override the statute.

It appears to me that the true view is substantially that taken by LORD STERNDALE, M.R., in the passage in his judgment in *Ritter* v. *Godfrey* (3) which I have quoted. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff ; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must, of course, be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct—wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.

Judged by these tests I doubt whether the decisions in *King* v. *Gillard* (1), *Edmund* v. *Martell* (2) and *Ritter* v. *Godfrey* (3) can be supported ; and judged by the same tests I am satisfied that the order made by the Court of Appeal in the present case cannot stand. Even if the rules laid down in *Ritter* v. *Godfrey* (3) were to be applied, I should find difficulty in holding that, in the present case, BRANSON, J., had no materials for the exercise of his discretion. The verdict on which the learned judge proceeded was rendered in the consolidated action and was, therefore, part of the proceedings in the present action ; and it was frequently referred to in the evidence given during the new trial of this action. It was, therefore, fully before the learned judge, and he was entitled to take it into account in considering whether the defendant had brought this litigation upon himself and to decline on that ground to give him the costs of the action. Further, although the verdict formed the main ground for the judge's decision as to costs, he stated that other points also had weight with him and the influence of those other points on his mind could not be and was not estimated by the Court of Appeal. On the merits, therefore, and assuming that the Court of Appeal had power to interfere,

I should be disposed to allow this appeal ; and, if your Lordships should agree with the view which I have expressed on the question of jurisdiction, it is clear that the appeal should succeed. For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of BRANSON, J., restored. But as the principal question discussed in this judgment was not raised by the present appellants either in the Court of Appeal or in their case for the present appeal, I am content that there should be no costs of the appeal to the Court of Appeal and to this House, except so far as such costs have already been disposed of on the hearing of the preliminary objection. I move your Lordships accordingly.

**VISCOUNT DUNEDIN**.—I have had the advantage of perusing the judgment which has just been delivered by the Lord Chancellor. I concur in that judgment, and I have nothing to add.

**LORD ATKINSON**.—I think it is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. A good deal of the arguments addressed to the House on behalf of the appellant in this case appeared to me to go the length of contending, either that the discretion of the judge was absolute and unfettered, or that, though the exercise of this discretion might have given free scope to whim or prejudice, it must be assumed that, where discretion is given to a judge, it will always be properly exercised, the judge not being bound to disclose the facts, if any, upon which he acted. If, however, there be, in fact, some grounds to support the exercise by the trial judge of the discretion he purposes to exercise, the question of the sufficiency of those grounds for his purpose is entirely a matter for the judge himself to decide and the Court of Appeal cannot interfere with the exercise of his discretion in this instance. I take this statement of the law, applicable to cases tried without a jury, from the judgment of LORD STERNDALE, M.R., in the case of *Ritter* v. *Godfrey* (3). He said ([1920] 2. K.B. at p. 52):

> "This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine. One other consideration applies to these cases. The principle as to the exercise of discretion is the same in cases of plaintiffs and defendants, but it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will."

I think this judgment of LORD STERNDALE, M.R., contains a clear, condensed and accurate statement of the law and of the prevailing practice on the points with which it deals. He then proceeds to state what, in his view, is regarded as sufficient ground for refusing a defendant his costs. He says:

> "Speaking generally, I think it may be said that, in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of

A conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought."

This is so stated by VAUGHAN WILLIAMS, L.J., in *Bostock* v. *Ramsey U.D.C.* (47) ([1900] 2 Q.B. at p. 625). This last is a very important case, because it follows the decision of the Court of Appeal in *Harnett* v. *Vise* (48) and lays down the important principle, that in exercising his discretion under Ord. 65, r. 1, in a case B heard by a jury, a judge is not confined to the consideration of the defendant's conduct in the actual litigation. SMITH, L.J., in giving judgment in the Court of Appeal in the former case, said ([1900] 2 Q.B. at p. 622):

"It seems to me that the Lord Chief Justice was right when on general principles he came to the conclusion that 'the judge is not confined to the C consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation.' I say, on general principles, because his attention does not appear to have been called to the case of *Harnett* v. *Vise* (49) in which it was distinctly held by the Court of Appeal that the judge is not confined, in considering the question whether there is good cause for depriving the suc- D cessful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that, in this case, there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the judge was entitled to take into consideration as constituting good cause for depriving the defen- E dants of costs."

VAUGHAN WILLIAMS, L.J., and ROMER, L.J., concurred. The last named lord justice, in delivering judgment, said (ibid. at p. 627):

"It is clear that the 'good cause' referred to by Ord. 65, r. 1, is not confined to cause founded upon the conduct of the successful party in the course of F the litigation. It might, for example, in the case of a successful defendant, be founded on conduct of the defendant outside the action, if the conduct were such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. I limit the proposition so as to show clearly that I do not consider that such conduct on the part of the defendant would constitute good cause within Ord. 65, r. 1, if it G has no reference to the action, and did not induce the plaintiff reasonably to believe that he had a right of action."

In *Harnett* v. *Vise* (48) the action was brought by a doctor who practised at Barnet against the defendant and his wife for a letter written by the latter to an old lady named Perkins, who had for some time been confined in a lunatic H asylum, but was at the date of the letter convalescent, warning her against having any further communications with the plaintiff and making reflections upon him. The defendant traversed the innuendoes alleged in the statement of claim, pleaded that the letter was a privilegd communication and also pleaded a justification. The case was tried before HUDDLESTON, B., and a special jury. The judge ruled that the letter was not a privileged communication, and the jury found a verdict I for the plaintiff for £10 damages. After the verdict had been returned the counsel for the defendant applied to the judge to exercise his powers under Ord. 55 (then the proper order) and deprive the plaintiff of his costs on the ground that he had brought the libel on himself by his incautious conduct. The learned judge acceded to this application and refused to allow the plaintiff his costs. An application was made by the plaintiff to the Court of Exchequer to rescind this order, which was refused. The plaintiff appealed to the Court of Appeal. The appeal was heard by JAMES, L.J., BRETT, L.J., and COTTON, L.J. In delivering judgment, JAMES, L.J., after referring to the amount of the damages awarded, said:

"Every judge would take it as a material element in considering whether the jurisdiction given by Ord. 55 is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of." A B

Of the many judicial criticisms, which have been passed upon Ord. 65, r. 1, and its application none is, I think, clearer and more helpful than that of BOWEN, L.J., passed in *Jones* v. *Curling* (32), an action tried before a judge and jury. Referring to Ord. 65, r. 1, BOWEN, L.J., said:

"That rule begins with placing in the discretion of the court the costs of all proceedings in the court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the judge and are to follow the event, except in one case, which is, if the judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause, then the judge had no jurisdiction. It seems to me that on the true construction of the rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the judge depends. When, however, this jurisdiction is established, then I think there is no appeal unless the judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all." C D E

These last words are very significant, and mean that if the established facts of the case amount to such good cause as to give the judge jurisdiction to exercise his discretion, he must exercise that discretion in such a way as to amount to a reasonable exercise of it. An exercise of it based on whim or prejudice would be insufficient. The court, composed of BRETT, M.R., BOWEN, L.J., and FRY, L.J., held that to be good cause within this rule there must be facts showing that it would be more just not to allow costs to follow the event as, for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased. In the case of *Huxley* v. *West London Extension Rail. Co.* (6), on appeal to this House LORD WATSON said he would not attempt to define what good cause was, but that, in his opinion, it embraced everything for which the party is responsible connected with the sustentation and conduct of the suit and calculated to occasion unnecessary litigation or expense. He said: F G

"So long as the judge or court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters. They are acting within their jurisdiction and their decisions are final and conclusive." H

So much for the case under the proviso to this rule. There remains the question what is the nature of the discretion conferred upon the judge in cases tried by a judge without a jury. Is it entirely arbitrary, subject to no qualification or restraint? Must a litigant who has succeeded in a suit and has not been guilty of any misconduct of any kind be, on being deprived of his costs, content with the assurance that a judge exercised his discretion properly, though he has not mentioned or even suggested what the grounds were upon which he based the exercise of that discretion? I

The decision in the case of *Kierson* v. *Joseph L. Thompson & Sons, Ltd.* (33) throws some light upon the question of judicial discretion as to everyday cases. The facts are stated with sufficient fullness in the headnote and the judgment

of COZENS HARDY, M.R., concurred in by BUCKLEY, L.J., and HAMILTON, L.J. A workman who was in receipt of a weekly payment of 13s. 5d. from his employers as compensation for an accident within the meaning of the Workmen's Compensation Act, 1906, entered into an agreement to accept £100 in satisfaction of the employers' liability. The workman applied to the registrar to have the memorandum of this agreement recorded. The registrar, being dissatisfied with the amount of the compensation, referred the matter to the judge. Both parties appeared before the judge and supported the agreement. The judge overruled the objection as to quantum, ordered the memorandum to be recorded, and ordered the employers to pay the costs. The employers appealed from this order as to costs. The Master of the Rolls in giving judgment said:

> "Both the employers and the workman were then cited to appear and did appear before the judge. The objection to the agreement was solely based upon quantum, and this objection the judge overruled, and held that the memorandum should be recorded. Assuming, as I do, that the judge had a discretion as to costs, it must be exercised judicially, and, in my opinion, it was not a judicial exercise of his discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs."

See also *Hudsons, Ltd.* v. *De Halpert* (49), *Levy* v. *Johnson* (50).

In *Ritter* v. *Godfrey* (3), ATKIN, L.J., began his judgment thus:

> "In order to determine this appeal it seems to be necessary to pass in review some of the more recent authorities which have dealt with the provisions of Ord. 65, r. 1. Costs are to be in the discretion of the court or judge." (The judge who tried this case had refused to give the successful defendant his costs.) "If this discretion is absolute the appellant must fail. If the discretion is limited then the appellants must show that the exercise of the discretion in this case exceeded the proper limits. I think that it will appear from the authorities to be mentioned that the discretion of the court or judge is not an absolute discretion, but must be exercised subject to certain governing principles which, in this appeal, it seems to me necessary to ascertain."

He then divides the authorities into two groups. The first group comprising trials by a judge and jury and the second trials by a judge alone, and he says:

> "Where the courts have held that there is a good cause for deprivation of costs after a trial by jury, I think it clear that under similar circumstances after trial without a jury the exercise of the discretion in the same way must be justifiable."

For the purpose of the present case, I pass over the learned lord justice's comments on the cases in which there was a trial by jury, and only refer to his criticisms on those cases in which there was no jury. The first case with which he deals is *Civil Service Co-operative Society, Ltd.*, v. *General Steam Navigation Co., Ltd.* (29). The learned judge who tried the case had deprived the successful defendants of their costs, apparently because they would not submit to the learned judge himself, as arbitrator, saying what in the circumstances should be done. The learned judge did not state why he had deprived the successful defendants of their costs. If his discretion was absolute there was an end of the matter. It could go no further. The Court of Appeal would not be concerned with the question whether he had grounds for the exercise of his discretion or not. The Court of Appeal took precisely the opposite view. LORD HALSBURY, in giving judgment, after referring to what the judge at the trial did, said:

> "That is not exercising a discretion upon materials properly before the judge, but it is depriving a litigant of rights of which he is by law possessed upon

grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion."

The next case to which the lord justice refers is that of *Frederick King & Co., Ltd.* v. *Gillard & Co., Ltd.* (1). It was a passing off action. The judge held that there was no passing off, but deprived the defendants of their costs on the ground that there were misleading and untrue statements in the advertisement upon some of the defendants' packages which were calculated to deceive the public though they had no bearing on the question of passing off. It was held by the Court of Appeal that the defendants had not acted dishonestly, but that, even if they had been guilty of misrepresentation, it had no relation to the plaintiffs' case, and was not, therefore, a ground on which the judge had a discretion to deprive the defendants of their costs. The learned lord justice next refers to *Edmund* v. *Martell* (2), heard in 1907. The judge at the trial had deprived the defendant of her costs on the ground that before she had done one of the acts which were complained of by the landlord she ought to have consulted him. LORD ALVERSTONE, who presided in the Court of Appeal, after referring to *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29), said that the case before them

"was an a fortiori case. SUTTON, J., thought that because the defendant did not approach her landlord on the matter of converting the house into a shop she should be deprived of costs. That had nothing to do with the grounds of the action."

BUCKLEY, L.J., said:

"The facts upon which a judge could exercise his discretion in depriving a successful litigant of costs must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The judge had no power to deprive the successful litigant of costs because in some matter not material he might think that that party should have behaved, say, with more courtesy or consideration. These were not matters upon which the court could act."

To *Higgins.* v. *L. Higgins & Co.* (51) ATKIN, L.J., next refers. It was a case under the Workmen's Compensation Act. The judge in such cases is given by the Act the same discretion as to costs as is given by the terms of Ord. 65, r. 1. There the judge had made a declaration of liability, and had ordered the employers, who were considered by the Court of Appeal to have been successful, to pay the costs. BANKES, L.J., in giving judgment, said ([1916] 1 K.B. at p. 643):

"By para. 7 of Sched. II of the Workmen's Compensation Act, 1906, the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the arbitrator, just in the same way as the costs of proceedings in the High Court are in the discretion of the judge where the case is not tried by a jury under Ord. 65, r. 1. In both cases, however, the discretion is fettered by a well-accepted rule which was stated by LORD HALSBURY in *Civil Service Co-operative Society, Ltd.* v. *General Steam Navigation Co., Ltd.* (29), in these words:

'No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to over-rule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied'."

Lower down ATKIN, L.J., proceeds to lay down three principles by which a judge may be able to discern whether the materials necessary to support the exercise of his judicial discretion exist in any given case. The principles he shortly stated as follows ([1920] 2 K.B. at p. 60):

"In the case of a wholly successful defendant in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.

"These principles require further expansion. By (1) is meant—has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this is *Bostock* v. *Ramsey U.D.C.* (47). It is wide, for in terms it is not limited to unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract, and most actions of tort is due to the effect upon the plaintiff's mind of defendant's conduct and the effect is, at any rate, to induce a belief that the plaintiff has a good cause of action, it would appear to follow that, provided the belief was reasonable, the judge in all such cases has grounds for depriving a successful defendant of costs. I presume e converso there would be grounds for dealing with a successful plaintiff's costs when his conduct has induced the defendant reasonably to believe that he has a good defence. I am inclined to think therefore, that the proposition in *Bostock* v. *Ramsey U.D.C.* (47) should be read subject to the first, if not also to the second of the limitations suggested above, i.e., subject to the conduct being unreasonable or improper and being conduct other than that which constituted the alleged cause of action."

Eve, J., delivered a clear and able judgment to the same effect.

In my view, it necessarily follows from those authorities that if a defendant in a case tried before a judge alone be charged with fraud and successfully defends himself against that charge, he may yet be deprived of his costs if he has been guilty of misconduct coming within one of the classes indicated by Atkin, L.J. There is no such principle or rule of practice that, if a defendant accused of fraud obtains from either a judge or jury a decision that he is not guilty of the fraud, he is necessarily entitled to his costs whatever his conduct and cannot be justly deprived of them. Branson, J., when dealing with the two actions which were brought, the one by the firm against the respondent and the other by the liquidator against the same man, explains the relation in which they stood to each other, and points out that it is the company's claim of which he is now endeavouring to dispose. He then, when giving judgment, spoke as follows:

"I do not think it is either necessary or desirable that I should go in great detail through all the many facts of this long and troublesome action, which has lasted some nine days before me. I think it is sufficient for me to say this, that in my view the real reason why the action was brought by the liquidator, and the real reason which forced him, in my view, in the proper execution of his duty, and also the creditors of the company, to bring the action, was the fact that Mr. Pollak [the respondent] had, in his dealings with Said, begun with a concealed partnership with Said, of which every trace was kept out of the books, and that so far as anybody looking at the books is concerned, once it appears that Pollak was a partner with Said in the first of the transactions in which Said took part, there is nothing to show when he ceased to be a partner. I think a man who puts himself into that position has only himself to blame, if anybody who is concerned to make him liable on the contracts with Said which follow brings an action against him in respect of them. That is the main ground put forward by the liquidator for the course which he asks me to take in the matter, and it is the main ground upon which I accede to the request that he makes. The real reason why I am doing what

I propose to do in this case, is as I have stated, the fact that I believe that if it had not been for Pollak entering into this partnership with Said in the way in which he did, and keeping all this record out of the books which would lead anybody to know it, and keeping the knowledge of it from his subordinates in the department, the action need not have been brought. It was his fault that it was brought, because his conduct, and guilty conduct, in a matter which is outside the immediate cause of action which is being brought against him here, and so satisfies every one of the limitations which are stated by ATKIN, L.J., is the real cause of the initiation and the prosecution of this litigation. The result is that I think this is one of those cases in which it is clear that the defendant has brought the litigation upon himself, and by the way in which he has behaved himself, and consequently is an appropriate case in which, in the exercise of the discretion which in such cases I possess, I should say that I make no order for costs."

The Court of Appeal appear to me to have based their decision on this ground, that Pollak is not estopped by the verdict of the jury against him from denying that he was dealing improperly in speculating with Said, of which no mention was made in the books of the firm, or by the finding of the jury that he did not inform the other members of the firm that he was doing so. That, accordingly, it was open to Pollak to deny on oath both the accusation which the jury in the first action found to be true, that he reiterated the statement he had made at the first trial on these points, and that none of the members of the firm was produced on the second trial, as they were upon the first, to prove that Pollak never asked for or got the consent of his co-partners to the course of dealing he pursued. BRANSON, J., held that Pollak was not guilty of the fraud charged against him on the second, but that notwithstanding this he was clearly of opinion that he was shown to be guilty of misconduct, which he indicates and describes, of a character which entitled the learned judge to deprive him of costs. That is a wholly different thing, if the learned judge was entitled to take into consideration the whole circumstances of the case, everything which led up to the action. As *Harnett* v. *Vise* (48) *and Bostock* v. *Ramsey U.D.C.* (47) decide that he was so entitled, then there were, in my opinion, some grounds to support his order. And if there were, he had jurisdiction to make it, and neither he nor the Court of Appeal nor this House have any jurisdiction to interfere with his order because they are of opinion that the grounds were insufficient. In my view then the appeal succeeds.

**VISCOUNT CAVE**.—My noble and learned friend, **LORD PHILLIMORE**, desires me to say that he agrees with the judgment which I have delivered.

**LORD CARSON** (read by VISCOUNT DUNEDIN).—I agree with the motion proposed by the noble VISCOUNT on the Woolsack. I am not at all sure that the course of legal decisions has not gradually so circumscribed the discretion as to costs given to a judge in cases tried by him alone without a jury as to render such discretion almost nugatory. Indeed, ATKIN, L.J., in the quotation made by the noble Lord from his judgment in *Ritter* v. *Godfrey* (3) seems to lay down that such discretion must be exercised under formulated rules which appear to me to leave very little "discretion" to the judge. It is not surprising, therefore, in this state of the authorities that protracted litigation as to costs only should ensue, involving in some cases a re-hearing of the action and a reproduction of the evidence and documents used at the trial in order to enable a full inquiry as to whether the judge has acted within the rules laid down in the cases already decided. This, I think, is a result quite contrary to what was intended by the provisions of the Judicature Acts and the Rules of the Supreme Court already quoted, which drew a clear line as to costs where issues were tried before a judge and a jury respectively. It seems strange that in the course of so many authorities

so little attention has been given to s. 49 of the Judicature Act, 1873. The words of the section are clear and explicit and deal, not with the exercise of the discretion, but with the question whether the discretion is conferred upon the judge; and, in my opinion, no matter what the practice may have been hitherto, we are bound to give full effect to it. The only question we have to determine under that section is: Was the order of BRANSON, J., as to costs made in a case where the costs are by law left to the discretion of the court? The very basis of the appeal is that the learned judge had such a discretion and, indeed, that could not be disputed. In such a case the section says that the order made by the judge is not subject to appeal, and, therefore, either the Court of Appeal nor this House is competent to entertain such an appeal. While, therefore, it is, of course, true that a judge ought to exercise his discretion judicially, whether he has done so or not is a question which cannot be raised on appeal as to costs unless the judge gives leave as provided by the section.

*Appeal allowed.*

Solicitors: *Bull & Bull; Wedlake, Letts & Birds.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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## LAKE *v.* SIMMONS

[HOUSE OF LORDS (Viscount Haldane, Viscount Sumner, Lord Atkinson, Lord Wrenbury and Lord Blanesburgh), February 1, 3, 4, 10, 11, April 4, 1927]

[Reported [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233; 43 T.L.R. 417; 71 Sol. Jo. 369; 33 Com. Cas. 16]

*Insurance—Theft—Larceny by a trick—Exception of theft of goods "entrusted" to customer—"Entrusting" to thief—Liability of insurer.*

By a policy of insurance underwritten by the respondent the goods of the appellant, a jeweller, were insured against, inter alia, theft. By an exceptions clause there was excepted "loss by theft or dishonesty committed by any . . . customer . . . in respect of goods entrusted to him by the assured." A woman, E., who had bought certain articles from the appellant on previous occasions, told him that her husband, B., wished to give her a pearl necklet, and that D., who was engaged to her sister, also wished to give a necklet to the sister. Believing that E. was the person she represented herself to be and that her statements were true, the appellant allowed her to take two necklets to show B. and D. In fact E. was not B.'s wife, and D. was a fictitious person. Having obtained the necklets E. disposed of them and retained the proceeds. In an action by the appellant against the respondent on the policy,

**Held:** in obtaining the necklet in the way she did E. was guilty of larceny by a trick, and, therefore, when the appellant permitted her to take the necklets there was no consensus ad idem between them and the necklets were not "entrusted" to her within the exceptions clause in the policy, which was to be construed contra proferentem; accordingly, the appellant was entitled to succeed.

Per VISCOUNT SUMNER: The natural meaning of "entrusted" involved that the assured should by some real and conscious volition have imposed on the person to whom he delivered the goods some species of fiduciary duty.

BIBL. LONDIN UNIV.

**Notes.** Considered and distinguished: *John Rigby (Haulage), Ltd.* v. *Reliance Marine Insurance Co., Ltd.*, [1956] 3 All E.R. 1.

As to insurance against theft and fraud see 22 HALSBURY'S LAWS (3rd Edn.) 324–328, and for cases see 29 DIGEST 415–419.

Cases referred to:

(1) *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co.* v. *Cundy*, 47 L.J.Q.B. 481, H.L.; 39 Digest 534, *1454*.

(2) *Smith* v. *Wheatcroft* (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 27 W.R. 42; 35 Digest 98, *71*.

(3) *Phillips* v. *Brooks, Ltd.*, [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 35 T.L.R. 470; 24 Com. Cas. 263; 39 Digest 533, *1451*.

(4) *Moore* v. *Evans*, [1918] A.C. 185; 87 L.J.K.B. 207; 117 L.T. 761; 34 T.L.R. 51; 62 Sol. Jo. 69; 23 Com. Cas. 124, H.L.; 29 Digest 421, *3282*.

(5) *Folkes* v. *King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 39 T.L.R. 77; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P. Jo. 552, C.A., Digest Supp.

**Appeal** by the plaintiff from an order of the Court of Appeal (BANKES, WARRINGTON, and ATKIN, L.JJ.), reported [1926] 2 K.B. 51.

The facts appear in the opinions of the noble Lords.

*Jowitt, K.C.* and *J. B. Melville* for the appellant.

*Sir John Simon, K.C.* and *Van den Berg* for the respondent.

The House took time for consideration.

April 4. The following opinions were read.

**VISCOUNT HALDANE.**—In this case there is no dispute as to the facts. What has happened is that two of the learned judges of the Court of Appeal have taken a different view of the interpretation to be put on them from that taken by ATKIN, L.J., who dissented, and that taken by MCCARDIE, J., who tried the case. The narrative of events is briefly this. The appellant, who claims as plaintiff on a policy of insurance, is a jeweller at Exeter who became insured in 1922 by a Lloyd's policy underwritten among others, by the respondent, to cover risks up to a total of £16,000 for twelve months. The property so insured consisted of the appellant's stock-in-trade, and it included precious stones, pearls, and all other articles usually kept in stock by jewellers. What was insured extended not only to the property of the appellant, who was described in the policy by the name of his firm, but to what he held in trust or commission, or was held by him as responsible while in his own custody, "or in the custody of any person to whom" he might "have entrusted the same on the condition of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The perils insured against were loss or damage or misfortune to any of the property arising from any cause, with the exception, set out specially in the policy, of such as are, inter alia, not mentioned. These exceptions extend to

> "loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post), or by any customer or broker or broker's customer in respect of goods entrusted to them by the insured, his servants or agents, [unless such loss] arise when the goods are deposited for safe custody by the assured, his servants or agents with such broker or customer or broker's customer."

The claim of the appellant under this policy was for the value of two pearl necklets (valued at £750 and £700 respectively) lost during the currency of the policy. The circumstances in which the claim arose are as follows. The claim was made by the appellant against the respondent, representing a number of

A insurers, by reason of the fraudulent conduct of a woman named Esmé Ellison, who was convicted, on Oct. 2, 1923, at the quarter sessions of the city of Exeter, of the theft of the necklets, the subject of the claim in this action, and was sentenced to hard labour for sixteen months. She was a practised criminal, who had been previously convicted of larceny and false pretences, and had spent substantial periods in prison. In the early part of 1923 Esmé Ellison was living B with a Mr. Van der Borgh, who probably knew nothing of her past, as his wife, which she was not, at Stonelands, a well-known residence near Dawlish, not very far from Exeter. On Mar. 2, 1923, she called at the appellant's shop in Exeter, and saw his manager. She said that she was living with her husband at Stonelands, and mentioned that her sister had just become engaged to a Commander Digby. She bought a ring for £30. This sum was debited to her personally, as C Mrs. Van der Borgh, and she paid it on Mar. 6 by a cheque on a local bank with which she had opened an account. On the same date she bought from the appellant a pair of old Sheffield dishes for £16 16s., which was duly debited to her personally as before, and she paid the price on Mar. 16 by a cheque on the same account. On Mar. 6 she also bought a diamond ring for £28 10s., which was again debited to her personally as Mrs. Van der Borgh, and for which she paid by cheque on April D 4. In some of these transactions the appellant personally dealt with Esmé Ellison. When she made her visit to the appellant's shop on Mar. 6, she saw the appellant and told him that her husband intended to give her as a birthday present a pearl necklet of the value of £1,000, and she asked the appellant to produce some necklets for her inspection. After he had sent for and got them she saw them at the shop. She told him that a relative, a Mrs. Bosanquet, who she said was E staying at Stonelands, wished to give a wedding present to one of her sisters who had become engaged. On Mar. 16, at an interview with the appellant, she looked at two necklets, which he showed her, and asked him to permit her to take them to Stonelands in order that her husband, who was temporarily absent, might look at them. This the appellant let her do. He made an entry in his books F which is :

> "P. F. Van der Borgh, Stonelands, Dawlish. (1) A fine pearl necklet of 121 pearls, £1,100; (2) a fine pearl necklet of 139 pearls, £1,000. On appro."

The learned judge who tried the case and the Court of Appeal agreed in thinking that Esmé Ellison was in these circumstances a "customer" within the meaning of the policy. No doubt on the earlier occasions she was so, but that does not G conclude the question as to the relationship in the transactions to which I now come.

What was the precise nature of the transaction between the appellant and Esmé Ellison in regard to the two pearl necklets? As already stated, it took place on Mar. 16, 1923. The appellant made an entry in his books, not in her favour but in that of P. Van der Borgh, her supposed husband, as the purchaser, H on approbation. He let her take both necklets away to show to him. On Mar. 21 she paid a further visit to the shop. She bought one of the necklets, saying that her husband was pleased with the other and had selected it, but that Commander Digby, who, she had said, was engaged to her sister, admired the one she brought back, but would not be able to pay the whole price at once. On Mar. 28 she made yet another visit to the shop and stated that Commander Digby I continued to admire the necklace she had brought back, and that she wished to take it back to show to him again. On April 4 she called again and the appellant let her take it away for this purpose. He entered in his books,

> "Lt. Commander Digby, Caddistock, Dorset, a fine pearl necklet (139 pearls), £1,000, on appro."

There was no such person as Commander Digby, nor had Esmé Ellison a sister. Van der Borgh knew nothing of the transactions about the necklets. She herself made away with both of them. She disposed of them and neither has been

recovered. The learned judge who tried the case found the facts as I have stated them, and he also found that Esmé Ellison's conduct was fraudulent throughout; that the small preliminary purchases in her own name were part of a design to gain the confidence of the appellant; that at the time she gained possession of each necklet she intended to steal it; that the only purpose for which the appellant gave her possession was that she might hand the one to Van der Borgh for his inspection and the other to the fictitious Commander Digby for a similar purpose; that she received the necklets for limited and specific purposes only; that the appellant intended that his purchaser and debtor should be Van der Borgh, in the one case, and Digby, in the other, and not Esmé Ellison. In these findings of fact the Court of Appeal concurred. Both courts held that as the result she was guilty of larceny by a trick.

So far, I have no doubt that this was a true conclusion. If that were all, the case would come within the initial and operative words of the policy, which insures against the risk of theft. It would also come within the words which follow descriptive of the property insured, for these expressly mention property for which the insured is responsible if it is in the custody of any person to whom the insured has entrusted it on the condition of sale or return, for valuation or inspection, or for any other purpose whatsoever. But there is in this policy the exception to which I have already referred in quoting the language of the policy. It is exception 1, which excepts from the insurance loss by theft or dishonesty committed by, inter alios, "any customer or broker or broker's customer in respect of goods entrusted to them" by the insured, unless the loss arises when the goods are deposited for safe custody. It is contended for the respondent that what has been established in point of fact amounts to an entrusting obtained by false pretences of the property, as distinguished from an obtaining by larceny by a trick or theft. What we have to determine is thus a question on the construction of the exception. Was the case simply one where there was no real consent to any property or such possession being taken over by the woman, and in that sense theft in contemplation of law? Or was it a merely voidable as distinguished from a void transaction, in which a delivery, which was intended to pass the possession and a limited proprietary title in the nature of a bailment, was brought about by a false representation, so that it would stand if the seller did not disaffirm it? That this question is a difficult one is obvious, for the judges in the courts below have been evenly divided about it. We have had it fully argued at the Bar. In the speeches of counsel on the appeal a mass of authorities was cited and relied on. I have thought it my duty to read them through. I cannot say that I have derived much new light from the study. Some of the cases cited lay down principles of law which are general and clear. About these principles there is, however, no real controversy. Others relate to the application of principles to circumstances which are not the same as those in the case before us. They help, in truth, but little. What is important for our purpose is to get before our minds the particular concrete questions before considering the law to be applied.

The first of the questions is partly, at least, one of mixed fact and law, the interpretation to be placed on the application of the word "entrusted" in the exceptions. "Entrusted" is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all. I hand my umbrella to a servant to enable me to be free of it while I am taking off my coat. In a very general sense I entrust him with the umbrella. But there is no easily definable bailment in such an instance. What I have really done is to divest myself of the embarrassing circumstances of holding it. Entrusting may, of course, introduce a bailment, conferring some definite, but restricted, proprietary right. It is a question, then, of a contract entered into, and whether there is such a contract depends on more than a bare parting with possession. To entrust to a customer

A or broker or "broker's customer," as specified in the exception, means a definite contract. The reference to "safe custody" as a purpose outside the exception points to this. So does the reference to a broker or a broker's customer. But in the general clause at the beginning of the policy, where the entrusting may be for any purpose whatsoever, the word is surely used in a more general sense, to cover all cases in which the article has been deliberately put into the possession of some B other person. It may well be that in this more general sense the appellant entrusted Esmé Ellison with the possession of the necklets. She may well have been his customer on other occasions. But on this particular occasion it is plain from his evidence and from his books that he did not look on her, but only on Mr. Van der Borgh and the supposed Commander Digby, as the possible purchasing customers. Esmé Ellison was a mere intermediary, little more than a porter, C so far as any contract was concerned, a person entrusted with the possession for purposes which seem to fall short of all those specified in the exception. She certainly got no property. Having regard to the circumstances that in contemplation of law she stole the necklets from the appellant, it is only in a qualified sense that she got even the possession. No doubt, she got possession physically, but there was no mutual assent to any contract which would give her even the D qualified proprietary right to hold it as a bailee proper. The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The E latter was entirely deceived as to the identity of the person with whom he was transacting. It was only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all. In circumstances such as these, I think that there was no such consensus ad idem as, for example LORD CAIRNS, in his judgment in *Cundy* v. *Lindsay* (1) declared to be requisite for the constitution of a contract. No doubt physically the woman entered the F shop and pretended to bargain in a particular capacity, but only on the footing of being a different person from what she really was. There was never any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller.

Jurists have laid down, as I think rightly, the test to be applied to determine G whether there is a mistake as to the party which is fatal to there being any contract at all, or whether there is an intention to contract with a de facto physical individual, which constitutes a contract induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. POTHIER (TRAITÉ DES OBLIGATIONS, s. 19) lays down the principle H thus, in a passage adopted by FRY, J., in *Smith* v. *Wheatcroft* (2):

> "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, I and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

In the careful judgment delivered by him in *Phillips* v. *Brooks, Ltd.* (3), HORRIDGE, J., decided that the alternative view secondly stated by POTHIER applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and

looked at and selected certain jewels which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer, who drew a cheque pretending to be someone else and signed it in a well known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. HORRIDGE, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was, therefore, consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by POTHIER, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as HOLMES, J., says at the beginning of the ninth lecture in his book on the common law, no contract because there is really only one party.

This being so, I think that on the facts found there ought to be judgment for the appellant. No doubt, if there was a bailment such as alleged by the respondent, and it is merely voidable, as where the handing over merely follows on a further false representation which leaves an initial contract intact, a determinable right of property of some kind may pass sufficient to enable a title to be made by the bailee to someone who takes under proper circumstances without notice. But it is otherwise when the bailment is void ab initio, as in case of mere theft. I am unable to see how the relation of entrusting to a customer within the meaning of the exceptions can arise here. BANKES, L.J., and WARRINGTON, L.J., came to the conclusion that there was in this case an entrusting to a customer within the words of the exception. I find myself more nearly in agreement with the other view taken by ATKIN, L.J., and by MCCARDIE, J., at the trial. I go rather further than the learned lords justices went in their interpretation of the facts. For to me it appears that on the occasion we are dealing with the jeweller was not dealing with this woman as a customer. We have to remember that what he did was to let her have possession in her alleged capacity as the wife of a husband who was to inspect and possibly approve. Nothing short of a belief in her identity as a wife who was transacting for her husband as the real customer would have induced the appellant to act as he did. I do not rely on any doctrine belonging to criminal as distinguished from civil law. The only relevance of the criminal law is, I think, the analysis of the elements required to establish a consenting mind in a general sense. On the broader ground stated I am of opinion that on the facts before us the judgments of MCCARDIE, J., and ATKIN, L.J., were right, and those of the majority of the Court of Appeal wrong. If so the appeal must be allowed with costs here and also in the courts below.

**VISCOUNT SUMNER**.—The facts which are material here fall under two heads. The first is accurately described by saying that the woman Ellison might have been convicted of larceny by a trick ; the second by saying that no actual contract, either of sale or of agency or otherwise, purported to have been made between her and Messrs. Lake & Co. "Larceny by trick" is a short way of saying that the actual delivery of the necklace to her by Mr. Lake de manu in manum, though it wore the outward appearance of consent on his part, was in that respect illusory, because, owing to the deception which Ellison practised on him, his mind did not go consensually with his physical action. It might have saved some discussion if the finding of fact had simply been so described without resorting to the more formal title of the crime which she committed, but, in my opinion, the result is the same. Whichever description is preferable, I adopt the conclusion of both courts below. I should have been slow to differ from the learned judge, for, in any case, his finding involved consideration of Mr. Lake's state of mind, and

A he alone heard his evidence. The conclusion that his state of mind was an appearance of consent produced by the trick and not a real consent induced by fraud is a judicial conclusion from the circumstances proved, from the evidence of the victim as to what was said and done, what he believed, and what he would or would not have done in the absence of that belief, and finally, from the judge's own view of the ability of the witness himself to analyse and explain his own B mental processes with tolerable exactness. A conclusion from these materials is greatly assisted by seeing him and judging what manner of man he is. It would, therefore, be rash to set up any opinion of my own against the trial judge's conclusion and I am content to accept it, but I wish to add that, on the evidence, it was doubtless right. As to what purported to be done the case is clear. The necklaces had been placed in Mr. Lake's hands on approbation in such circum- C stances that, for the purposes of this case he was in the same position as if he had actually been the owner. Ellison proposed Van der Borgh and the fictitious Digby as purchasers. She never proposed to be the buyer herself. She never acquired nor was meant to acquire any property from Mr. Lake. He let her take the goods in order that these persons might see them on approval. He gave her no authority to negotiate or to conclude a bargain or to pass property from D him to them. If the pearls were approved, if they were kept beyond a reasonable time, if the persons, who were to have the opportunity of approving or of disapproving the pearls offered to them, dealt with them in a manner inconsistent with such offer, a direct sale by Messrs. Lake & Co. to them would result with an immediate passing of the property from the vendors to them.

E However otiose it may be to do so in your Lordship's House, I would venture further to say something as to the definite consequences of this finding, since any obscurity on this question is certain to raise doubts on a branch of law which is settled beyond dispute and ought not to be unsettled. First, when Ellison took the necklaces from the hand of Mr. Lake, she took them as a thief and with no more consent on his part than if she had picked his pocket. The facts are not F that she received them from Mr. Lake honestly and without any trick and afterwards formed a felonious intention to deprive him of them, which intention she proceeded to carry out. If that had been so, her offence would have been that of larceny as a bailee. Such a state of facts would further have been inconsistent with obtaining the pearls by false pretences, for a felonious mind only arising after she received the goods from the jeweller would not constitute criminality at the time G of the actual obtaining. The whole argument as to the meaning and effect of the word "entrusted" in the exceptions clause in the policy is at once vitally affected, if the expression "larceny by a trick" is used in anything but its strict, that is its only legal, sense. Again, if Mr. Lake consented to nothing, analogies from the distinction between void and voidable contracts are beside the mark, and equally so are arguments which turn on consensus ad idem as an ingredient in the con- H clusion of a contract. A voidable contract imports a consent with a right to avoid it. The jeweller must then make an election in order to free himself from the obligation. As it is, there was no contract and nothing to avoid. Enlightenment as to the facts was what Mr. Lake needed, and, on becoming aware of Ellison's dishonesty, he could forthwith have taken back his pearls provided that he avoided any trespass or use of unjustifiable force in doing so. Again, we need not ask I how far Ellison would have enjoyed rights under an assumed or implied bailment, if some stranger had converted the pearls as against her. What is clear is that she herself had no property or title of any kind as against Mr. Lake. A legal expression, not altogether felicitous, attributes to a pawnee what is called a "special property" as against the pawnor's "general property" in a chattel, but as there was no question of pledging these pearls to Ellison or of giving her a lien as security over them, she had no special or any other property in them and the possession was merely that of a thief. We come back again to the larceny by a trick.

Such being the relevancy of this finding, the next step is to consider whether anything can be imputed to Mr. Lake, which would be equivalent to his consent, however it may have been obtained. Your Lordships heard an argument to the effect that Mr. Lake was not deceived as to the identity of Ellison. She was the same person, it is said, whom he had seen before, and, if he continued to deal with her, it must have been because he gave credit to her statements, which in itself made his act an "entrusting." I think this immaterial. Such facts may raise difficulties in deciding whether his frame of mind involved misplaced consent or was consistent with absence of any consent at all, but the conclusion that it was such as would negative the appearance of consent and so remove the difficulty in the way of proving an asportavit concludes the whole issue. It matters not whether the trick takes the form of claiming falsely to be a particular person, or of claiming falsely to be a different kind of personage from what the thief is, or in manipulating the objects which are to be acquired. The trickster is equally a trickster in all. If A. B. passes himself off as C. D. it is an instance of the first class. The confidence trick man, posing as a benevolent millionaire from the United States is of the second. The man who rings the changes and confuses the barmaid, whom he has asked for change, is of the third. The result in all is absence of consent on the part of the person tricked. Of course, animus furandi may be a separate matter and it remains to be proved. If the jury were persuaded that the trick was all a joke they would have to acquit, but that would not set up a true consent on the part of the party hoaxed nor would it establish a bailment. The joker's possession would still be bad for want of any consent.

Let us now examine the structure of this accustomed form of policy. Even in reported cases it figures as in use in 1914 (*Moore* v. *Evans* (4)) and I have no doubt is much older. I offer no observations on its drafting. If it suits the parties, as it obviously does, there are no doubt sound reasons for the shape in which it comes before us. It begins with (a) a recital, that a premium has been paid to insure Messrs. Lake against the risks of loss and/or damage by fire, burglary, robbery, theft, accident, from whatsoever cause or misadventure to/of the property herein specified. (b) Certain chattels, including pearls, the property of Messrs. Lake, in trust or on commission or for which the assured are held to be responsible, (c) while in their own custody or in the custody of any person, to whom they may have entrusted the same on sale or return for valuation or inspection or for any other purpose whatsoever. (d) The loss must have occurred from Mr. Lake's premises, 43, High Street, Exeter, or while in transit in the United Kingdom. Then follows (e) the duration of the policy. Having thus recited the name and premises of the assured, the kind of chattels covered and their relation to the assured, and the place in which they are to be when covered and the period of the insurance, the policy declares as follows

> "touching the adventures and perils to the property hereby insured, which we the assurers . . . do take upon us, they are the loss of and/or damage or misfortune to the before-mentioned property or any part thereof, arising from any cause whatsoever, except as hereinafter mentioned,"

and then follows the material exception clause No. 1. Leaving out words not material for present purposes, I think that as a matter of construction the exception clause takes out of the stipulated cover against "thefts" generally, certain thefts conditioned in accordance with its terms, and these fall into two classes, viz., those committed by employees of the assured in all circumstances, and those committed by customers, brokers, or brokers' customers, when, but only when, the words "in respect of goods entrusted to them by the assured" are satisfied. That must mean the same theft or thefts as in the recitals which define the extent of the insurance, and, though not so peculiarly a term of art as larceny, theft in each case must mean anything that the law would regard and punish as theft in the fullest sense of the word. Next, the part of the clause under which a

A quality of the excluded theft is indicated by the words "by any customer . . . in respect of goods entrusted" must cut out something already in the policy and exclude something already included by the general recitals and provisions. When the goods have passed out of the assured's own custody they are not covered unless they have been "entrusted" to others on sale or return, for valuation or inspection, or for any other like purpose under the ejusdem generis rule of con-
B struction. "Entrusted" has, therefore, the same sense in the exception as in the general words, and the only material "entrusting" is an entrusting (a) by the assured, (b) for one of the specified purposes. I think it follows that "entrusting" in the exception cannot mean a bare handing over or physical delivery. It does not extend beyond such a delivery as satisfies the two qualifications stated. The goods must have been handed over in a way that can be described as "entrusting"
C and for one of the named purposes, which in this case can be no other than "on the condition of sale or return." Here it is quite plain that the pearls were never entrusted to Ellison on condition of sale or return. She was not the person who was to approve or to buy or return them—that was Mr. Van der Borgh or Commander Digby. If there was entrusting, it was to one of them. One of these persons was imaginary. The other was not a customer and he was not, in fact,
D aware of what was being done or concerned in it in any way. In fact, nobody was entrusted.

In the next place, Mr. Lake, who trusted Ellison in the sense of believing what she said, but entrusted the pearls to her, if at all, only that she might take them to Van der Borgh or Digby for purchase or return by them, and who did what was done under a complete delusion, can only be said to have "entrusted"
E the pearls to her, if he consented to her having them. If there was a trick, which prevented any true consent arising, there could be no entrusting. The terms are mutually exclusive. In my opinion, the natural meaning of "entrusted" involves that the assured should be some real and conscious volition have imposed on the person to whom he delivers the goods some species of fiduciary duty. There
F is no room here for any colloquial sense. A large and important part is played in a jeweller's business by the various kinds of genuine "entrusting" which the earlier part of the policy describes. The exclusion from the risk covered of any delivery of possession, however devoid of mental assent on the part of the person who gives it, would be quite arbitrary and hard to reconcile with the general insuring words. The language is the insurers' own, and in an exception it must be read contra preferentes. If they intended no more than "handed over," they
G should have said so, and the more plainly the better.

Against this conclusion reliance has been placed, both before your Lordships and below, on three lines of argument, of which the last two have particularly found favour with BANKES and WARRINGTON, L.JJ. The first is that in the exception clause "entrusted" should be read as referring simply to a physical act and means "handed over"; or, alternatively that, though Ellison's mind was felonious,
H Mr. Lake's was, in his ignorance of that fact, an entrusting mind at the moment, and it is to his mind in connection with his act that the exception must be deemed to refer. With this I have already dealt. A second is that in a commercial document no legal technicality of the criminal law should be taken into account. A third is that the element of consent should be taken in the sense
I in which, in the Factors Act, 1889, s. 2, the Court of Appeal was disposed to read it in *Folkes* v. *King* (5).

Everyone must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with what they deal, the language used by those who are parties to them, and the objects which they are intended to secure. This, however, is not a case in which the appellants propose to read the policy as if they were arguing an old-fashioned indictment, nor do I think it fair to discuss their contention as if it involved "technicalities of the criminal law." Even if it be the case that the occasion on which the doctrine of larceny by a trick at

common law was first developed was one in which a thief would otherwise have escaped conviction, where he had called in fraud to the assistance of his nimble fingers, the doctrine is now statutory under the Larceny Act, but I do not think the doctrine was ever one which could be described as being an artificial view of the facts as opposed to the actual facts of the case. It was not merely "invented by judges" to prevent a thief from taking advantage of his own wrong and relying upon a possession which he obtained unlawfully. Before this "invention" an accused person, who contended that there was no sufficient evidence of a taking, was not relying on a possession unlawfully obtained ; he was relying on the law and was taking proper advantage—if that is the right word—of being in the right as to the law of evidence. I dissent from the view that criminal law should be treated as irrelevant merely because a document is commercial. After all, criminal law is still law and so are its definitions and rules. The distinction between a real consent obtained by deceit and an unreal consent extracted by a trick is equally applicable to civil disputes. As STORY, J., says (EQUITY JURISPRUDENCE, s. 222):

> "consent is an act of reason accompanied with deliberation. . . . GROTIUS has added that what is not done with a deliberate mind does not come under the class of perfect obligation, and hence it is true, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

On the bearing which apparent consent obtained by a trick may have on the "consent," which is mentioned in s. 2 of the Factors Act, 1889, there has been so signal and so indecisive a conflict of authoritative opinion that I should be loath to offer any conclusion of my own, unless it was quite clear that the point was necessary to the decision of this case. I think it is not. The fact that it is the word "entrusted" that is before us and not the word "consent" is a minor matter, but the nature of the document under construction is crucial. By the present policy the underwriters stand behind Messrs. Lake and hold them harmless, if certain events happen to their detriment, specifying those events in their own words, first by a general inclusive statement and then by a particular exclusion thereout. All theft is covered except such theft (so far as this case is concerned) as is committed by an "entrusted" customer. The question of larceny by a trick and the question of false pretences do not arise under the words " theft or dishonesty." The relevance of larceny by a trick is to test whether the customer, whose dishonest act is in issue, is a customer "entrusted." The word clearly connotes a definite state of mind. Whose mind ? Only that of the assured. It is he who entrusts, if entrusting there be ; no third party other than the thief enters into the case and it is the jeweller's state of mind that matters on the issue "consent or no consent," while the thief's state of mind, and not the jeweller's, is relevant to loss by theft or dishonesty. Further, this contract is made for the protection of the assured and of nobody else. The Factors Act, on the other hand, was framed for the benefit and protection of third persons into whose hands commercial documents of title have passed for value and in good faith on their part. The action, which prejudices them, is action which only becomes possible because an unauthorised person has got the documents under circumstances that lead others to act in the belief that the true owner has given his consent. An argument may well arise in such circumstances that, as against the third party who has changed his position, the original owner cannot deny a consent, which is not only apparent but is invested with this appearance by what he has done. What they have to be protected against is not confined to the results of his intelligent and consensual action but against the results of any action on his part at all. Be this as it may, it seems to me not to be decisive in the present case and I say no more upon it.

I agree that Ellison was not a customer for the purpose of the exceptions clause.

A There is no point in introducing a person who is by trade a broker, and still less his customers too, who may be unknown to the assured, unless that capacity is directly connected with the goods with which the exception deals. Accordingly, I think that the appeal succeeds.

**LORD ATKINSON**.—The argument in this case has ranged over a very wide B field. My noble friends who have preceded me have dealt with the various points which have been argued by counsel on both sides. I do not propose to deal with those points again. I think the appeal succeeds. I think Miss Esmé Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it she feloniously appropriated it, is not disputed. But the operation C of entrusting the possession of the jewellery, but not the property in it, to her, which primâ facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed ; secondly, the D action he took, acting on that belief ; and, thirdly, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her furnished to her—as she intended it should—the opportunity for and means of committing the theft. It does not appear to me to be possible to separate the handing over of the possession of the jewels from the falsehood which preceded it and the felonious action which followed it. The entrusting of E goods to a customer mentioned in the exception cannot mean the delivery in all good faith by a dealer of goods to a customer which that customer has planned to steal, and by that very delivery enabling the customer to effect her felonious purpose. The true character of the operation was larceny of the appellant's goods by means of a trick—the trick being the false and fraudulent representation which this woman made to the appellant, by which the delivery to her of the possession F of the jewels was obtained. The appellant had no suspicion, apparently, that he was about to be robbed through the medium of this trick. He acted perfectly honestly in giving over the possession of the jewellery. So does everyone, presumably, who suffers from larceny by a trick. It is the honest belief of the person robbed in the false statements made which enables the intending thief to defraud him. That, however, does not alter the real character of the entire transaction. G Again, the inclination of my opinion is that Miss Esmé Ellison was not a customer of the appellant quoad the goods, the possession of which was handed over to her, within the meaning of the exception, though she may have stood to the appellant in relation of customer in other transactions. No doubt, the appellant regarded the handing over of the jewels to her as ancillary to a possible sale of them to her pretended husband, but the idea of having any dealing of that kind with the H appellant in reference to this jewellery never entered her head. From the first she apparently designed and intended a theft. That was the nature of the only dealing she had in mind. As I have said, I think the appeal succeeds.

**LORD WRENBURY**.—I concur.

I **LORD BLANESBURGH**.—I think also that this appeal succeeds, and, while I entirely agree with the judgment of my noble and learned friend LORD SUMNER, which I have had the advantage of reading, I propose specifically to base my judgment on the simple ground that Ellison was not in either transaction a customer of the appellant within the meaning of the exception clause of the policy. I do not doubt that by the month of March, 1923, she had resorted to the appellant's shop for the purpose of purchasing goods from him with sufficient frequency to justify her inclusion in the class of persons aptly enough described as the customers of the appellant in connection with his business of a jeweller. I am free also

to agree that if the only customers or persons referred to in the exception clause had been customers of the assured, it might on construction have been difficult to avoid the conclusion that nothing more was required to bring Ellison in this respect within the exception. With reference to a clause so framed it could with force have been urged that his customers were so excepted because the assured had no need to be protected against the unlikely dishonesty of people he knew and trusted in business. But the exception is not confined to customers of the assured. It extends to a "broker or broker's customer" as well, and, as will be seen in a moment, no corresponding explanation of their appearance in the exception can be put forward. If the whole expression is to be construed in absolute or detached terms, as I have so far construed the word "customer," Who, it may be asked, is a " broker "? May he be any kind of broker ? What is the qualification for his inclusion if he may not ? What possible connection, still construing the word at large, is there between the assured and the "customer" of such a broker ? Who is such a "customer" ? Who is not ? How would that position, one way or the other, be known to the assured ? It is, I think, quite impossible to say. In my judgment, therefore, it is necessary to re-consider the effect of the whole phrase "customer, broker or broker's customer in respect of goods entrusted to them," from this standpoint and with a view to seeing whether there is any relation in which they all stand to the assured which makes it possible at once to fix their identity and to justify the exception in regard to each of them indifferently, and that relation, in my judgment, is that the customer of the assured, the broker or the broker's customer are, each and all of them, such with reference to the particular goods so entrusted to them. And Ellison was not, and never pretended to be, and was not treated by the appellant as being, a customer in that sense in relation to either of the necklaces now in question. I am in entire agreement with McCardie, J., on this point. I cannot think that it would have been dealt with in the Court of Appeal so lightly as it was if the lords justices had noticed that reasons which, apt enough to justify the inclusion of customers of the assured as such in the exception, have no application either to brokers or their customers and that in construing the clause no wider meaning can properly be attached to the word "customer" in the one case than in the other.

*Appeal allowed.*

Solicitors : *Kenneth Brown, Baker, Baker* ; *Windybank, Samuell & Lawrence.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

# Re LANYON. LANYON *v.* LANYON

[CHANCERY DIVISION (Russell, J.), June 23, 24, July 7, 1927]

[Reported [1927] 2 Ch. 264 ; 96 L.J.Ch. 487 ; 137 L.T. 806 ; 43 T.L.R. 714 ; 71 Sol. Jo. 865]

*Will—Condition—Defeasance of vested estate on happening of event—Need for event to be clearly prescribed—Restraint on marriage—Prohibition of marriage with "blood relation—Defeasance, not of estate of beneficiary, but of estate vested in children.*

By his will the testator, who died in 1924, devised and bequeathed his residuary estate to trustees upon trust to pay the income thereof to his son for his life, and then to divide the corpus among his children equally, "provided he does not marry a relation by blood as I wish to mark my great objection to marriage between blood relations and in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years or in the event of his marrying a blood relation," then upon other trusts.

**Held:** (i) to be valid a condition in a will providing for the defeasance of a vested estate on the happening of a prescribed event must indicate in clear terms, so as to leave no room for uncertainty, what was the event on which the defeasance was to take effect, but difficulty in ascertaining whether or not the event had occurred would not render the condition void for uncertainty; in the present case the prescribed event was quite clear, and, therefore, the condition could not be avoided ; but (ii) while the restraint on marriage created by the condition was in terms partial, the son could never be certain that he was not marrying a blood relation in the sense of a person who had some remote ancestor in common with him ; although the condition inflicted a penalty, not on the son, but on his children, it could operate in terrorem as regards him ; in those circumstances the restraint led to the probable prohibition of marriage ; and on that ground the condition was void.

**Notes.** Considered: *Sifton* v. *Sifton*, [1938] 3 All E.R. 435 ; *Re Fentem, Cockerton* v. *Fentem*, [1950] 2 All E.R. 1073. Referred to: *Bromley* v. *Tryon*, [1951] 2 All E.R. 1058.

As to conditions in wills in restrain of marriage see 34 HALSBURY'S LAWS (2nd Edn.) 107–109, and for conditions void for uncertainty see ibid. 109. For cases see 44 DIGEST 436–438, 454–459, 466, 467, 479, 482–491.

Cases referred to :

(1) *Re Viscount Exmouth, Viscount Exmouth* v. *Praed* (1883), 23 Ch.D. 158 ; 52 L.J.Ch. 420; 48 L.T. 422 ; 31 W.R. 545 ; 44 Digest 441, *2668*.

(2) *Re Sandbrook, Noel* v. *Sandbrook*, [1912] 2 Ch. 471 ; 81 L.J.Ch. 800 ; 107 L.T. 148 ; 56 Sol. Jo. 721 ; 44 Digest 444, *2686*.

(3) *Re Patterson, Dunlop* v. *Greer*, [1899] 1 I.R. 324 ; 44 Digest 536, *3528 xiv*.

(4) *Cruwys* v. *Colman* (1804), 9 Ves. 319 ; 32 E.R. 626 ; 44 Digest 888, *7449*.

(5) *Wilson* v. *Duguid* (1883), 24 Ch.D. 244 ; 53 L.J.Ch. 52 ; 49 L.T. 124 ; 31 W.R. 945; 37 Digest 532, *1232*.

(6) *Perrin* v. *Lyon, Lyon* v. *Geddes* (1807), 9 East, 170 ; 103 E.R. 538, L.C. ; 44 Digest 456, *2778*.

(7) *Jenner* v. *Turner* (1880), 16 Ch.D. 188 ; 50 L.J.Ch. 161 ; 43 L.T. 468 ; 45 J.P. 124 ; 29 W.R. 90 ; 44 Digest 456, *2781*.

(8) *Hodgson* v. *Halford* (1879), 11 Ch.D. 959 ; 48 L.J.Ch. 548 ; sub nom. *Re Lyon, Re Jacobs, Hodgson* v. *Halford*, 27 W.R. 545; 44 Digest 452, *2748*.

(9) *Clavering* v. *Ellison* (1856), 3 Drew. 451 ; 25 L.J.Ch. 274; affirmed (1857), 8 De G.M. & G. 662 ; 26 L.J.Ch. 335, L.JJ. ; affirmed (1859), 7 H.L. Cas. 707 ; 29 L.J.Ch. 761 ; 11 E.R. 282, H.L. ; 44 Digest 440, *2667*.

(10) *Keily* v. *Monck* (1795), 3 Ridg. Parl. Rep. 205 ; 44 Digest 457, *d.*
(11) *Lowe* v. *Peers* (1770), 4 Burr 2225 ; Wilm. 364 ; 98 E.R. 160 ; 12 Digest (Repl.) 278, *2131.*
(12) *Long* v. *Dennis* (1767), 4 Burr. 2052 ; 1 Wm. Bl. 630 ; 98 E.R. 69 ; 44 Digest 466, *2868.*

**Adjourned Summons.**

By his will dated June 15, 1922, the testator devised and bequeathed all his residuary estate to his trustees therein named upon trust to pay the net income to his son, James Lanyon, for life, and after his decease to pay and divide the corpus to or among his—the son's—child or children, equally between them if more than one, "provided he does not marry a relation by blood as I wish to mark my great objection to marriage between blood relations and in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years or in the event of his marrying a blood relation"—then over on other trusts. The testator died on June 18, 1924. By this summons the trustees asked (i) that it might be determined what persons or class of persons were, upon the true construction of the will, relations by blood or blood relations of the son, and (ii) whether the gift over in the event of his marrying a blood relation was (a) void altogether, (b) would in that event determine his life interest, or (c) operate so as to defeat the estates of his issue (if any) by any marriage he might contract other than the marriage so contracted by him with a blood relation as well as the issue (if any) of such marriage.

*Rawlence* for the trustees.

*Farwell, K.C.* and *C. E. Harman*, for the son, referred to *Viscount Exmouth* v. *Praed* (1), *Re Sandbrook* (2), *Re Patterson* (3), JARMAN ON WILLS (6th Edn.), vol. 2, p. 1627, *Cruwys* v. *Colman* (4) and *Wilson* v. *Duguid* (5).

*Bennett, K.C.* and *Christie*, for the residuary legatees, cited JARMAN ON WILLS (6th Edn.) vol. 2, p. 1525, *Perrin* v. *Lyon* (6), *Jenner* v. *Turner* (7) and *Hodgson* v. *Halford* (8).

*Beebee* for the widow.

*Cur. adv. vult.*

July 7.—**RUSSELL, J.**, read a judgment in which he stated the facts and continued: The son is anxious to have his position clearly defined. He is a bachelor, aged thirty-seven. He not unnaturally wishes to know (i) whether, if he did knowingly or unknowingly marry a blood relation, he would lose his life interest, and (ii) whether the provisions in the will in regard to his marrying a blood relation are void, or whether his future choice of a bride is to be fettered by the risk of a subsequent discovery that he and his wife had a common ancestor who (say) landed in Pevensey Bay with William the Conqueror.

As to the first question I feel no difficulty. The proviso appears to be in no way annexed to the gift of his life interest. It and the gift over in the event of his marrying a blood relation are included in and apply only to the trusts declared to take effect on his decease. The result is, that if the provisions are valid in law they only operate to defeat the interest of children of James Lanyon, not to defeat his life interest.

The second question is more difficult. The meaning of blood relationship seems clear enough. It cannot here refer to the statutory next of kin. In my opinion, it describes the relationship existing between two or more persons who stand in lawful descent from a common ancestor. The chain of descent may be broken by illegitimacy, but with that qualification all persons descended from a common ancestor, however remote, are blood relations. Indeed, this was conceded on both sides and the case was argued on that footing. The first argument on behalf of the son ran thus: That the proviso and condition are intended to defeat the vested interest previously given to the children. That, in order to be valid, such a provision must be of such a nature that it must be possible at any given time

to know its limits and to know whether there has in fact been a breach of the condition or not. That in the present case it is impossible for the son at any given time to know the limits of the provision, or to be sure that any person whom he marries is not a blood relation. The authorities cited in support of these contentions were *Clavering* v. *Ellison* (9), *Viscount Exmouth* v. *Praed* (1), and *Re Sandbrook* (2). Before considering these cases I would point out that I can see no difficulty in knowing the limits of the provision—the limits are marriage with a blood relation; but I agree, that if the son married someone believed to be in no degree of relationship to him he could not, as a general rule, be absolutely certain that his bride was not in fact a blood relation.

Turning now to the cases cited, they do not, in my opinion, support the proposition in question. They do support this proposition: That such a provision must indicate in clear terms what the event is upon which the defeasance of a vested estate is to take effect. There must be no room for uncertainty on that score. They do not, however, establish the proposition that difficulty in ascertaining whether the defined event has or has not occurred will render the provision void for uncertainty.

In *Clavering* v. *Ellison* (9) the provision for defeasance ran thus:

> "And in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England."

It has two branches. For this purpose the important one was the first, because, as to the second branch, all the judges agreed that upon the evidence its event had not happened. The question of its validity was not discussed. As regards the education branch its validity was discussed. In the court below, KINDERSLEY, V.-C.—as I read his judgment—held it to be invalid and inoperative, on the ground that the contingency was not expressed in such terms as to enable the court to say what the event was upon which the defeasance was to take place. He says:

> "The contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate."

After analysing the particular facts in regard to each child to illustrate the impossibility of attaching a clear meaning of the words "educated abroad," he finds the clause to be inoperative on the ground of uncertainty. On appeal the court took the view that no breach had occurred. KNIGHT-BRUCE, L.J., assumed validity in the appellant's favour, and was apparently of opinion—but, I think, erroneously—that KINDERSLEY, V.-C., had also assumed validity. In the House of Lords, LORD CAMPBELL considered that neither condition was void, but held that neither condition had been broken. LORD CRANWORTH held that the first branch was void for uncertainty. He says:

> "Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine. . . . I think that looking at the language here used it is far too indefinite and uncertain to enable the court to say what it was that the testator meant should be the event on which the estate was to determine."

LORD KINGSDOWN merely concurred in the propriety of the decision that the decree below should be affirmed.

In *Viscount Exmouth* v. *Praed* (1), FRY, J., held there the clause in question to be void for uncertainty, and he used the following language:

> "The condition must be clear and certain. That, in my opinion, includes not only certainty in the expression in the creation of the limitation, but also

certainty in its operation. It must be such a limitation that at any given moment of time it is ascertainable whether the limitation has or has not taken effect."

And, again, after citing the passage already cited by me from KINDERSLEY, V.-C., he adds:

"No doubt there the want of certainty was rather in the expression used than in the ascertainment of the operation of the limitation. But it is quite plain certainty in the one is as essential as certainty in the other."

The meaning of the words "certainty in the operation of the limitation" is not at first sight quite clear. They became clear, I think, when the nature of the provision in that case is looked at. They do not, I think, mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision, the nature of which is clearly expressed. The want of certainty in the operation of the limitation here in question was this. The clause postponed the vesting of an absolute interest in chattels till the expiration of a term of twenty-one years, to commence from the deceased of all such persons as should be living at the testator's death and should at any time after the testator's death attain the title of Exmouth. The result was that one could never tell at any time who was entitled to the chattels because, until all persons —and there were several—who were alive at the testator's death, and who might succeed to the title, were actually dead one could never say whether the term of twenty-one years had commenced to run, was still current, had expired, or had not commenced to run. The matter was one of absolute impossibility.

In *Re Sandbrook* (2) the provision for defeasance was to take effect—so far as relevant—if at any time before a fixed date one or both of two grandchildren should live with, or be or continue under the custody, guardianship or control of their father, or be in any way directly under his control. PARKER, J., held—for the reasons given by him—that he could not arrive with certainty at any conception of the event which would cause the forfeiture, and that, therefore, on the authority of *Clavering* v. *Ellison* (9) the provision was void because it was so vague. Here, again, it was the uncertainty in the description of the event causing the defeasance which avoided the provision.

In the case before me the prescribed event is quite clear, but it is sought to avoid the clause because it is said that it is difficult and probably impossible for the son to ascertain whether a particular marriage will be or has been a breach of the provision. The authorities cited do not, in my opinion, justify me in declaring the provision to be void on that ground.

Let me now consider the proposition on general principles. It is open to a testator to make, within legal limits, any disposition of his property, however unreasonable or whimsical it may appear to others. He may, within perpetuity limits, take property away from A. and give it to B. upon the happening of an event. But the event must be clearly defined and must not violate considerations of public policy. The son seeks to add another qualification to a testator's right to dispose of his property, namely, that the event must be of such a nature that at any point of time limited for its occurrence it must be possible to know whether it has occurred or not. I am not aware of any legal principles upon which I am at liberty to so hold. In the case before me the very difficulty which the son may have in ascertaining that he and his bride do not trace legal descent from a common ancestor will affect the persons on whom will be the onus of proving that the specified event has happened. If the difficulty amounts to impossibility the defeasance can never operate. If the defeasance ever does operate, then it can only be because it was not impossible, but was possible, to know within the limited time whether the event had occurred or had not occurred. In my opinion, although uncertainty as to what is the prescribed event upon which a defeasance is to occur will avoid the provision for defeasance, it is impossible

to hold that because it may be uncertain from time to time whether a clearly defined event has or has not occurred the provision is void.

The second argument presented on behalf of the son was that the provision for defeasance was void on grounds of public policy as being in restraint of marriage. By the laws of this country the doctrine of the civil law, which avoided all conditions in wills restraining marriage, has not been adopted. Many such conditions have been held valid. Thus, in *Perrin* v. *Lyon* (6), a condition against marriage with any person born in Scotland, or born of Scottish parents, was held good. In *Hodgson* v. *Halford* (8), a clause was upheld which provided for forfeiture in the event of marriage with a person who did not profess the Jewish religion, or was not born a Jew. In *Jenner* v. *Turner* (7), a condition for defeasance in the event of marriage with a domestic servant, or a person who had been a domestic servant, was held valid. It was pointed out that the whole female world—except only domestic servants—was open as a field of choice. But, in my opinion, all partial restraints of marriage are not necessarily valid because they are partial only. It is not enough to say that a particular restraint is not a general restraint, but leaves open a field of choice and is therefore valid. Considerations of public policy require more than that. It still remains to be considered in each case whether the particular restraint is reasonable—reasonable, that is to say, from the point of view of public policy. A restraint which, although in terms partial from its nature, would or might lead in practice to a probable prohibition of marriage, would, in my opinion, fall within the mischief which public policy requires should be prevented. This view is established by a decision of the High Court of Parliament in Ireland in the old case of *Keily* v. *Monck* (10). The provision for defeasance there was the event of a daughter marrying a person not being at the time of marriage seised of an estate in fee or of a freehold perpetual of the clear yearly value of £500 sterling. The restraint was in terms partial, but the court held the provision to be void as leading to a probable prohibition of marriage. The Lord Chancellor in his speech—which is the only one reported—used the following language:

> "If then this be a vested legacy the condition annexed to it is clearly a condition subsequent and the rule of the common law is that if a condition subsequent be illegal or impossible at the time of the gift or become impossible by the act of God the gift remains absolute and the condition is void. See then whether the condition which the caprice of old age has dictated in the present instance can be supported in any court of justice. The condition is that the respondent shall not marry without the consent of her mother and Mr. Usher. This consent has been given. And further that she shall not marry any man who shall not be seised at the time of his marriage of an estate in fee simple or of freehold property of the clear yearly value of £500 over and above all incumbrances. It has been objected at the Bar that there is no precedent to be found condemning such a condition. If this argument had prevailed in Westminster Hall for the last century that beautiful system of jurisprudence which is the best birthright of British subjects would never have been settled and established. Give me a fair and broad principle and I never will scruple to build a precedent upon it. And therefore in this case we are only to look to the principles of the law of England and see whether they will sustain such a condition. And upon this point I take the principle to be settled that the law allows reasonable restraints upon marriage. But that conditions prohibiting marriage or leading to a probable prohibition of marriage are condemned upon principles of sound and general policy. A condition in restraint of marriage excluding men of a particular profession has been held void. So a covenant with a woman not to marry any other has been held void as leading to a general prohibition of marriage—*Lowe* v. *Peers* (11). So in *Long* v. *Denis* (12), a father had imposed a condition disinheriting the

children of his son and disabling him from settling a jointure on his wife if he married a woman not having a competent marriage portion or without consent. LORD MANSFIELD and the other judges in giving judgment on that case all declare—'conditions in restraint of marriage are odious and therefore are held to the utmost rigour and strictness. They are contrary to sound policy. Conditions precedent must previously exist, therefore in these there can be no liberality except in the construction of the clauses.' LORD MANSFIELD says: 'The forfeiture here is so cruel as to begin with the innocent offspring of the offending son. This testator considered money as the only qualification to a wife.' It seems pretty clear from the report of this case of *Long* v. *Denis* (12) that if it had been the case of a condition subsequent the court would have condemned the condition.''

Looking at the case before me, the restraint is in terms partial, although no one could say how large or small a portion of the female world is left open to choice, it is still in terms a partial restraint. But its nature is undoubtedly such that it would be difficult, almost impossible, to ascertain definitely that any particular lady was not a blood relation—that a Pevensey Bay, or even more remote, common ancestor could not be found. No marriage with a supposed stranger in blood could be contracted except subject to the risk that, should a common ancestor be traced, the provision for defeasance would operate. The son could only be certain that he was marrying a blood relation; he could never be certain that he was not. A provision which by its nature produces those results is, in my opinion, a provision leading to the probable prohibition of marriage and is void accordingly. There is one novel feature in this case—namely, that the penalty is inflicted not on the son who violates the provision but upon his children. No property is taken away from the son. In my opinion, this makes no difference. It might well be that a provision taking away property from A. in the event of a breach of condition by B. would not operate in terrorem as regards B. if A. were a stranger. But I am clearly of opinion that where the victims are B.'s children and the prohibited event is B.'s marriage there is complete scope for operation in terrorem as regards B.

Solicitors: *Patersons, Snow & Co.*, for *Hare & Son*, Much Hadham; *Carleton-Holmes, Fell & Wade*, for *Nockolds & Son*, Bishop's Stortford.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

# ROYAL EXCHANGE ASSURANCE *v.* HOPE

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), December 9, 1927]

[Reported [1928] Ch. 179; 97 L.J.Ch. 153; 138 L.T. 446; 44 T.L.R. 160; 72 Sol. Jo. 68]

*Insurance—Life assurance—Assignment of policy—Extension of term—Death of assured during extended period—Right of assignee to policy moneys.*

A policy of life insurance effected by B. for a term of one year was assigned by him to H. absolutely. Shortly before the policy was due to expire, B. arranged with the insurance company for an extension of the term of the policy for a further period of three months. No new policy, duly stamped, was issued in respect of the extended term, but the policy was endorsed with a memorandum of the extension and a receipt for the premium payable thereon. B. died during the extended period. In an action by B.'s executors against H. for a declaration that the policy moneys belonged to B.'s estate,

**Held:** the extension of the period of the policy did not constitute a new contract between B. and the insurance company, but was a variation and an extension of one term of the original contract as assigned to H., and, therefore, H. was entitled to the policy moneys under the terms of the policy as extended. *Kensington* v. *Inglis* (1) (1807), 8 East, 273, applied.

**Semble:** if the contract for the extended period was to be regarded as a new contract, B., when he entered into it, must be taken to have acted as a trustee for H.

**Notes.** Referred to: *Jenkins* v. *Deane*, [1933] All E.R. Rep. 699; *Prudential Assurance Co.* v. *I.R. Comrs.*, [1934] All E.R. Rep. 515.

As to the assignment of life policies see 22 Halsbury's Laws (3rd Edn.) 281–285, and for cases see 29 Digest 372 et seq.

Cases referred to:

(1) *Kensington* v. *Inglis* (1807), 8 East, 273; 103 E.R. 346; 29 Digest 67, *253*.

(2) *Re Engelbach's Estate, Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348; 93 L.J.Ch. 616; 130 L.T. 401; 68 Sol. Jo. 208; 29 Digest 422, *3288*.

(3) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 29 Digest 369, *2969*.

(4) *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11; 43 L.J.Ch. 459; 22 W.R. 584; 43 Digest 560, *107*.

(5) *Lloyd's* v. *Harper* (1880), 16 Ch.D. 290; 50 L.J.Ch. 140; 43 L.T. 481; 29 W.R. 452, C.A.; 43 Digest 791, *2290*.

(6) *Re Burgess's Policy* (1915), 85 L.J.Ch. 273; sub nom. *Re Burges's Policy, Lee* v. *Scottish Union and National Insurance Co.*, 113 L.T. 443; 59 Sol. Jo. 546; 27 Digest (Repl.) 135, *982*.

(7) *Gandy* v. *Gandy* (1885), 30 Ch.D. 57; 54 L.J.Ch. 1154; 53 L.T. 306; 33 W.R. 803; 1 T.L.R. 520, C.A.; 27 Digest (Repl.) 237, *1910*.

(8) *Hill* v. *Patten* (1807), 8 East, 373; Holt, N.P. 333, n; 103 E.R. 386; 29 Digest 67, *254*.

(9) *Tomlinson* v. *Gill* (1756), Amb. 330; 27 E.R. 221, L.C.; 24 Digest (Repl.) 706, *6922*.

(10) *British and Beningtons, Ltd.* v. *North Western Cachar Tea Co., etc.*, [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422; 28 Com. Cas. 265; 13 Floyd L.R. 67 H.L.; 12 Digest (Repl.) 400, *3101*.

(11) *Morris* v. *Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 398, *3086*.

(12) *Re Leslie, Leslie* v. *French* (1883), 23 Ch.D. 552; 52 L.J.Ch. 762; 48 L.T. 564; 31 W.R. 561; 29 Digest 383, *3066.* A

(13) *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 8 Jur. N.S. 806; 45 E.R. 1185, L.JJ.; 8 Digest (Repl.) 631, *677.*

**Appeal** by plaintiffs from an order of TOMLIN, J.

The plaintiffs, as executors under the will of the testator, Samuel Barker, deceased; claimed a declaration that they were entitled to all right, title, and interest under a policy of life assurance effected by the testator. The defendant, Mrs. Hope, claimed to be entitled to the policy moneys under an absolute assignment to her. The policy was dated Aug. 13, 1925, and by it the testator insured his life in the Sun Life Assurance Society for a period of one year from July 31, 1925, for £1,000. By an assignment dated Aug. 27, 1925, he assigned the policy to the defendant absolutely. In July, 1926, when the policy was running out, the testator renewed the policy for a period of three months, i.e., until Oct. 31, 1926. The testator died on Oct. 1, 1926. B C

*S. L. Porter, K.C.*, and *Macgillivray*, for the plaintiffs, referred to *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (2), *Cleaver* v. *Mutual Reserve Fund Life Association* (3), *Richards* v. *Delbridge* (4), *Lloyd's* v. *Harper* (5). D

*Archer, K.C.*, and *H. Johnson*, for the defendant, referred to *Re Burgess's Policy* (6), *Gandy* v. *Gandy* (7), *Kensington* v. *Inglis* (1), *Hill* v. *Patten* (8), *Tomlinson* v. *Gill* (9).

**LORD HANWORTH, M.R.**—By a policy dated Aug. 13, 1925, Samuel Barker effected an insurance on his life for the term of one year from July 31, 1925, with the Sun Life Assurance Society. He paid a single premium of £22. The policy, which was numbered 276732 and stamped, expressed the terms and conditions on which it was granted. It was world wide and free from all restrictions as to foreign residence, travel, and occupation, and contained a term that notice of any assignment must be registered at the chief office of the society. On Aug. 27, 1925, by an indenture of that date, Samuel Barker assigned that policy to the defendant absolutely; and notice of this assignment was given to and received by the society on Sept. 3. In June and July, 1926, Barker was in California, and at the end of that month his solicitors cabled to him the terms on which the Sun Assurance Society would grant "an extension short time policy not exceeding three months," on condition that his health was good and that he had not suffered any illness since the policy was effected—at a premium of £6 2s. 6d. On July 29 Mr. Barker cabled accepting the offer and stating that his condition and health since July 31, 1925, fulfilled the required conditions. Accordingly, on July 30 the stipulated premium was paid, and the following receipt given, signed by the secretary. E F G

> "Policy No. 276732. Extension of policy for three months, till 31/10/26.—£6 2s. 6d.—Received this 30th day of July 1926 additional premium as stated above. The delivery of the policy may be expected at the expiration of about fourteen days from the date of this receipt." H

The policy was returned and bore an endorsement dated Aug. 13, 1926, as follows:

> "Endorsement . . . in consideration of the sum of £6 2s. 6d. (a separate receipt for which has been issued) having been received by the society, it is hereby declared that the sum assured shall be payable in the event of the death of the life assured on or before the 31st Oct., 1926, instead of as set out in the schedule." I

The schedule on the face of the policy which described "the event in which the sum assured is payable" as "the death of the life assured on or before the 31st July, 1926," had the words added: "Altered by endorsement." No fresh stamp was paid. The original policy stood, but one of its terms, the time limit, was

extended, just as in a policy which contained a restriction on foreign residence or travel, that term might have been withdrawn so as to make the assurance world-wide on the payment of an extra premium. Mr. Barker died on Oct. 1, 1926. The society are ready to pay the £1,000; and this action has been brought by his executors for a declaration that they are entitled to receive the sum assured as falling into his estate. The executors claim that the contract of insurance that was operative at the time of their testator's death was not the original one whereby Mr. Barker's life was insured between July 31, 1925, and July 31, 1926, which was assigned to the defendant, but a new and separate contract altogether—a contract insuring the life from Aug. 1 to Oct. 31, 1926, at a separate premium of £6 2s. 6d.—and that that policy did not pass to the defendant under the assignment. Tomlin, J., held that the defendant was entitled to succeed—that the testator entered into the contract for the extended period as trustee for the defendant. He made a declaration that the defendant was entitled to the moneys payable under the policy and gave judgment for her with costs. From that judgment the executors appeal.

It is, in my opinion, impossible to hold that the insurance for the later three months was a new and separate contract. The terms offered and accepted were for a short extension of the contract of insurance which was then in being and unexpired. No suggestion was made for a new and independent policy. There was no fresh stamp, as there must have been if a new policy had been effected. There was no new number assigned to the fresh contract; but the old policy was endorsed with a new time limit for the risk, and the old limit was "altered." This alteration is subsidiary to the main purpose of the contract as it stood originally—the subject-matter of the risk was not changed. The observations made by Lord Sumner in *British & Beningtons, Ltd.* v. *North Western Cachar Tea Co.* (10) ([1923] A.C. at pp. 68, 69) appear to me to be in point. The variation may be in strict logic a new contract, but the discharge of an old contract is a matter of intention. So far as it was possible to indicate it, the insured and the society appear to me to have expressed an intention to maintain the old contract —to continue and to extend it. There was no new policy issued and the requirements of the Stamp Act were not complied with. In *Morris* v. *Baron & Co.* (11), the question of the rescission of an old contract upon the making of a new one was considered, and it was held that where there is a clear intention to rescind, as distinguished from an intention to vary, the old contract will be rescinded. In the present case there was the clearest intention to maintain the contract and to vary one term of it only. The distinction between an extension of the time of insurance upon the old subject of insurance, and an extension which makes the policy cover a different risk from that originally embraced, is well pointed out by Lord Ellenborough, C.J., in *Kensington* v. *Inglis* (1) (8 East, at p. 293), where the quantum of the risk was not altered, but the dates of sailing extended leaving "an insurance on the same thing if the underwriters should agree by a memorandum to continue insurers on it." It was thus held that a fresh stamp was not required because an alteration of the dates of sailing did not alter the nature of the risk and was merely "a lawful alteration in the terms or conditions of the policy," and so within the exception of s. 13 of the Act 35 Geo. 3, c. 63, which excuses the necessity of a fresh stamp in such cases.

There remains the point taken for the plaintiffs, that at the time when the extension was made all interest in the policy had passed to the defendant by the assignment, so that the deceased had no rights or power in relation to it, and that the defendant had no insurable interest in the deceased's life, so that he could not act as her agent. In my judgment, however, the deceased could enlarge or improve the policy, and if the enlargement or improvement was agreed to and accepted by the Sun Assurance Society, it enured to the benefit of the defendant. If during the original term, Policy No. 276732 had been increased to an amount of £1500 by the payment of an additional premium accepted by the

insurers, I think the extra £500 would have been receivable by the defendant, just as if the assignment had been of numbered shares in a company, which had been increased in value. The money payable by the Sun Assurance Society is payable under Policy No. 276732, and that policy was identified in the assignment. This view makes it unnecessary to consider the point on which TOMLIN, J., based his judgment, namely, that Mr. Barker when he effected the extension, acted as trustee for the defendant. I agree that that principle can be adopted, if necessary, in the present case. That is to say that the deceased by a new contract effected an enlargement of the time limit, acting as trustee for the defendant, and the money received, even if it is treated as received under a separate contract, is to be treated as received under a contract made by a trustee for the defendant who can enforce her rights as a beneficiary under it, on the same principle as in *Lloyd's* v. *Harper* (5). The appeal must be dismissed with costs.

**SARGANT, L.J.**—I agree that the decision of TOMLIN, J., should be affirmed. The plaintiff's position, as stated in their pleading and as presented in their argument, is that there were here two distinct and separate contracts between the deceased Mr. Samuel Barker and the Sun Life Society, the first being that of August 13, 1925, for an insurance for a period of one year, that is from July, 31, 1925, over July 31, 1926, and the second being that of Aug. 13, 1926, for an insurance for a further period of three months, namely, from July 31, 1926, over Oct. 31 following. This being so, and there having been no actual assignment by the deceased to the respondent, Mrs. Hope, of the benefit of the second contract, nor any declaration of trust by him in her favour of that contract, the plaintiffs argue that the benefit of the second three months' contract remained the property of Mr. Barker, and forms part of the estate to which they are entitled as his executors. They do not dispute in any way the general intention of Mr. Barker that Mrs. Hope should have the benefit of the second contract, but they argue that Mr. Barker's acts did not amount at most to more than an incomplete attempt to assign or to declare a trust, and that this is not sufficient in the case of a voluntary donee, or volunteer, such as Mrs. Hope. On this point they cite and rely on the clear exposition of the equitable doctrines on the subject to be found in the judgment of SIR GEORGE JESSEL in *Richards* v. *Delbridge* (4).

At first sight this argument is attractive from a mere legal point of view, however repugnant to an ordinary common-sense view of the transaction. But on closer examination I think it defective even from a legal standpoint in paying too little attention, first to the situation occupied by the persons concerned at the date of the second transaction, and, secondly, to the precise terms of the bargain effected between the deceased and the Sun office. At the date of the second transaction the whole benefit of and interest in the policy had been assigned by the deceased to Mrs. Hope to the knowledge of the Sun office, and he and they were bargaining with regard to a chose in action which belonged absolutely to her. Further, the second transaction, as evidenced both by the terms of the written documents which made the bargain and by those of the endorsed memorandum which carried it out, was not that a new contract of insurance should be effected, but that Mrs. Hope's existing contract should be varied and extended so as to be rendered more valuable by the substitution of Oct. 31, 1926, for July 31, 1926, as the termination of the period protected by the insurance. I see no reason why a payment actually made to and accepted by the Sun office for the purposes of improving a policy of theirs in the hands of the holder and owner should not have that effect although the payment comes from a third party.

Let me take one or two examples by way of analogy. A. has a current account with a bank, B., and C., an outsider, makes an actual voluntary payment to the bank to the credit of the current account. Or A. holds shares in company B., on which calls are due, and C., an outsider, voluntarily pays those calls to the company ; or, again, to get a little closer, A. holds a policy of insurance on his

own life with an insurance company, B., on which annual payments have to be made, and C. to benefit A. pays a lump sum to the company, B., to render the policy free from annual payments in the future. In all these cases it seems reasonably clear that A. takes the benefit of the actual voluntary payment, and holds his balance or his shares or his policy improved by the actual payment without there being any claim by C. thereon by way of equitable lien or otherwise: *Re Leslie, Leslie* v. *French* (12). It is, of course, true that in any such case C. cannot make any bargain with B. to alter the general rights of A. as against B. But an actual completed payment, however voluntary, which has the mere effect of benefiting the property or chose in action of A. stands on a totally different footing. *Milroy* v. *Lord* (13), *Richards* v. *Delbridge* (4) and other cases of that kind are examples of attempts to make voluntary transfers of property which are insufficient as actual transfers and do not amount to declarations of trust. They do not, in my judgment, touch a case like this, where there is an actual completed payment by way of addition to or improvement of a fund, chose in action or other property which already belongs to the volunteer intended to be benefited. Had the policy here run out at the time when the payment by Mr. Barker was agreed to and made, Mrs. Hope's position would be a more difficult one. In that case a completely new contract of insurance might have been necessary. But it is clear that both the agreement and the payment were effectual while the policy had still a day or two to run, and, in my judgment, they amounted to a variation for the benefit of the assured of the existing policy—a variation which was subsequently formally expressed in the memorandum endorsed on the policy. As to this, the decision in *Kensington* v. *Inglis* (1) is of much assistance to the respondent.

In the view I have taken it is unnecessary to consider whether the respondent can succeed on the ground relied on by TOMLIN, J., namely, that Mr. Barker, in effecting the second transaction, was constituting himself a trustee for the defendant of the benefit of the contract to extend the policy. But I must not be taken as dissenting from that conclusion. In view of the absolute ownership by Mrs. Hope of the existing policy it is difficult to see how, in contracting for its extension, Mr. Barker can have been acting for himself or on behalf of anyone other than Mrs. Hope. He could not, himself, acquire an interest in the policy since he was at the time a mere outsider: *Re Leslie* (12).

**LAWRENCE, L.J.**—The main contention of the plaintiffs on this appeal was that the assignment of Aug. 27, 1925, only operated to assign the policy as it then existed, and did not pass any future extensions of the policy. The plaintiffs also contended that, even if the terms of the assignment were held to be wide enough to cover future extensions, the assignment would, as regards such extensions, at most operate as an agreement to assign, and, being voluntary, could not be enforced.

In my opinion, these contentions are based on a misconception of the real nature of the transaction as carried out by the parties. The method adopted by the assured for effectuating his admitted intention to benefit the defendant by extending the policy in her favour was to make an agreement with the assurance society that in consideration of a money payment the assurance society should alter one of the terms of the existing policy, which then belonged absolutely to the defendant, and incorporate such alteration in that policy as if the policy has originally been issued as so altered, thus improving the policy in the hands of the defendant. In pursuance of this agreement, and in consideration of the payment by the assured of £6 2s. 6d. the assurance society duly effected the necessary alteration in the policy and thereby made itself liable on the face of the policy to pay to the defendant the sum of £1000 in the event of the death of the assured on or before Oct. 31, 1926, instead of the date originally inserted in the policy. Had the assurance society, after receiving payment of the consideration, failed to

carry out their bargain to alter the policy in the manner agreed upon, or had the society declined to honour their obligation under the policy as altered, the assured or his executors might have had a claim against the society for damages for breach of the agreement to effect or carry out the alteration, but such a breach would have created no right in the executors to recover the policy moneys for the benefit of the estate of the assured. A

The fallacy underlying the contention of the plaintiffs consists in treating the transaction as if the assured had effected a fresh policy on his life for a further period of three months and had omitted to assign such fresh policy to the defendant, thus compelling her to rely on the original assignment as impliedly transferring the beneficial interest in the fresh policy to her. If the transaction had taken this form the plaintiffs' contention would, in my opinion, have been well founded and then the defendant could only have succeeded on the footing that in taking out this fresh policy the assured had acted as a trustee for her. In view, however, of the form which the transaction actually took, this question does not, in my opinion, arise. The whole transaction was complete when the assurance society made the alteration in the policy and assumed liability to the defendant under the altered policy. There was then nothing further for the assured to do in order to vest the benefit of the extension in the defendant and no assignment by him was required. B C D

Counsel for the plaintiffs suggested that whatever might be the method by which the transaction was carried out it could only be effectual in law on the footing that the assured had taken out a fresh policy on his life, and that in order that the benefit of such new policy should have become vested in the defendant, it was essential that it should have been assigned by him to the defendant, because the defendant had no insurable interest in the life of the assured, and, therefore, the assured could not be treated as having effected the alteration merely as her agent. In my judgment, this suggestion had no substance in it. The assured was fully competent to agree with the assurance society that the policy on his life should be improved in the hands of his assignee by substituting a later date for the date originally inserted in it. If the defendant had actually been a party to the transaction, I fail to see how any question could have arisen, and the subsequent acceptance by the defendant of the alteration seems to me to place her in the same position as if she had originally been a party to it. The assurance society has not raised any objection to pay the sum assured to the defendant on the ground that she cannot take the benefit of the alteration because she was not a party to it when it was first agreed upon, and in the face of the bargain which the society made with the assured, it is difficult to see how the society could have sustained any such objection ; moreover such an objection would not have operated to vest the beneficial interest in the sum assured in the estate of the assured, but would at most, if well founded, have entitled the assurance society to have refused to pay the sum assured to the defendant. E F G H

If, contrary to my opinion, the question whether the assured acted as trustee for the defendant in making the agreement with the assurance society for the extension of the policy were material, I think that the fact that at the date of such agreement the written policy was in the possession of the assured as trustee for the defendant, and that he caused the assurance society to record the agreement in the document which he held as such trustee affords strong, if not conclusive, evidence that in making such agreement he was acting solely for the benefit of and as trustee for the defendant. In the result, I think that the decision of TOMLIN, J., is right and this appeal ought to be dismissed with costs. I

Solicitors : *Parker, Barrett & Co.; Stilgoes.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

A

# ROBINS *v.* NATIONAL TRUST CO., LTD.

[Privy Council (Lord Finlay, Viscount Dunedin, Lord Parmoor, Lord Darling and Lord Warrington), November 25, 28, 29, 1926, February 7, 1927]

[Reported [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; 43 T.L.R. 243 ; 71 Sol. Jo. 158]

B

*Privy Council (Judicial Committee)—Practice—Interference with concurrent findings of fact by courts below—Miscarriage of justice—Violation of principle of law or procedure.*

The Judicial Committee of the Privy Council will not examine evidence given in a court of first instance in order to interfere with concurrent findings of that court and a court of appeal on a pure question of fact, unless there has been a miscarriage of justice or some principle of law or procedure has been violated in the courts below. That the appellate court looked at the evidence in rather a different way from the court of first instance matters not, for the rule is a rule as to concurrent findings and not as to concurrent reasons. An inadequate appreciation and unjustifiable belittling of a witness would not amount to a miscarriage of justice which means such a departure from the rules which permeate all judicial procedure as to make that which happened not, in the proper use of the word, judicial procedure at all. But if it can be shown that the finding of one of the courts is so based on an erroneous proposition of law—e.g., an erroneous decision as to onus of proof—that, if that proposition be corrected, the finding disappears, then it is no finding at all.

C D E

*Dominion (Canada)—Decision of Dominion appellate court differing from decision of English Court of Appeal, House of Lords, or Privy Council—Validity of Dominion decision.*

When a decision of an appellate court in a Dominion regulated by English law differs from the law as pronounced by the Court of Appeal in England, it is not right to assume that the Dominion court is wrong, but it is otherwise if the authority in England is the House of Lords which is the supreme tribunal to settle English law so that a court in such a Dominion is bound to follow it. Equally the question may be settled, so far as the Dominion court is concerned, by a decision of the Judicial Committee of the Privy Council. The rule of that committee with regard to the finality of concurrent findings of fact applies to all the various judicatures whose final tribunal is the Judicial Committee.

F G

**Notes.** Considered: *Pope Alliance Corpn.* v. *Spanish River Pulp and Paper Mills*, [1929] A.C. 269 ; *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*, [1946] A.C. 508 ; *Watt (or Thomas)* v. *Thomas*, [1947] 1 All E.R. 582. Applied: *Yachuk* v. *Oliver Blais Co., Ltd.*, [1949] 2 All E.R. 150 ; *Huyton-with-Roby U.D.C.* v. *Hunter*, [1955] 2 All E.R. 398. Referred to: *Paterson Steamships, Ltd.*, v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538 ; *New York* v. *Phillips Heirs* [1939] 3 All E.R. 952.

H

As to the practice of the Judicial Committee on the hearing of ordinary appeals see 9 Halsbury's Laws (3rd Edn.) 393, 394 and as to the binding character of decisions of the House of Lords and of the Privy Council see 22 ibid., 798 and 803 respectively. For cases see 16 Digest 150–164.

I

Cases referred to:

(1) *Moung Tha Hnyeen* v. *Moung Pan Nyo* (1900), L.R. 27 Ind. App. 166, P.C. ; 16 Digest 163, *653*.

(2) *Rani Srimati* v. *Khagendra Narayn Singh* (1904), I.L.R. 31 Calc. 871; 9 C.W.N. 74 ; L.R. 31 Ind. App. 127 ; 22 Digest (Repl.) 52, **297*.

(3) *Barry* v. *Butlin* (1838) 2 Moo. P.C.C. 480 ; 1 Curt. 637 ; 12 E.R. 1089, P.C.; 23 Digest (Repl.) 131, *1357*.

(4) *Cross* v. *Cross* (1864), 3 Sw. & Tr. 292 ; 33 L.J.P.M. & A. 49 ; 10 L.T. 70 ; 28 J.P. 183 ; 10 Jur. N.S. 183 ; 12 W.R. 694 ; 164 E.R. 1287 ; 23 Digest (Repl.) 121, *1243*.

(5) *Tyrrell* v. *Painton*, [1894] P. 151 ; 70 L.T. 453 ; 42 W.R. 343 ; 6 R. 540, C.A. ; 23 Digest (Repl.) 132, *1368*.

(6) *Larocque* v. *Landry* (1921), 50 O.L.R. 614 ; 64 D.L.R. 613 ; 23 Digest (Repl.) 111, **347*.

(7) *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (1902), L.R. 30 Ind. App. 41, P.C.; 16 Digest 164, *676*.

(8) *Craig* v. *Lamoureux*, [1920] A.C. 349 ; 89 L.J. P.C. 22 ; 122 L.T. 208 ; 36 T.L.R. 26, P.C. ; 23 Digest (Repl.) 129, *1332*.

**Appeal** from an order of the Supreme Court of Ontario (Appellate Division) affirming the decision of the trial judge (MOWAT, J.).

A testator, Edward Chandler Walker, left a will dated Feb. 27, 1914, of and under which the respondents were the trustees and principal beneficiaries. This will revoked all prior wills. The testator had made a prior will on Dec. 21, 1901, under which the appellant was a beneficiary and the present action was at the instance of the appellant to set aside the will of 1914 and restore the will of 1901 on the grounds of want of testamentary capacity in the testator on the date of the execution of the said will, and fraud or undue influence by which the testator's brothers obtained the execution of the will. The trial judge found that no testamentary incapacity of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that court unanimously affirmed the judgment of the trial judge. The appellant appealed to His Majesty in Council.

*Stuart Bevan*, *K.C.*, *O.E. Fleming*, *K.C.* (of the Canadian Bar), and *Sir Robert Aske* for the appellant.

*Glyn Osler*, *K.C.*, *J. H. Rodd*, *K.C.*, and *J. F. Hellmuth*, *K.C.* (all of the Canadian Bar) for the respondents.

Feb. 7.—**VISCOUNT DUNEDIN.**—The testator, Edward Chandler Walker, was senior partner of the firm of Walker & Sons, and, when that firm was changed into a limited company, he was president of Walker & Sons, Ltd., whisky distillers, in Walkerville, Ontario. He was a very wealthy man, married, but with no children, and he died on Mar. 11, 1915, leaving a widow. He left a will of date Feb. 27, 1914, and the respondents are the trustees and the principal beneficiaries under the will, which revoked all prior wills. The testator had made a prior will on Dec. 21, 1901, under which the appellant is a beneficiary. The present action is at the instance of the appellant to set aside the will of 1914 and restore the will of 1901. The grounds on which he seeks to set aside the will of 1914 are: (i) Want of testamentary capacity in the testator on the date of the execution of the will ; (ii) fraud or undue influence by which the testator's brothers obtained the execution of the will. The appellant was manager of the business, both as a firm and afterwards as a limited company, for a long period, and was on terms of great intimacy with the testator. The appellant left Walkerville in 1914, and went to England. He alleges that he only came to know of the will of 1901 under which he was a beneficiary, and of the state of affairs as at the date of the will of 1914, in April, 1922. On June 23, 1923, he raised the present action against the executors, and the beneficiaries were afterwards added as defendants. The action was tried before MOWAT, J., without a jury. Evidence was read on both sides. The evidence was voluminous and contradictory, and the trial lasted six or seven days. The learned judge found that no testamentary incapacity of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that court unanimously affirmed the judgment of the trial judge.

Appeal has now been taken to the King in Council, and the appellant has sought to induce their Lordships who sat on this Board to examine and revise the evidence and to come to the conclusion that the result arrived at by the trial judge and the Court of Appeal was wrong. This raises in a quite distinct way the question whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed, it is obvious that if such a rule is a good rule to be applied to the findings of the courts in India, there could be no reason for suggesting that the findings of the courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire and will be applied to all the various judicatures whose final tribunal is this Board.

Being, as has been said, a rule of conduct, and not a statutory provision, the rule is not cast iron, but it would avail little to try to give a definition which should at once be exhaustive and accurate, of the exceptions which may arise. It will be sufficient to quote what has been said on this subject in the past. In *Moung Tha Hnyeen* v. *Moung Pan Nyo* (1) Lord Hobhouse, delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said (L.R. 27 Ind. App. at p. 167):

> "There has been nothing to show that there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the courts below. This case is one which very decidedly falls within the valuable principle recognised here and commonly observed in second Courts of Appeal, that such a court will not interfere with concurrent judgments of the courts below on matters of fact ; unless very definite and explicit grounds for that interference are assigned."

In *Rani Srimati* v. *Khagendra Narayn Singh* (2) Lord Lindley repeated the view (L.R. 31 Ind. App. at p. 131):

> "The appellants have failed to show any miscarriage of justice or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not, in the proper use of the word, judicial procedure at all.

There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the courts is so based on an erroneous proposition of law that, if that proposition be corrected, the finding disappears, then in that case it is no finding at all. Such an attempt was made with great skill and pertinacity by counsel for the appellant in the present case. He laid stress on the law as it had been authoritatively settled in England, and in Ontario in such matters the law of England rules. Now the English courts have gone what some might think pretty far on the question of what duty lies on those who propound a will. Those who propound a will must show that the will of which

probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common, and not in solemn, form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by the following cases: *Barry* v. *Butlin* (3), *Cross* v. *Cross* (4), and *Tyrrell* v. *Painton* (5). Their Lordships will assume that these cases are right. The reason for this form of expression is that the appellant represented that the Appellate Division of the Supreme Court of Ontario in *Larocque* v. *Landry* (6) had taken another view, in that it held that once probate was granted, though only in common form, the onus was on him who sought to set it aside, and the court in this case held itself bound by that case. It is questionable whether that is the result of the decision. But assuming that it is, when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board. But in the present case their Lordships do not consider it necessary to settle which of the two possible views as to onus is right ; they will assume for the purposes of this discussion, that the English rule is right. But, given the law, the appellant, in their Lordships' opinion, fails in its application to the facts. Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self-evident that he had been born. But to assert that he was born on a certain date if the date is material, requires proof ; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. That seems to their Lordships the case here. After reviewing the evidence as to capacity the learned trial judge says:

> "The result of this evidence pieced together, dovetailed together, combined and considered as a whole, does not make me think that there was anything which would affect the mind or which would show the incapacity of the late E. C. Walker to make his will when he did."

The Court of Appeal first stated the grounds put forward by the appellant for the reversal of the judgment of the trial judge, thus: "That the evidence established that the testator was not mentally capable of making a will at the time when the alleged will was executed." And after examining the evidence, it concludes thus: "The plaintiff clearly fails upon the first of his grounds for the reversal of the judgment."

There is a passage at the beginning of the trial judge's judgment which shows that on the question of onus he agreed with what had been laid down by the Supreme Court of Ontario, and the appellant argued that the learned judges of

the Court of Appeal must be presumed to have had the same views, and that, consequently, the whole judgment was vitiated by this wrong view as to onus. But, as has been already explained, there was no question of onus in the determination as it came to be made. It was a considered result of the evidence and onus as a determining factor never arose for the learned judges could, and did, come to a positive conclusion on the evidence laid. Learned counsel laid stress on the fact that the trial judge expressed the result of his view in a negative fashion: "The evidence does not make me think that there was anything which would show the incapacity of the testator." And he argued that that was no positive finding of capacity as the authorities require. The learned judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive.

Their Lordships, therefore, think that the attempt to avoid the effect of the concurrent finding rule fails. Much was sought to be made of the unfair way in which, the appellate argued, the trial judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (7) the judgment of this Board states (L.R. 30 Ind. App. at p. 43):

> "The rule (as to concurrent findings) is none the less applicable because the courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence."

No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will: see *Craig* v. *Lamoureux* (8). In their Lordships' opinion the rule as to concurrent findings clearly applies in this case, and the appeal falls to be dismissed. A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local court on what is really a question of discretion and procedure. This petition therefore falls to be dismissed with costs. Their Lordships will humbly advise His Majesty in accordance with the above opinion. The appellant will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors: *Collyer-Bristow & Co.; Blake & Redden; Freshfields, Leese & Munns.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

# SALVESEN (OR VON LORANG) *v.* AUSTRIAN PROPERTY ADMINISTRATOR

[House of Lords (Viscount Haldane, Viscount Dunedin, Lord Phillimore, Lord Blanesburgh and Lord Warrington), March 28, 29, 31, May 27, 1927]

B

[Reported [1927] A.C. 641 ; 96 L.J.P.C. 105 ; 137 L.T. 571 ; 43 T.L.R. 609]

*Conflict of Laws—Foreign judgment—Recognition by English court—Nullity decree granted on ground of want of formalities of marriage—Parties domiciled in loco fori.*

C

When the court of the domicil of both the parties has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a court in England, where they are not domiciled, cannot review that decision. Our courts do not inquire whether a competent foreign court has exercised its jurisdiction improperly, provided that no substantial injustice, according to our notions, has been committed. A decree of nullity for want of formalities alters the status of the parties to the marriage annulled, since they cease retrospectively to be married people in the community of their country. That status must be taken to have been a res and the judgment of nullity a judgment in rem.

D

*Ogden* v. *Ogden* (1), [1908] P. 46, and *Niboyet* v. *Niboyet* (2) (1878), 4 P.D. 1 overruled.

E

**Notes.** Followed: *Inverclyde* v. *Inverclyde*, [1931] P. 29. Distinguished: *White* (*otherwise Bennett*) v. *White*, [1937] 1 All E.R. 708. Considered: *Re Luck, Walter* v. *Luck*, [1940] 3 All E.R. 307. Explained: *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368. Distinguished: *Chapelle* v. *Chapelle*, [1950] 1 All E.R. 236. Considered: *Ramsay-Fairfax* (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax*, [1955] 2 All E.R. 709. Referred to: *H.* v. *H.*, [1928] P. 206; *Nachinson* v. *Nachinson*, [1930] All E.R. Rep. 114; *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; *Casey* v. *Casey*, [1949] 2 All E.R. 110; *Wall* v. *Wall*, [1949] 2 All E.R. 927; *Har-Shefi* v. *Har-Shefi*, [1953] 1 All E.R. 783; *Sealey* (*otherwise Callan*) v. *Callan*, [1953] 1 All E.R. 942; *Starkowski* v. *A.-G.*, [1953] 2 All E.R. 1272; *Dunne* v. *Saban* (*formerly Dunne*), [1954] 3 All E.R. 586.

F

As to the recognition by English courts of foreign decrees of divorce and nullity see 7 Halsbury's Laws (3rd Edn.) 112, 117, and for cases see 11 Digest (Repl.) 466 et seq.

G

Cases referred to:

(1) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, *260*.

H

(2) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

(3) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

(4) *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; 89 L.J.P.C. 209; 124 L.T. 129; 36 T.L.R. 820; 64 Sol. Jo. 713, H.L.; 11 Digest (Repl.) 356, *253*.

I

(5) *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 42 T.L.R. 317, P.C.; 11 Digest (Repl.) 472, *1030*.

(6) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 19 W.R. 1; 3 Mar. L.C. 454, H.L.; 11 Digest (Repl.) 525, *1375*.

(7) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli. N.S. 89; 2 Sh. & Macl. 154; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250*.

(8) *R.* v. *Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden* v. *Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, *1108*.

(9) *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, *1081.*

(10) *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, *1084.*

(11) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955.*

(12) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294; 161 E.R. 557; 11 Digest (Repl.) 485, *1098.*

(13) *Kennedy* v. *Earl of Cassillis* (1818), 2 Swan. 313; 36 E.R. 635, L.C.; 11 Digest (Repl.) 546, *1540.*

(14) *Cottington's Case* (1678), cited in 2 Swan. 326; 36 E.R. 640; 11 Digest (Repl.) 519, *1331.*

(15) *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur. N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, *1065.*

(16) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 47 W.R. 354; 15 T.L.R. 211; 43 Sol. Jo. 365, C.A.; 11 Digest (Repl.) 487, *1115.*

(17) *M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614; 2 Cl. & Fin. 568, n.; 9 L.J.Ch. 180; 39 E.R. 528, L.C.; 11 Digest (Repl.) 481, *1080.*

(18) *Turner* v. *Thompson* (1888), 13 P.D. 37; 58 L.T. 387; 52 J.P. 151; 36 W.R. 702; 4 T.L.R. 243; 11 Digest (Repl.) 355, *244.*

(19) *Dolphin* v. *Robins* (1859), 7 H.L. Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur. N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, *252.*

(20) *Board* v. *Board*, [1919] A.C. 956; 88 L.J.P.C. 165; 121 L.T. 620; [1919] 2 W.W.R. 940; 48 D.L.R. 13; 11 Digest (Repl.) 466, **508.*

(21) *Longworth* v. *Yelverton* (1867), 5 Macph. (Ct. of Sess.) 144; 39 Sc. Jur. 635; L.R. 1 Sc. & Div. 218, H.L.; 21 Digest 153, *e.*

(22) *Murison* v. *Murison*, 1923 S.C. 624; 60 Sc.L.R. 409; 1923 S.L.T. 408.

(23) *A.* v. *B.* (1868), L.R. 1 P. & D. 559; 17 W.R. 14; sub nom. *P.* v. *S.*, 37 L.J. P. & M. 80; sub nom. — v. —, 19 L.T. 22; sub nom. Anon., 32 J.P. 743; 23 Digest (Repl.) 149, *1581.*

(24) *Duchess of Kingston's Case* (1776), 1 Leach, 146; 1 East, P.C. 468; 20 State Tr. 355; 168 E.R. 175; 27 Digest (Repl.) 692, *6623.*

**Appeal** from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary, Lord Morison, in an action of multiplepoinding.

On June 15, 1897, the appellant, formerly Kate Salvesen, a British subject, domiciled in Scotland, went through a form of marriage in Paris with Franz von Lorang, an Austrian subject. In 1898 the parties settled in Wiesbaden, in Germany, where they lived together as man and wife until 1914. From then until 1918 Franz von Lorang served with the Austrian army and the appellant lived in Switzerland. In 1919 they returned to Wiesbaden and lived there as man and wife until the end of 1923. In that year the Administrator of Austrian Property claimed the movable property of the appellant in Scotland on the ground that she became an Austrian national by her marriage and that in consequence her property in that country fell to be paid to him under the Treaty of Peace (Austria) Order, 1920, and the Treaty of Peace (Austria) (No. 2) Amendment Order, 1921. The holders of the movable property brought an action of multiplepoinding on Dec. 21, 1923, to have it determined who was entitled to the property, and to obtain their own discharge. The appellant claimed the property, averring, inter alia, that she had recently discovered that her marriage in Paris was null and void because the parties had not observed the formalities of residence and publication which the French law required. On the present action being brought the appellant intimated that it was her intention to bring a suit in the Civil

Court of Wiesbaden, the court of the domicil and residence of both Herr von Lorang and herself. The administrator made no attempt to intervene in the proceedings, and, by a decree published on Mar. 28, 1924, which became final on May 4, 1924, the court at Wiesbaden declared the marriage null and void. The court in Scotland having been asked to give effect to the Wiesbaden decree, the Administrator averred, inter alia, that the proceedings in the nullity suit at Wiesbaden were instituted under a collusive arrangement between the parties for the express purpose of defeating the Administrator's claim in this action and resulted in the German court being misled. The Administrator maintained that he was entitled to have an opportunity of proving his contention that the Paris marriage was valid.

The question for determination was, therefore, whether the decree of the German court was to be held conclusive and binding on the Scottish court, so as to preclude that court from allowing to the respondent a proof of his averments. The Lord Ordinary (Lord Morison) repelled the Administrator's claim for a proof and preferred the appellant to the property in question. The First Division, by a majority (the Lord President, Lord Blackburn, and Lord Ashmore; Lord Sands dissenting) recalled the interlocutor of the Lord Ordinary and remitted the case to him to allow the parties a proof of their respective averments. The appellant appealed.

*Macmillan, K.C.*, and *Normand, K.C.* (*W. D. Patrick* with them) (all of the Scottish Bar) for the appellant.

*The Lord Advocate* (*W. Watson, K.C.*), the *Solicitor-General for Scotland* (*MacRobert, K.C.*), and *Albert Russell* (of the Scottish Bar) for the respondent, the Administrator.

The House took time for consideration.

May 27. The following opinions were read.

**VISCOUNT HALDANE.**—This is an appeal from the First Division of the Court of Session. The interlocutor questioned recalled an interlocutor of the Lord Ordinary, Lord Morison, in an action of multiplepoinding. The subject-matter was a fund consisting of moneys and shares in movable property held by the real raisers as bankers or agents. This fund was claimed by the appellant on the one hand and by the respondent on the other. The latter alleged that the fund was payable to him as being subject to a charge created by the Treaty of Peace (Austria) Order, 1920, on the footing that the appellant was then, in virtue of her marriage with Herr von Lorang, an Austrian national. The appellant replied that she had ascertained that her marriage was null and void, and that, therefore, she was never an Austrian national, and she obtained a sist or continuation of the proceedings in the multiplepoinding which would give her time to bring a suit in Germany, the country of the domicil of Herr von Lorang and herself, to have the validity of the marriage ascertained. In 1924 the court at Wiesbaden gave judgment declaring the marriage to have been null and void. This decree was then produced by the appellant in the multiplepoinding proceedings in the Scottish action. The Lord Ordinary gave effect to it, and dismissed the claim of the respondent. The First Division on appeal, by a majority, Lord Sands dissenting, recalled his interlocutor, and remitted to the Lord Ordinary to allow a proof before answer. The question before your Lordships is whether the judgment of the German court was conclusive, or whether the invalidity of the marriage was still open to question by the courts here at the instance of the Administrator who had not been a party in the German proceedings.

The history of the case may be stated briefly. The marriage with Herr von Lorang, who was then an Austrian subject, to the appellant, who was a British subject domiciled in Scotland, took place in June 1897. In 1898 the pair settled in Germany, at Wiesbaden, and lived there as man and wife with a brief interruption of residence, due to the war, until the end of 1923. Undoubtedly Wiesbaden

had become the place of their domicil. The respondent claimed the fund, and the action of multiplepoinding was instituted in December, 1923. The appellant resisted the claim of the respondent and took proceedings in the German court of their domicil, traversing the validity of her marriage. She averred that she met Herr von Lorang at Wiesbaden in 1896 and became engaged to him. Had they been married by a religious ceremony in Austria, the country of his nationality, they would have had to undertake to bring up any children in the Roman Catholic faith. This they both desired to avoid. On the other hand, merely civil marriage in Austria would not have been agreeable to Herr von Lorang's friends there. Consequently, they decided that their marriage should take place in Paris. The appellant pleads, in the present action, that she had only recently discovered that her marriage in Paris was null and void, for the reason that the parties had not observed the formalities of residence and publication which the French law required, and because the registrar in Paris had been induced to perform the marriage ceremony upon the faith of a certificate to which she was no party under the hands of Herr von Lorang and the jurisconsult of the Austrian embassy, which stated what was untrue, that Herr von Lorang was domiciled in France and was not obliged to publish the marriage in Austria. It made no difference, according to her, that the marriage was also celebrated at the English Church in Paris, according to the rites of the Episcopal Church of England. The proceeding in the court at Wiesbaden was commenced by petition of the appellant against Herr von Lorang. The latter appeared and was represented by an advocate, but he took no active part in the proceedings. In the result the court, acting on the principle locus regit actum, declared the marriage null and void. The evidence of Professor Brunet, a qualified French jurist, was taken. The court satisfied itself that the marriage had been constituted neither in accordance with the conditions required by French law nor in accordance with those required by the law of the domicil. No later French law which would apply nor any circumstances had cured the invalidity thus brought about. The respondent Administrator was not a party to these Wiesbaden proceedings. The final decree of the German court of the domicil was produced in the Scottish action, in which the court was asked to give effect to it. The present respondent, as I have just stated, did not appear in the German proceedings. But in the Court of Session he claimed that he was entitled to have their validity, as against himself at least, investigated, notwithstanding that the parties to them, Herr von Lorang and his wife, were domiciled in Germany and not in Scotland.

I do not think that there are any materials before us on which exception can be taken to the judgment in Germany as having been obtained by what amounts in law to collusion. I will assume that both the husband and his wife had as their main motive to obtain that judgment in order, if possible, to avoid the application of the Austrian Administrator's title to claim. But I think that on the grounds assigned by the Lord Ordinary and LORD SANDS, if they had the legal right to do this the motive for which they exercised it could make no difference in a case in which fraud practised on the German tribunal is not now alleged, and no collusion in any attempt to deceive that tribunal is established. The real question is simply whether the court of the domicil was competent to dispose conclusively and finally of the question before it. If so, it does not matter in law whether it had an exclusive jurisdiction. Had the question been one of divorce for adultery there could to-day have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the court of their domicil is the appropriate court, and its decision is treated by our courts not only as being valid but as conclusive. The case before us is, however, not one of dissolving an existing marriage, but is one of deciding that no valid marriage ever took place. The marriage was declared by the court of the domicil to have been void by reason of non-compliance with the formalities required by the law of France when it was celebrated. If this

was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties as having been a judgment in rem. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognises as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. The juridical result is more than any mere outcome of the agreement inter se to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of.

There is nothing unusual in this doctrine. I cannot see how, for instance, a husband could plead as a good answer to a claim for necessaries supplied to his wife that the marriage which had been publicly celebrated was one which he was entitled if he took proceedings to have declared void for either impotency or for want of compliance with formalities which the public authority which had celebrated the marriage had assumed to have been complied with. For the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities. The disability of monastic celibacy, for example, or that of a minor, or that of consanguinity, may be binding by the law of one country so as to invalidate the married status, while not binding by that of another. When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, it is necessary to determine the law by which they are fixed. It may be going too far to assert that these are all recognised in this country as referable only to the law of the domicil. But at least it is now established, since the decisions in *Le Mesurier* v. *Le Mesurier* (3), *Lord Advocate* v. *Jaffrey* (4), and *A.-G. for Alberta* v. *Cook* (5), that for a decree of dissolution of a marriage the court of the domicil is the true court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive. But for the purposes of the present case it is not necessary to refer to the point, for if the German court was competent to pronounce the judgment it did in the case before us, the judgment, being that of the court of the domicil, was conclusive in our courts here, so far as competency is concerned, unless there is something in the decree of dissolution for nullity which distinguishes such a proceeding from one for divorce for adultery.

In *Niboyet* v. *Niboyet* (2), in which the judgment of the majority of the court is no longer law, BRETT, L.J., in the dissenting judgment which he delivered, observed that the court of the domicil was the only court that was entitled to alter the status of married people, but he went on to indicate that the principle, while it applies so as to include suits for judicial separation and for restitution of conjugal rights, did not apply to suits for a declaration of nullity. He gives no reasons for saying this. Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit of nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German court was competent as against all other courts conclusively to declare the marriage in the present case void. I am unable, as matter of principle, to see how its competence as the court of the domicil can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the

question raised that status must be taken to have been a res and the judgment was therefore one in rem.

If the status in question was a res within the meaning of the principle, the duty of our courts is clear. In *Castrique* v. *Imrie* (6) this House, adopting the language of BLACKBURN, J., who was one of the judges who advised it, laid down that the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide on the disposition of the thing, and the court has acted within its jurisdiction. In the careful judgment he delivered in the First Division the Lord President holds that the principle so laid down applies to a decree of divorce, making it conclusive of the dissolution of the marriage, at all events if the ground of the divorce was one or other of those recognised by the law of Scotland, namely, adultery or desertion. But he limits the application of the principle. It applies, in his view, to a decree of judicial separation, for this alters the married status; it applies also to a decree of declaration of marriage. He thinks, too, that a decree of nullity founded on the impediment of impotency also falls within the principle. This is, indeed, in his view, not a bar to the constitution of marriage, but only a resolutive condition of the contract, invalidating by non-performance a marriage that was complete, and assimilating the case to divorce. But the Lord President goes on to say that as in other instances nullity proceedings on certain grounds may be instituted by third parties having interest, the principle under discussion cannot be one of universal application. He, therefore, thinks that a sentence of nullity on the ground of insanity, propinquity, prior marriage, or non-compliance with the lex loci, is not a judgment disposing of married status and so a judgment in rem, notwithstanding that the sentence, if obtained in an action in which the pretended spouses are the parties, may be res judicata as between themselves. It seems, he says, plain that the competency of such actions by third parties having interest, such as the respondent here, cannot spring from the intention of the persons who were parties to the pretended marriage; nor does the force of the decree pronounced in them necessarily depend on its being given by the court of the pretended husband's domicil. Even accepting this, I do not think that the proposition is at all conclusive on the particular question before us. I do not find even the judgment of the Lord President convincing, and I am compelled to prefer the other view worked out by LORD SANDS. There does not appear to be any reason why a judgment of nullity, even on such restricted grounds as the Lord President mentions, should not be regarded as disposing of the status of married persons. It does not do so the less because third parties may have it open to them to litigate elsewhere questions of validity in certain restricted instances before such questions have been disposed of in the court of the domicil. Such status is not dependent only on the contract of the parties to the marriage. Before Lord Lyndhurst's Act, for example, a man and a woman in England standing in an affinity within the prohibited degrees could marry, and the marriage, though voidable, could only be got rid of by the sentence of an ecclesiastical court pronounced within the lifetime of the parties. But the status, though voidable, was not the less a status, a res with which the court could deal. That shows that, though voidable and not void, it was that as to which the sentence of the appropriate court was essential for its dissolution.

For these reasons I am unable to agree with the view of the Lord President that the foreign judgment in the case before us did not as soon as given establish conclusively against the respondent and everyone else that the appellant, at the relevant date in the multiplepoinding proceedings, was not an Austrian national qua wife of an Austria subject. If so, the claim of the Administrator in the multiplepoinding became inept on Mar. 28, 1924, the date of the decree of the Wiesbaden court, which was made final on May 4 in that year. The interlocutor

of the Lord Ordinary repelling the claim for the administrator was not pronounced until April 21, 1925, and ought accordingly to receive effect.

There were cited numerous authorities for the contention of the respondent in the Court of Session. These I have examined, but they do not appear to me to modify the conclusion at which I have arrived as to the principle which must be applied. In considering them it should be borne in mind that some of the dicta in the older cases have been affected by the English Divorce Act of 1857, which for the first time enabled divorce a vinculo to be granted by a court of general law in England. Before that year it was the prevalent view that a marriage duly celebrated in England could not be got rid of (except by Act of Parliament) validly so far as England was concerned, even by a foreign decree, at least when the domicil at the time of the marriage was English. In the report of *Warrender* v. *Warrender* (7) (2 Cl. & Fin. at p. 567), *Lolley's Case* (8), which had been decided by eminent English judges, is explained, and it is yet more precisely explained by Lord Westbury in *Shaw* v. *Gould* (9) (L.R. 3 H.L. at p. 85), and by Lord Selborne in *Harvey* v. *Farnie* (10) (8 App. Cas. at p. 54). *Lolley's Case* (8) appears in reality to have turned on domicil as much as on the indissoluble character of an "English marriage." After 1857 the indissoluble character of an English marriage disappeared, and the effect of this disappearance is noticeable in the later decisions. In the judgment in *Le Mesurier* v. *Le Mesurier* (3) the modern doctrine of domicil as the true test prevails unrestrainedly.

Turning to some of the authorities cited, a beginning may be made with a case in which the only question was as to the jurisdiction of the Consistorial Court in England to inquire into the validity of a sentence of a foreign court declaring a marriage to have been illegal by reason of non-compliance with the lex loci contractus of the foreign country where it was celebrated. There is very little in the judgment there which even touches the point before us. *Scrimshire* v. *Scrimshire* (11) was a suit in which the validity of a foreign marriage was denied on the ground that it had not been celebrated according to the law of the country in which it was celebrated. This was held to have been proved by a sentence to that effect of nullity in France, and by the evidence. As the marriage appeared to have been illegal by the lex loci contractus, the decree here was against the validity. But inquiry in the Consistorial Court in England was admitted. *Scrimshire* v. *Scrimshire* (11) is a relevant authority, but the result was not based on principles relating to domicil, which in 1752 were obscure but to-day are well established.

In *Sinclair* v. *Sinclair* (12) before Lord Stowell, at that time Sir William Scott, the respondent pleaded, as an answer to a suit by his wife for separation on the ground of cruelty and adultery, that the marriage had been celebrated at Paris, and had been dissolved by a sentence of the court at Brussels on the ground of nullity. The parties were not domiciled at Brussels. The marriage appears to have been really celebrated in England. As the parties were within the English jurisdiction Sir William Scott considered that the Consistorial Court could examine the validity of the marriage. He thought that it was to go too far to hold that a sentence of nullity (the reasons for the nullity do not appear) would not carry great weight if sentence were pronounced in the country where the marriage was solemnised. But he was not prepared to say that a judgment of a third country on the validity of a marriage not within its own territories nor had between subjects of that country would be universally binding. He decided that there was no foreign sentence which would prevent the Consistorial Court from entertaining the suit.

In *Kennedy* v. *Earl of Cassillis* (13) a note is quoted (2 Swan. at p. 326) extracted from the MSS. of Lord Nottingham, L.C. He says, referring to the case of *Cottington* (14), that where a woman claimed to be a lawful wife here, although she was said to have already a husband living in Turin on the ground that she had been divorced from that husband by the Archbishop of Turin, he, Lord

A NOTTINGHAM, had held that it was against the law of nations not to give credit to the judgment and sentences of foreign countries. For what right had one kingdom to reverse the judgment of another ? What confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences ! This is an authority, so far as it goes, which supports the contention of the appellant here.

B *Simonin* v. *Mallac* (15) was a petition for nullity. The petitioner (the wife) was married to her husband in England. Both were of French domicil, and they had come here only to be married. She obtained a decree of nullity in France on the ground of want of parental consent and of publication. She then came to reside in England and petitioned for a declaration of nullity here. Sir CRESSWELL CRESSWELL held that as her marriage had been solemnised in England,

C the parties had contracted with reference to the law of this country as to validity. He decided that he had jurisdiction. This decision was given in 1860, but the marriage took place before the Matrimonial Causes Act, 1857.

In considering the application of other authorities cited to us it is essential to bear in mind the limited scope of the only question before us. It is simply whether, when the court of the domicil of both the parties has pronounced their

D marriage to be invalid on the ground of nullity for want of formalities, a court here, where they are not domiciled, can review that decision. The reasons given by LINDLEY, M.R., in *Pemberton* v. *Hughes* (16) ([1899] 1 Ch. at p. 790) are, in my opinion, conclusive against any attempt to re-open any such case on the footing of supposed irregularity of procedure. Our courts, as he says, never inquire whether a competent foreign court has exercised its jurisdiction improperly, provided that

E no substantial injustice according to our notions has been committed. In the present case the question was not divorce by way of dissolution for any offence, but because of nullity for want of essentials required for the contract. It is said that this makes a difference, inasmuch as the marriage if a nullity could not change the domicil of the supposed wife. That is possibly true, on the grounds assigned by the then President of the Divorce Court, SIR GORELL BARNES, P., in his

F elaborate judgment in *Ogden* v. *Ogden* (1) ([1908] P. at p. 78). But it does not affect the litigation before us, in which the decree of nullity in the court of the husband's domicil was pronounced with retrospective effect before the claim of the Administrator of Austrian Property could be established. None of the cases cited to us seems to me to affect this simple point. For the reason that the judgment of the Wiesbaden court was both competent and binding upon us, I

G think that we ought to recall the interlocutor of the First Division and to restore that of the Lord Ordinary. The appellant should have her costs in the Inner House and here. I move accordingly.

**VISCOUNT DUNEDIN**.—Although I had made up my mind as to what,

H according to my opinion, the judgment of the House ought to be in this case, yet before I had penned a single sentence of the opinion which I should deliver, I had the advantage of reading the opinions of the noble Lord on the Woolsack and of LORD PHILLIMORE. Agreeing, as I do, with these opinions and also with every word of what I may without offence term the exceedingly able judgment of

I LORD SANDS, if this were an ordinary case I should simply announce my concurrence. But the case is so important to the law that I need not apologise for adding some remarks of my own ; only, as it would be useless to retrace the ground so thoroughly explored in the opinions mentioned, these remarks will be necessarily discursive, but I hope may serve some purpose.

First, I would like to say that I thoroughly endorse the view of LORD PHILLIMORE that the outlook of the English courts was necessarily different before and after 1857. I would like to add that I think there is another date of great moment, viz., the date of the decision of *Warrender* v. *Warrender* (7) in this House, viz.,

1835. Now I venture to say this—that before that judgment, without my considering whether it really was the law or not, any English lawyer would have said that the law of England is that an English marriage is indissoluble by any court ; it is something that cannot be broken, indissoluble in essence, and, looking to *Lolley's Case* (8), who could say he was wrong ? I think satisfactory proof of this may be found in the argument of Sir John Campbell, A.-G., afterwards Lord Chancellor, in the *Warrender Case* (7), wherein he says (2 Sh. & Macl. p. 170) :

> "It may be considered as absolutely certain that the Bar of England could not have furnished a single counsel who would have set his name to the opinion that judicial indissolubility was not a legal quality of every English marriage."

But when *Warrender's Case* (7) was decided, that, as an abstract proposition, could no longer hold, though I doubt whether the majority of English lawyers appreciated it. They did not in those days pay much attention to Scottish cases. Besides, as a decision it did not necessarily say *Lolley's Case* (8) was wrong, because Lolley was an Englishman and only went to Scotland for the purpose of obtaining a divorce, while Warrender was a Scotsman. In other words, if the law of *Le Mesurier* (3) had then been fully known, Lolley's divorce in Scotland was no divorce at all. No one can read Lord Brougham's judgment without coming to the conclusion that he thought *Lolley's Case* (8) was wrong in what it laid down, and when Lord Lyndhurst twitted him with having gone out of his way to approve *Lolley's Case* (8) in *M'Carthy* v. *De Caix* (17) when he was Chancellor, Lord Brougham retorted that he was then only sitting in Chancery and was bound by *Lolley's Case* (8), but now he was in the House of Lords and was not. I do not think it necessary to consider whether I should follow the iconoclastic tendencies of my fellow-countryman. All I want to point out is that I think all early English decisions, certainly up to 1835, and I think up to 1857, must be read in the light of the general opinion of the indissolubility of an English marriage.

The other point on which I want to say a few words is the question of what is a judgment in rem. All are agreed that a judgment of divorce is a judgment in rem, but the whole argument of the majority of the judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is in the strict sense of the word a "res" as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no res. It seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford dictionary the word "status" is defined, inter alia, as "the legal standing or position of a person ; condition in respect of, e.g., of liberty or servitude, marriage or celibacy, infancy or majority." The judgment in a nullity case decrees either a status of marriage or a status of celibacy. The learned judges rest strongly on what was said on the subject in *Ogden* v. *Ogden* (1), but, first, I am not bound by *Ogden* v. *Ogden* (1), and so far as the dicta contradict what I have just said, I do not agree with them. And, further, a close perusal of the judgment in *Ogden* v. *Ogden* (1) will show that it is very much wrapped up with the question of jurisdiction, and if the first marriage was null, there was no jurisdiction in the French court against the so-called wife defending. But here the jurisdiction is undoubted. On this point I would cite the words of Sir James Hannen in *Turner* v. *Thompson* (18) (13 P.D. at p. 41) :

> "A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband, if she lives with him in the country of his domicil. There is no ground here for

A contending that she did not take up that domicil. She had the intention of taking up her permanent abode with him, and of making his country her permanent home."

These words exactly fit this case. I am, therefore, of opinion that a decree of nullity savours of a res just as much as a decree of divorce. I accept the conditions laid down by Lord Lindley, when he was Master of the Rolls, in *Pemberton* B v. *Hughes* (16). In order for a foreign decree to be immune from disturbance by an English court—and, in my opinion, Scottish may with perfect justice be substituted for English—it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the court is competent to deal, and it must not offend against English ideas of substantial justice.

C Although, as I said before, these remarks are discursive, and I do not wish to retrace traversed ground, yet I would put in the form of short propositions the points I hold proved, the proof of several of them being worked out, not by me, but by the opinions of my noble and learned friends. (i) The German court had jurisdiction over the parties, they being domiciled in Germany equally whether there was marriage or no marriage. (ii) This was a genuine action, and there was D no collusion or fraud used to deceive the German court. (iii) The validity of the marriage depended on French law, that being the law of the locus celebrationis. (iv) The German court took proper steps to inform itself of the French law, and gave judgment according to the law proved before it. (v) That judgment is a judgment which is equivalent to a judgment in rem, and is, therefore, binding on the Scottish court without further inquiry. It follows that I agree with the E motion made from the Woolsack.

**LORD PHILLIMORE**.—I have read and I concur in the opinions of Viscount Haldane and Viscount Dunedin. With regard to the respect to be paid to the judgment of a court having jurisdiction over the place where the parties are domiciled, it is suggested that the English decisions, though not strictly authoritative, may, in the comparative dearth of Scots authorities, be looked upon as F declaring common British law, or that at any rate they may be regarded as authorities on international law ; and the Administrator of Austrian Property contends that they show that the court before which a matrimonial suit is tried will not regard a previous decision of the court of the domicil as conclusive. Counsel for the lady appears to concede that this may be the result of the English decisions, but they say that this is a special English view applying only to English marriages. G Whether this means putative marriages solemnised in England, or such marriages solemnised elsewhere between two English persons or applies to both cases, did not clearly appear in the argument. I think that this matter requires a further analysis.

There are two classes of decisions affecting the matrimonial status: those H which decide that a putative marriage is or is not valid, judgments of declarator or nullity, and those which put an end to an unquestioned marriage, judgments of dissolution of marriage, or, in popular language, divorce. With regard to these latter, English courts before 1857, would, from their nature, be inclined to refuse to recognise a decree of dissolution of marriage because in their view of the law marriage (matrimonium verum et ratum) was indissoluble. They were church I courts, and the law of the church so taught them. Neither they nor foreign courts, in their view, could break the indissoluble chain. It was only in obedience to the so-to-speak brute force of a private Act of Parliament that they submitted to recognise a dissolution. And this law of the church was the marriage law of England. Hence the decision in *Lolley's Case* (8). It was, perhaps, conceivable, if people got into a strange country where non-Christian views or different views of Christianity prevailed, and became domiciled there, that the sentence of dissolution by the appropriate court of the country might be accepted. Lord Brougham and Lord Lyndhurst in *Warrender v. Warrender* (7) thought that this would not

be so and that *Lolley's Case* (8), which was that of a domiciled Englishman making a temporary stay in Scotland in order to give the Scots courts jurisdiction, would have been decided in the same manner even if Lolley had become domiciled in Scotland. It is, however, the fact, as LORD CRANWORTH points out in *Dolphin* v. *Robins* (19), that Lolley certainly had not a Scottish domicil.

However this may have been before 1857, circumstances entirely changed, when, instead of a number of church courts, there was established one statutory civil court empowered and instructed to grant decrees of dissolution of marriage in certain cases. Since 1857 there was no reason why the English High Court of Justice in its matrimonial division should refuse to recognise a decree of dissolution of marriage made by the court of the matrimonial domicil, at least on any ground which would be deemed sufficient by the present English law and possibly upon any ground deemed sufficient by the law of the domicil: see PHILLIMORE'S COMMENTARIES UPON INTERNATIONAL LAW, vol. IV, s. 507. Indeed, this matter is now set at rest. Since the opinions expressed in *Le Mesurier* v. *Le Mesurier* (3) and the *Lord Advocate* v. *Jaffrey* (4) and the decision of the Privy Council in *A.-G. for Alberta* v. *Cook* (5), it is established that the law of England recognises the competence and the exclusive competence of the court of domicil to decree dissolution of a marriage. The last case, though in form a decision upon the law of the province of Alberta in Canada, is authoritative as a decision upon the law of England, because it had been previously determined in *Board* v. *Board* (20) that the matrimonial law of Alberta is that of England. It may now be taken that the decision in *Niboyet* v. *Niboyet* (2), where the Court of Appeal by a majority reversed the decision of SIR ROBERT PHILLIMORE, is not sound.

I pass from executive decrees to deliberate pronouncements—decrees of declarator or of nullity. The first authorities to be considered are those of *Scrimshire* v. *Scrimshire* (11) and *Sinclair* v. *Sinclair* (12). In both cases a ceremony of marriage was gone through in France between English subjects domiciled in England. In both the parties continued so domiciled. In both there was a decree of nullity by a foreign court, which was set up by the man as a defence to matrimonial relief claimed by the woman. In *Scrimshire* v. *Scrimshire* (11) the man did not rely upon the decree of nullity as conclusive. He pleaded facts and the law of France, the lex loci celebrationis, according to which the marriage was null, and (it being a course of procedure in the ecclesiastical courts, to plead evidence) he pleaded the French decision as the best evidence of the French law (it was so done later in *Simonin* v. *Mallac* (15)) and upon the whole matter the court decided in his favour. In *Sinclair* v. *Sinclair* (12) the woman relied not merely upon the French ceremony, but also upon a subsequent marriage which she said had been solemnised in England, and she claimed a divorce á mensá et thoro by reason of her alleged husband's adultery, no doubt expecting to get alimony. The case, so far as it is reported, was tried upon the preliminary objection of the man that the court had no jurisdiction because the woman was disentitled by reason of a decree of a court in Flanders given against her, both in respect of nullity and in respect of her adultery. This latter finding, though not an objection to the jurisdiction, and therefore, improperly relied upon at this stage, would have been a good defence to the woman's claim for relief. But the judge, SIR WILLIAM SCOTT, after commenting upon the grotesqueness of such a joinder of causes of suit, came to the conclusion that it was not proved, at any rate at that stage, that there had been a decree against the woman for adultery. The historical circumstances of the condition of Flanders at that moment rendered certainty in these matters difficult of attainment. If the alleged decree against the woman for adultery was not proved, the decree, if that were a real one, of nullity would be at this stage of no avail to the man because the woman was relying upon the double ceremony, and the man did not suggest that the Flanders decree had been given upon anything but the French ceremony. There could be no doubt, therefore, that the man's protest to the jurisdiction had to be over-

ruled and that he must be put to answer in the usual way the case that was made against him. We do not know what followed. However, in the course of his judgment, SIR WILLIAM SCOTT made use of language which, owing to the great respect always paid to that eminent judge, has been treated as weighty. He does seem to speak as if in matrimonial cases where the validity of the marriage was in dispute, the court would not consider itself concluded by any previous decision of any other court even when rendered between the same parties, but would look at such decisions merely as helps or guides or adminicula of proof. If and so far as it was a matter of the law of France as the place of the alleged celebration, he would have regarded, it would appear, the decree of a French court as valuable evidence of French law, in the same way that SIR EDWARD SIMPSON treated the French decision in *Scrimshire* v. *Scrimshire* (11). But it would seem as if this was all the weight that SIR WILLIAM SCOTT could attach to it even if it were the court of the domicil of the parties. When, however, one remembers that in the case with which he was dealing, as in *Scrimshire* v. *Scrimshire* (11) (which he probably had in his recollection), there was no question of a sentence by the court of the domicil, one can see that it may well be a mistake to apply his language generally. At that time there was no one matrimonial court in England. There were as many courts as there were dioceses, and indeed more, because there were some special jurisdictions ; and he cannot have thought, if there had been a decree of nullity procured by a man living in the diocese of London who afterwards removed and made his domicil in Southwark, that the court of the Bishop of Winchester would not, if the question were raised either by the same woman or by another woman relying upon a subsequent marriage, be concluded by the decree of the Chancellor of London.

The next case, occurring after a long interval, which bears upon this matter seems to be *Simonin* v. *Mallac* (15). Rightly understood this case does not seem to be an authority for the proposition that an English court in the case of a putative English marriage will not treat the decision of the court of the domicil of the parties as conclusive. These were two French people who came over to Dover to celebrate an English marriage and returned to France where they were both domiciled, and where, as the man refused to ratify the marriage by a French ceremony, the woman sued in the French court and got a decree of nullity, and then, not content with that decree, sued also in the English matrimonial court for a similar decree. It was an unusual proceeding. It was not like the usual suit on a foreign judgment where execution is sought in this country, nor was it a case like those which I have mentioned, in which a foreign decree of nullity was set up as a bar to application for matrimonial relief. When the petition is looked at it will be seen that the lady did not rely on the foreign decree as conclusive. She set out facts, including the French law, and the French decree as evidence of the French law, just as it had been used in *Scrimshire* v. *Scrimshire* (11), and then proceeded to submit that the law governing the validity of marriage was the law of the domicil of the parties and not the lex loci celebrationis. Thereupon the decision of the court, right or wrong, was upon this issue only. The judges held that, at any rate in respect of the particular defect alleged (impedimentum impeditivum) the law of the place of celebration prevailed over the law of domicil. It may be said that the court ought to have guarded itself in respect of the French sentence of nullity, but inasmuch as it was not invited to hold this sentence as conclusive, but to examine the matter for itself, it is not to be wondered at that the court did not take this point.

The English decision which goes furthest in support of the conclusion arrived at by the Court of Session is *Ogden* v. *Ogden* (1), in which case the Court of Appeal disregarded the sentence of the French court, which was the court of the man's domicil, and proceeded to hold that a marriage celebrated in England between a competent English woman and a Frenchman who was capable of marrying her,

but could not validly marry her at the moment according to the law of France for want of the necessary consents, was a valid marriage, notwithstanding that the French court had pronounced it null. The impediment was, it is to be noted, an impedimentum impeditivum and not an impedimentum dirimens, such as incest or a colour bar. This authority looks at first sight as if an English court would not in the case of an English marriage hold itself concluded by the decision of a foreign court though the latter was the court of the domicil. But in truth the problem in *Ogden* v. *Ogden* (1) was almost insoluble. The short cohabitation between the parties which followed the ceremony of marriage did indeed take place in England but after this very temporary residence the man returned to his home in France and never lost his French domicil. On the other hand, the woman did not follow the man to France, and if she were not married to him, never acquired a French domicil. To treat her as domiciled in France would be to treat her as a wife, who takes her necessary domicil from her husband. But the French court proceeded to say that she was not a wife and when the suit of *Ogden* v. *Ogden* (1) came on that was, and necessarily was, her contention. The President, Sir Gorell Barnes, insists upon this point ([1908] P. at p. 78) and therefore took the French decree, as he expressed it, as only a declaration of the status of the parties in France. The French decision could not be relied upon as res inter partes judicata, for it was being questioned by the second putative husband, and the woman could not set it up as a judgment in rem by the court of her domicil. Moreover it was clear that the court of her own domicil never would have held the marriage null. To these observations upon *Ogden* v. *Ogden* (1) I should add that the case was unfavourably commented upon in the judgment of the Privy Council in the *A.-G. for Alberta* v. *Cook* (5) and that, whether it were a right or wrong decision upon the very peculiar facts of the case, I cannot regard it as an authority that English law would not recognise the decision of a competent court having jurisdiction over the place where the parties are domiciled as final and conclusive.

As to the general principles of international law upon this subject as viewed by British courts it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively. I have used the expression "the law which determines the personal status" because there are countries which would refer to nationality rather than to domicil, but the principle is the same. The text first quoted in *Shaw* v. *Gould* (9) and then cited in *Le Mesurier* v. *Le Mesurier* (3), and in *Lord Advocate* v. *Jaffrey* (4) was not, I apprehend, intended to be confined to decrees which effect some thing, but deals also, if not primarily, with decrees which decide upon the existing status. "Quum de statu et conditione hominum quaeritur uni solummodo judici et quidem domicilii universum in illo jus est attributum." There is no reason for supposing that the law of Scotland differs in this respect from general international law. The passage in *Longworth* v. *Yelverton* (21) (5 Macph. (Ct. of Sess.) at p. 147), where the reason given for refusing to put in force the special Scottish process of referring an issue to the conscience of the other party was refused because a judgment of declarator of marriage would thus be obtained on a personal admission and yet nevertheless as a judgment in rem, or a judgment upon a personal status would be binding on a new wife, indicates sufficiently the trend of Scottish law. I do not think that *Murison* v. *Murison* (22) or even the obiter observations which occur in the judgments affect this conclusion. Finally, if the court is a competent court, still more if it is the only competent court—and, in my opinion, the Wiesbaden court was the only competent court for these parties—its judgment must, for the very reason of the thing, be such a judgment as that described in *A.* v. *B.* (23) (L.R. 1 P. & D. at p. 561), a

A "definitive decree declaring a marriage void, which should be universally binding and which should ascertain and determine the status of the parties once for all."

I cannot conclude this delivery of my opinion without one cautela or reservation. If it could be said on behalf of the Administrator that this was a collusive suit and a judgment procured by collusion, it would, in my view, be unavailing. As the Solicitor-General said in the *Duchess of Kingston's Case* (24) (20 St. Tr. at p. 479): "Fabula, non judicium, hoc est ; in scena, non in foro, res agitur." I should lay such a judgment aside. But I agree with the Lord Ordinary and the Lord President that no such collusion is suggested in this case as amounts to a case of fraud upon the German court. No doubt the parties desired that the German court should pronounce the marriage null. But it is not suggested that any false evidence was given or that any material evidence was designedly excluded, or that the opinion of the advocate on the French law was not the honest opinion of a competent person, though it may or may not have been correct. For these reasons I concur with your Lordships in holding that the interlocutor of the Court of Session should be set aside and the judgment of the Lord Ordinary restored.

**LORD BLANESBURGH.**—The difficulty in this appeal, as I see it, has been, not so much to determine whether in ordinary circumstances a decree of nullity pronounced by the court of the domicil of the parties is conclusive everywhere, as it has been to determine whether, in the unusual circumstances and reactions of the nullity suit in the present case, the Wiesbaden decree made in it is outside the general rule, at least so far as the Court of Session in this action of multiplepoinding and at the instance of the Administrator of Austrian Property is concerned. I confess that if it had not been for the complete exposition of the case in all its aspects and from all points of view which is to be found in the weighty judgments of the Lord President and LORD SANDS, the difficulty I have experienced in reaching a decision entirely satisfactory to myself might, in the special circumstances here existing, still have remained unresolved. But, having examined and re-examined these judgments with all the care of which I am capable, and being assisted to a conclusion also by the fuller examination of the English authorities which has been made in this House, I now see no effective answer to the conclusions reached by LORD SANDS or to the reasoning by which he supports them. Accordingly, I concur in the motion which has been made by the noble VISCOUNT on the Woolsack.

**LORD WARRINGTON.**—I have had the advantage of reading the opinions pronounced by the noble VISCOUNT on the Woolsack and by VISCOUNT DUNEDIN and LORD PHILLIMORE. I agree with their reasoning and conclusions and I have nothing to add.

*Interlocutor reversed.*

Solicitors: *Thomas Cooper & Co.* for *John* and *W. K. Gair & Gibson*, Falkirk, and *Beveridge, Sutherland & Smith*, W.S., Leith ; *Solicitor to the Clearing Office (Enemy Debts)*, for *J.* and *R. A. Robertson*, W.S., Edinburgh.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

# RICHARDSON *v.* RICHARDSON. NATIONAL BANK OF INDIA, LTD., GARNISHEES

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), April 13, May 12, 1927]

[Reported [1927] P. 228 ; 96 L.J.P. 125 ; 137 L.T. 492 ; 43 T.L.R. 631 ; 71 Sol. Jo. 695]

*Execution—Garnishee order—Debt by third person not within the jurisdiction—Power to make order.*

Under the contract between banker and customer the promise of the bank is to repay the money received from the customer at the branch of the bank where the customer's account is kept, the bank not being liable to pay until the customer demands payment at that branch. If a demand is made at the correct branch and payment is refused, the bank can then be sued wherever it can be served. If the branch at which the demand is properly made is a foreign branch, payment in this country to the customer by the bank in foreign currency thus being involved, the customer's action against the bank must be for damages and not for debt. The power conferred on the court or a judge by R.S.C., Ord. 45, r. 1, to make a garnishee order on proof by the creditor that the debt is unpaid "and that any other person is indebted, and is within the jurisdiction" can only be exercised where the debt is properly recoverable within the jurisdiction.

Where, therefore, a creditor sought to garnishee bank balances of her debtor at foreign branches of the defendant bank,

**Held:** these balances could not be made the subject of a garnishee order for they were not debts recoverable within the jurisdiction.

**Notes.** Referred to: *Graumann* v. *Treitel*, [1940] 2 All E.R. 188 ; *Isaacs* v. *Barclays Bank, Ltd. and Barclays Bank (France), Ltd.*, [1943] 2 All E.R. 682 ; *Arab Bank, Ltd.* v. *Barclays Bank, Ltd.*, [1954] 2 All E.R. 226.

As to attachment by garnishee order of money on current account at a bank see 2 HALSBURY'S LAWS (3rd Edn.) 170, 174, and ibid., vol. 2, pp. 81–83, and for cases see 3 DIGEST 175–178. As to right of creditor to attach debt see 16 HALSBURY'S LAWS (3rd Edn.) 83.

Cases referred to:

(1) *Garnett* v. *M'Kewan* (1872), L.R. 8 Exch. 10; 42 L.J.Ex. 1; 27 L.T. 560 ; 21 W.R. 57 ; 3 Digest 222, *574*.

(2) *Willis* v. *Bank of England* (1835), 4 Ad. & El. 21 ; 1 Har. & W. 620 ; 5 Nev. and M.K.B. 478 ; 5 L.J.K.B. 73 ; 111 E.R. 694 ; 3 Digest 173, *299*.

(3) *Robertson* v. *Sheward* (1840), 1 Man. and G. 511 ; 1 Scott, N.R. 419 ; 133 E.R. 434 ; 3 Digest 143, *150*.

(4) *Martin* v. *Nadel*, [1906] 2 K.B. 26 ; 75 L.J.K.B. 620 ; 95 L.T. 16 ; 54 W.R. 525 ; 22 T.L.R. 561, C.A. ; 11 Digest (Repl.) 540, *1501*.

(5) *Swiss Bank Corpn.* v. *Boehmische Industrial Bank*, [1923] 1 K.B. 673 ; 92 L.J.K.B. 600 ; 128 L.T. 809 ; 39 T.L.R. 179 ; 67 Sol. Jo. 423, C.A. ; 11 Digest (Repl.) 540, *1502*.

(6) *Irwin* v. *Bank of Montreal* (1876), 38 U.C.R. 375 ; 11 Digest (Repl.) 411, **317*.

(7) *Di Ferdinando v. Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409 ; 89 L.J.K.B. 1039 ; 124 L.T. 117 ; 36 T.L.R. 797 ; 25 Com. Cas, 37, C.A. ; 35 Digest 175, *52*.

(8) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581 ; 67 L.J.Ch. 304 ; 78 L.T. 432 ; 46 W.R. 498 ; 14 T.L.R. 312 ; 42 Sol. Jo. 413, C.A. ; 35 Digest 176, *57*.

(9) *Lloyd Royal Belge Société Anonyme* v. *L. Dreyfus & Co.* (1927), Lloyd L.R. 288.

(10) *Woodland* v. *Fear* (1857), 7 E. & B. 519 ; 26 L.J.Q.B. 202 ; 29 L.T.O.S. 106 ; 3 Jur. N.S. 587 ; 5 W.R. 624 ; 119 E.R. 1339 ; 3 Digest 217, *548.*

(11) *Prince* v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325 ; 47 L.J.P.C. 42 ; 38 L.T. 41 ; 26 W.R. 543, P.C. ; 3 Digest 173, *301.*

(12) *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 110 ; 90 L.J.K.B. 973 ; 125 L.T. 338 ; 37 T.L.R. 534 ; 65 Sol. Jo. 434 ; 26 Com. Cas. 196, C.A. ; Digest Supp.

(13) *R.* v. *Lovitt*, [1912] A.C. 212 ; 81 L.J.P.C. 140 ; 105 L.T. 650 ; 28 T.L.R. 41, P.C. ; 3 Digest 173, *302i.*

(14) *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669 ; 96 L.J.K.B. 441 ; 136 L.T. 743 ; 43 T.L.R. 187 ; 71 Sol. Jo. 35, C.A. ; 8 Digest (Repl.) 549, *51.*

(15) *Clare & Co.* v. *Dresdner Bank*, [1915] 2 K.B. 576 ; 84 L.J.K.B. 1443 ; 113 L.T. 93 ; 31 T.L.R. 278 ; 21 Com. Cas. 62 ; 3 Digest 173, *302.*

(16) *Leader, Plunkett and Leader* v. *Direction der Disconto-Gesellschaft*, [1915] 3 K.B. 154 ; 84 L.J.K.B. 1806 ; 113 L.T. 596 ; 31 T.L.R. 464, C.A. ; 2 Digest (Repl.) 247, *490.*

(17) *Rogers* v. *Whiteley*, [1892] A.C. 118 ; 61 L.J.Q.B. 512 ; 66 L.T. 303 ; 8 T.L.R. 418, H.L. ; 3 Digest 176, *317.*

**Adjourned Summons** taken out by a judgment creditor asking that a garnishee order obtained against the account of a judgment debtor at the head office of a bank in London should be extended to cover amounts standing to the credit of the judgment debtor at branches of the bank in Africa.

A wife obtained a decree nisi of dissolution of marriage against her husband and two orders for the costs of the proceedings, amounting to £182 10s. 2d., were made against him. He was duly served with these orders, but failed to comply with them. On Jan. 28, 1927, the wife obtained a garnishee order nisi for the amount due under these orders, directed to the National Bank of India, Ltd., a company registered in England, but having branches in many other parts of the world, including Mombasa, in Kenya Colony and Dar-es-Salaam in Tanganyika. The husband had accounts both at the head office of the bank in London, and at these two branches. The bank admitted that the sum of £12 2s. 1d. stood to his credit in London, and this amount was duly paid over, but they denied any knowledge of the state of his account at either of the African branches. On Mar. 9, 1927, the garnishee order nisi was made absolute, but was limited by the registrar to the amount admitted in England as due from the garnishees to the judgment debtor. The wife issued this summons asking that the registrar's order should be varied to include the amounts standing to the credit of the judgment debtor, at the date of the garnishee order nisi, at the Mombasa and Dar-es-Salaam branches of the bank.

*R. Fortune*, for the judgment creditor, referred to *Garnett v. M'Kewan* (1), *Willis* v. *Bank of England* (2), *Robertson* v. *Sheward* (3), *Martin* v. *Nadel* (4), *Swiss Bank Corpn.* v. *Boehmische Industrial Bank* (5), and *Irwin* v. *Bank of Montreal* (6).

*Robert Aske*, for the garnishees, referred to *Di Ferdinando* v. *Simon, Smits & Co.* (7), *Manners* v. *Pearson & Son* (8), *Lloyd Royal Belge Société Anonyme* v. *L. Dreyfus & Co.* (9), *Woodland* v. *Fear* (10), *Prince* v. *Oriental Bank Corpn.* (11), and *Joachimson* v. *Swiss Bank Corpn.* (12).

*Cur. adv. vult.*

May 12.—**HILL, J.** read the following judgment: The petitioner, the wife, is a judgment creditor of the respondent husband for costs amounting to £182 10s. 2d. On Jan. 28, 1927, the judgment creditor obtained a garnishee order nisi directed to the National Bank of India, Ltd. The bank appeared to the summons. The bank is a company registered in England. The head office is in London. It has

branches at many places abroad, including Mombasa, in Kenya Colony, and Dar-es-Salaam, in the Tanganyika mandated territory. The judgment debtor was formerly employed in Mombasa, and in January, 1927, was employed in Dar-es-Salaam. The affidavit in support of the garnishee proceedings deposed to the belief that the judgment debtor had an account with the bank at Mombasa or at Dar-es-Salaam. A copy, produced by the bank, of the judgment debtor's account at the head office in London showed transfers in 1926 from his account at Mombasa to his account in London and showed a credit balance of £12 2s. 1d. on the London account. The bank does not dispute that that amount is subject to the garnishee order. The judgment creditor, however, seeks to make subject to the garnishee order any amounts to the credit of the judgment debtor at the branches in Africa on Jan. 28, 1927. As to that, the bank, by the affidavit of the London sub-manager, says that the head office does not know whether the judgment debtor had, in January 1927, an account at either of the branches. The bank takes up the position that if there are any moneys to his credit at either branch, they cannot be made the subject of a garnishee order here, and that, even if they could, they ought not to be made the subject of a garnishee order here because payment under the order would not be a good discharge in the courts of Kenya Colony or Tanganyika. The bank further says that any account at the African branches is kept in a foreign currency, namely Kenya or Tanganyika shillings, which is a different currency from the English currency.

The questions raised, especially the first, are obviously of great and general importance to banks with foreign branches. I have come to the conclusion that the bank is in the right. For the purposes of my judgment, I assume that on Jan. 28, 1927, there were moneys to the credit of the judgment debtor at one of the African branches. Certain contractual obligations of a bank and its customers, in the absence of special agreement, are well ascertained. They include these implied terms, as stated by ATKIN, L.J., in *Joachimson* v. *Swiss Bank Corpn.* (12), (i) the promise of the bank to repay is to repay at the branch of the bank where the account is kept, and (ii) the bank is not liable to pay until payment is demanded at the branch at which the account is kept. The court was there dealing with a current account, and the actual decision was that, in the absence of a special agreement, a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent. The same principle underlies the judgment of the Judicial Committee of the Privy Council in *R.* v. *Lovitt* (13), which related to a deposit account at the New Brunswick branch of the Bank of British North America. The judgment refers to older cases and says:

> "In each of these cases the courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localised its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were 'property situate within the province' of New Brunswick."

In another part of the judgment are these words, which are in point:

> "According to the defendants' contention, the bank in London might be called on at any time by a person of whom it would probably know nothing, and with only limited time in which to obtain the detailed information that would be necessary from the St. John's branch, to pay $90,351 in London without any deduction of cost of transmission or any agreement as to the rate of exchange. No such obligation appears by express words or necessary implication in the contract of the parties, and it is very improbable that it was ever contemplated or intended by them. It is true that the money was to be 'accounted for by the Bank of British North America,' but when the circumstances are considered it is seen that those words mean only that the bank is to account for the money as being money payable by them or their

agents at St. John. Thus if the manager of the St. John's branch refused payment, or if the branch itself were closed, the bank in London would, of course, be liable as a principal, but that fact does not affect the locality of the debt as originally fixed by the parties."

So in *Republica de Guatemala* v. *Nunez* (14) SCRUTTON, L.J., speaks of a person who "deposited in an English bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England," and, as to current account, in *Clare & Co.* v. *Dresdner Bank* (15) ROWLATT, J., said "there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country."

It will be noted that in *R.* v. *Lovitt* (13) the words used are "primarily at all events." If a demand is made at the branch where the account is kept and payment is refused, the position is altered. Undoubtedly, the bank is then liable to be sued wherever it can be served. Thus in *Leader, Plunkett and Leader* v. *Direction der Disconto-Gesellschaft* (16), referred to in *Clare & Co.* v. *Dresdner Bank* (15), a demand having been made at Berlin, where the account was kept, and refused, and a writ having been properly served on a branch in England, judgment was given against the bank in England under Ord. 14, the claim being treated as for a liquidated demand. It may, perhaps, be asked whether the cause of action in such a case is for damages for breach of contract to pay at the branch or for money lent. I have not found any case in which that point was discussed. No doubt the bank, in such a case, is liable in damages, but it may be that, having itself by its branch refused to repay, notwithstanding the fulfilment of the condition which was implied in the contract for its benefit, it becomes unconditionally liable to repay. Be that as it may, the bank is not liable anywhere until the demand is made at the branch where the account is kept. A further difficulty, on the question whether the liability in this country is in damages or in debt, arises when the bank is sued here and the account is kept at the branch abroad in a foreign currency. The questions arising upon a liability to pay in a foreign currency, enforced in the courts here, had not at the time of *Leader, Plunkett and Leader* v. *Direction der Disconto-Gesellschaft* (16) received that full consideration which it has since received in *Di Ferdinando* v. *Simon, Smits & Co.* (7) and recently in *Lloyd Royal Belge Société Anonyme* v. *L. Dreyfus & Co.* (9). The Court of Appeal has made it clear that the cause of action upon refusal to pay in foreign currency is for damages and not for debt.

These considerations lead to the following conclusions in the present case as between the bank and the debtor: (i) That primarily the bank was liable to pay only at the African branch ; (ii) that upon demand at and refusal to pay by the African branch the bank could be sued here, but that, the breach having been a refusal to pay in a foreign currency, the cause of action here could only be for damages ; the bank could not be sued here for money lent. It has occurred to me to consider whether the obligation of the bank could be put in another way. It is the practice of banks, at the request of a customer, to transfer amounts to the credit of the customer from one account to another. Perhaps it is an implied term of the contract that the bank shall, at the request of the customer, make such transfer at the expense of the customer, and, if a conversion from one currency to another is necessary, at the rate of exchange ruling at the date of the transfer. This would get over the difficulty about the difference of currency. But, even if such a term is to be implied, and the request to transfer can be made to the head office and not to the branch where the account is kept, it seems to me that the cause of action must be for damages for refusal to transfer, and that a refusal to transfer at request would not make the money recoverable as money lent elsewhere than at the branch where the account is kept.

Such being the position as between the judgment debtor and the bank, I have to consider whether Ord. 45, r. 1, applies. The bank is no doubt indebted to the judgment debtor and the bank is within the jurisdiction. The order deals with

the case where "any other person is indebted to the judgment debtor, and is within the jurisdiction." But, both in principle and upon authority, that means "is indebted within the jurisdiction, and is within the jurisdiction." The debt must be properly recoverable within the jurisdiction. In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the court which orders it. A debt is not property within the jurisdiction if it cannot be recovered here. As a matter of authority, *Martin* v. *Nadel* (4), as explained by *Swiss Bank Corpn.* v. *Boehmische Industrial Bank* (5), and the decision and judgment in that case, show that the order does not apply unless the debt is properly recoverable within the jurisdiction. In the *Swiss Bank Case* (5) the customer's account was in London. Of it SCRUTTON, L.J., said in that case:

> "It is a sum held by a banker who is resident in this country for his customer and is not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country."

In *Martin* v. *Nadel* (4) the deposit had been made in Berlin, and of it SCRUTTON, L.J., says in the *Swiss Bank Case* (5):

> "That debt was not in London. It was in Berlin; Nadel having deposited the £500 with the branch in Berlin could not without more have made good a claim to be paid by the London branch. Before he could do anything, he must make his claim on the Berlin branch who had the money, not on the London branch who had not."

In *Joachimson* v. *Swiss Bank Corpn.* (12) the Court of Appeal said that the service of a garnishee order nisi was a sufficient demand. But the court had not to consider whether the service of an order nisi on the London branch would be a sufficient demand for repayment by a branch abroad. I do not see how it could be so regarded, and when the branch at which the account is kept is abroad, the order nisi cannot be served there.

In the result, I am of opinion that, in respect of moneys held by the bank to the credit of the judgment debtor at either of the African branches, they cannot be made the subject of a garnishee order, for they are not a debt recoverable within the jurisdiction. I add this. If the judgment creditor is right, then, upon service of the order nisi, the bank became custodian for the court of the whole of the funds attached, i.e., for all amounts to credit of the judgment debtor at all its branches and the bank could not, except at its peril, part with any of the funds in any part of the world: see *Rogers* v. *Whiteley* (17); and the burden upon the bank cannot be to communicate with all its branches in all parts of the world. If I am wrong in the views so far expressed the question will still remain whether the order ought as a matter of discretion to be made absolute. It ought not, if payment under it will not be a good discharge in the courts of Kenya Colony and Tanganyika. One witness whose affidavit I have heard is clearly of opinion that it will not be a good discharge. Another suggests that payments made under the order in England will not be a good discharge in Kenya Colony, but that if the order were registered in Kenya under the Judgments Extension Ordinance of that colony, payments under it by the Kenya branch would be a good discharge. He says the same would apply to Tanganyika. It does not, however, seem clear that the bank could register the order, and the judgment creditor, if she gets the order here, will enforce payment here and will not go to the trouble of registering and enforcing the order abroad. In this state of the law abroad it would be unequitable to make the order. It is satisfactory to learn from the affidavit evidence that the judgment creditor is not without a remedy. She can register in Kenya and Tanganyika the order of this court for £182 10s. 2d. and then enforce it there by execution.

*Appeal dismissed.*

Solicitors: *Gordon, Dadds & Co.; Sanderson, Lee & Co.*

[*Reported by* R. WAVELL-PAXTON, ESQ., *Barrister-at-Law.*]

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# J. C. HOUGHTON & CO. *v.* NOTHARD, LOWE AND WILLS, LTD.

[House of Lords (Viscount Dunedin, Viscount Sumner, Lord Atkinson, Lord Shaw and Lord Carson), July 5, 7, 8, November 7, 1927]

B [Reported [1928] A.C. 1 ; 97 L.J.K.B. 76 ; 138 L.T. 210 ; 44 T.L.R. 76]

*Company—Estoppel—Notice of facts to company—Standing by—Knowledge of director—Director party to fraud against company.*

On the question whether an individual is estopped from averring certain C facts because he has stood by while another party, relying on those facts, has acted to his disadvantage, if information of such standing by is intelligibly conveyed to and received by him, its source matters little, if at all. But with an artificial incorporated person like a company it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs by which it receives D knowledge so as to affect its rights may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge which is relevant is that of the directors themselves, since it is their board that deals with the company's rights. The knowledge of a mere official like the secretary would only be the knowledge of the company E if the thing of which knowledge was predicated was within the ordinary domain of his duties. The mind of a company is not reached by information only possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows, or ought in the course of his duty to know, may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action which a fully informed F corporation would proceed to take on the strength of it. But where the knowledge of the company is that of a director who is particeps criminis in a fraud against the company—if, e.g., knowledge of an infringement of a right of the company is only brought home to a director who was himself the artificer of the infringement—the director's knowledge of the fraud would not be the knowledge of the company.

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**Notes.** Applied: *Evans* v. *Employers Mutual Insurance Association, Ltd.*, [1935] All E.R. Rep. 659. Considered: *Mercantile Bank of India, Ltd.* v. *Chartered Bank of India, Australia and China, and Strauss & Co.*, [1937] 1 All E.R. 231. Referred to: *Kreditbank Cassel G.m.b.H.* v. *Schenters, Ltd.*, post, p. 421; *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank, Ltd.*, post, p. 451; *Newsholme* H *Bros.* v. *Road Transport and General Insurance Co.* [1929] All E.R. Rep. 442.

As to notice to a company see 6 Halsbury's Laws (3rd. Edn.) 435 et seq., and for cases see 9 Digest (Repl.) 689 et seq. As to estoppel by conduct see 15 Halsbury's Laws (3rd Edn.) 235 et. seq., and for cases see 21 Digest 328 et. seq.

Cases referred to:

I (1) *Re Hampshire Land Co., Ltd.*, [1896] 2 Ch. 743 ; 75 L.T. 181 ; 45 W.R. 136 ; 12 T.L.R. 517 ; 40 Sol. Jo. 654 ; 3 Mans. 269 ; sub nom. *Re Hampshire Land Co., Ltd., Ex parte Portsea Island Building Society*, 65 L.J.Ch. 860 ; 9 Digest (Repl.) 691, *4557*.

(2) *Lacey* v. *Hill*, *Leney* v. *Hill* (1876), 4 Ch.D. 537 ; 35 L.T. 149, C.A. ; affirmed sub nom. *Read* v. *Bailey* (1877), 3 App. Cas 94 ; 47 L.J.Ch. 161 ; 37 L.T. 510; 26 W.R. 223, H.L.; 4 Digest 468, *4217*.

(3) *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 ; 52 L.J.Q.B. 737 ; 49 L.T. 303 ; 47 J.P. 821 ; 31 W.R. 820, H.L. ; 12 Digest (Repl.) 182, *1245*.

(4) *Cairncross* v. *Lorimer* (1860), 3 L.T. 130 ; 7 Jur. N.S. 149 ; 3 Macq. 827, H.L. ; 21 Digest 328, *1227*. A

**Appeal** by the plaintiffs from an order of the Court of Appeal (BANKS, ATKIN, and SARGANT, L.JJ.), reported [1927] 1 K.B. 246.

The action was brought by the appellants against the respondents for a declaration that the appellants were entitled to, and to possession of, bills of lading in respect of fruit consigned to the respondents at Liverpool on board the steamships *Adriatic*, *Aurania*, *Devonian*, *Cedric*, *Laconia*, and *Samaria*, during the month of November, 1924, in respect of advances of money made by the appellants. The respondents counterclaimed the sum of £21,158 3s. 11d. as the value of the respondents' goods wrongfully converted by the appellants, and alternatively, as money had and received by the appellants to the use of the respondents, with interest. The Court of Appeal held, reversing the decision of WRIGHT, J., that the contract on which the appellants relied as the basis of their claim was not binding on the respondent company and ordered judgment to be entered for the respondent company on the claim and counterclaim. The appellants appealed. B C

*Sir John Simon*, *K.C.*, *A. T. Miller*, *K.C.*, and *Porter*, *K.C.*, for the appellants. *Upjohn*, *K.C.* and *Robert Fortune* for the respondents. D

The House took time for consideration.

Nov. 7. The following opinions were read.

**VISCOUNT DUNEDIN**.—The appellants in this case are fruit brokers and the respondents are a fruit-importing company. The action which was raised by the appellants was for delivery of certain bills of lading. This was met by denial of the right to ask for them and by a counterclaim for a sum of money which has eventually been settled at £19,757 8s. 7d., being the proceeds of fruit, belonging to the respondents and sold by the appellants, for which they had not accounted. The learned trial judge gave judgment in favour of the appellants on both points, the Court of Appeal reversed his decision on both points, hence this appeal. E F

To make the case intelligible, it is necessary to detail the history of the parties. As regards the appellants little need be said ; they are an ordinary firm of well-established fruit brokers. The business of a fruit broker is to sell fruit for the importer to the various retail dealers in the United Kingdom. The fruit is bought abroad by the importer and consigned to him, bills of lading being made out in his name as consignee. In many cases the fruit actually arrives before the bills of lading, and as fruit is a perishable commodity it is common practice for the broker, who has been advised of the consignment expected on a certain ship, to go to the ship and get immediate delivery, giving an obligation to the ship to present the bills of lading when received and giving an indemnity against any possible claim if the bills of lading are not forthcoming. It is also a common practice for an agreement to be come to between the broker and the importer by which the broker finances the importer by making advances and recoups himself by being allowed to retain the proceeds of the fruit when sold. The position of the respondents needs more minute explanation and history. There was a firm of fruit importers known as George Wills & Co., which had been formed into a company called Wills & Co., Ltd. There was another firm of fruit importers called Nothard and Lowe, which had been formed into a company called Nothard and Lowe Fruit Preserving Co., Ltd. Although this was the proper title of the company, the company was generally known and spoken of as Nothard and Lowe. The two companies, finding that they were apt to be in competition, agreed to eliminate this competition in certain branches of the fruit trade. To effect this object they formed another company called Nothard, Lowe and Wills, Ltd., who are the respondents in this case. This company had within its memorandum very wide powers, but practically it was to be a fruit-importing company. The shares were practically all held in substantially equal proportions by the two companies G H I

which had arranged for its formation. Two of the directors, namely, Messrs. Walker and Braund, were taken from the George Wills company, they being directors of it, and the other two directors were taken from the Preserving company, being directors of it. Contemporaneously with the formation of the company, a tripartite agreement was entered into between the two old companies and the new. By this agreement the nomination of the directors as aforesaid and the equal contribution to the capital was provided for. Fresh fruit was defined as all fruit except tomatoes, in all parts of the world except Italy, Spain, Portugal, Nova Scotia, the Canary Islands, and France. Then each of the two older companies undertook to leave the trade in fruit, as defined, exclusively to the new company, they being free to continue their own trade in all other classes of fruit.

For the purposes of this case it may therefore be stated that American apples were the province of the new company, Nova Scotian apples the province of the other companies, and, in particular, of the Preserving company, which I shall hereafter designate by its trade sobriquet of Nothard and Lowe. It was also provided that the new company should have the benefit of Nothard and Lowe's premises and the use of its personnel. A certain payment was to be made in return for these services. The date of the registration of the new company was April, 1920. The new company started business. By arrangement Maurice Lowe was the director to whom was entrusted the arrangements as to brokerage. In this matter George Lowe was associated with him. Walker looked after the shipping arrangements and the buying of fruit for importation. For some time brokers other than the appellants were employed, but in May, 1924, Maurice Lowe approached Mr. Dart, who represented the appellants, with a view to making a brokerage arrangement as to apples. The apples he wished dealt with were American apples, the property of the respondents, and Nova Scotian apples, the property of Nothard and Lowe. As Nothard and Lowe were throughout acting for the respondent company, Maurice Lowe was in the habit of dealing with the two sets of apples together. Now at this time the Nothard and Lowe company was hard pressed for money. This was, of course, known to the two Lowes, but was not known to the other two directors, Walker and Braund. Maurice Lowe and Dart had several meetings which were spoken to by Dart before the trial judge. Maurice Lowe was not examined. It is, however, unnecessary to consider the exact terms of Dart's evidence because undoubtedly the result of all the preliminary arrangements was reduced to writing in a letter which passed between the two contracting parties. The final position was expressed in a letter of July 16, 1924, written by Dart to Maurice Lowe. It is in the following terms:

> "Dear Mr. Lowe, I think it well to confirm the conversation we had on Monday in writing, to see if we understand each other correctly. I wish to commence by thanking you for the offer of the business and feel that if we once start working together we shall neither of us have anything to regret. I understand that you wish my firm to advance to Messrs. Nothard and Lowe £10,000 now, and another £5,000 on the 25th Aug., and a final £5,000 some time in Sept., making a total of £20,000, and that you would give us the deeds of your packing houses as security, which are worth some £13,000. Presumably these documents you will have recorded at the Registry of Deeds in the usual way. You will guarantee a minimum of 50,000 barrels of Nova Scotian apples. Besides your Nova Scotian fruit, we would receive free of advance all the goods consigned to Messrs. Nothard, Lowe, and Wills at Liverpool, and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the goods belonged to your firm or to Messrs. Nothard, Lowe, and Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe, and Wills would have to be subscribed to by them. As regards your marine insurance policy, presumably you have something better than the ordinary F.P.A. clause, and that you are

covered against breakdown of steamer or delay in arriving at its destination. The interest would ½ per cent. over bank rate with minimum of 5 per cent. from the date of advance to the time of making up account sales.—Yours very truly, J. W. Dart. London, S.E.1."

Following upon this an agreement was made and executed by Nothard and Lowe, as the Preserving company, to which agreement Maurice Lowe, George Lowe, and a Mr. Prescott, who was also secretary of the respondent company, as individuals, were associated as guarantors. The material parts of the agreement were as follows: By cl. 1 the appellants were to advance to the Preserving company, at various dates, sums amounting in all to £20,000 ; by cl. 2 the Preserving company were, as security for these advances, to deliver to the plaintiffs the title deeds of certain premises in Nova Scotia belonging to them ; by cl. 3 the individual guarantors guaranteed the loan to the extent of £10,000 ; by cl. 4 the Preserving company appointed the appellants sole brokers for its fruit during the season 1924–25, and guaranteed 50,000 barrels of Nova Scotian apples. Clauses 5 and 6 must be quoted in full:

"Clause 5: Seventy per cent. of the net proceeds which shall arise from the sale of fruit so consigned to the agents after deducting the usual brokers' commission and sale expenses shall be retained by them and applied in or towards repayment of the said advances and the balance of thirty per cent. of such net proceeds shall be payable by the agents to the company forthwith on the making up of the account of any and every such sale. Clause 6: For the consideration aforesaid the company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances seventy per cent. of the net proceeds of the sale of goods sold by the agents on behalf of or as agents for Nothard Lowe and Wills, Ltd."

This agreement was executed under the seal of the Preserving company, and by the signatures of the individual guarantors a counterpart of the agreement was executed by the appellants. Finally, on the same day, July 22, 1924, the following letter was dispatched and received by the appellants:

"Messrs. J. C. Houghton & Co., 1, Temple Court, Liverpool.—Dear Sirs,—We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made to Messrs. Nothard and Lowe in the same proportions and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard and Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to.—Yours faithfully, For Nothard, Lowe, and Wills, Ltd., A. V. Prescott, Secretary."

The initial advance of £10,000 was made and shipment then began both of American and Nova Scotian apples. The whole were treated by Maurice Lowe as in one account. The appellants first retained 70 per cent. of all the sales which were effected ; eventually further advances were made, and by agreement with Maurice Lowe the appellants retained the whole proceeds of the sales of the fruit in respect of which these advances were made. The whole of the advances were applied by Maurice Lowe or George Lowe to meeting the necessities of the Preserving company, and were not put, to any extent, to the credit of the respondent company. It will have been observed from the whole recital that there was no meeting of directors or minutes of the respondent company sanctioning these arrangements, and no agreement under seal of the company, agreeing to, or ratifying, them.

Turning now to the movements of the directors. Walker was absent up till Aug. 9. By that time Maurice Lowe had left the country, and he did not return till October. Braund had been in London in early August, and then was away

till the third week of September. During the whole time, therefore, there had been no meeting of directors, and neither Walker nor Braund had met Maurice Lowe. After Walker got back in August, early in September he had a conversation with George Lowe as he found that the advances from George Wills & Co., his company, to the respondent company, were rather large. George Lowe explained that owing to a strike at Covent Garden there had been great difficulty in recovering accounts, and Walker was satisfied with the explanation. There was no conversation as to the position of the respondent company and the Preserving company. Maurice Lowe having returned in the middle of October, a few days after this his accountant, whose name was Nash, applied for a further advance from George Wills & Co. to the Preserving company. Walker refused the request, and it was renewed by Maurice Lowe. Maurice Lowe not being able to give satisfactory explanations why the money was wanted, Walker reported the matter to the board of George Wills & Co., and they then instructed their own accountant, Curtis, to look into the books of the two companies. This was about Oct. 10. As a result of the investigation, Walker and Braund became aware, for the first time, that the advances by the plaintiffs had been entirely applied to the needs of the Preserving company, and that the Preserving company was hopelessly insolvent. As a result a directors' meeting of the respondent company was held on Nov. 7, and on that day the following minute was passed:

> "No further loans by Nothard, Lowe, and Wills, Ltd., to any other company to be made, and no proceeds of any of Nothard, Lowe, and Wills, Ltd.'s, fruit to be diverted from the company's funds, and no further payments of any sort to be made to the Nothard and Lowe Fruit and Preserving Co., Ltd., or their subsidiary companies. Present: Messrs. M. A. Lowe (chairman), F. W. Braund, H. W. Walker, G. N. Lowe, and the secretary."

After this Curtis called Walker's attention to the retention by the plaintiffs of the proceeds of the respondents' apples, and said that he had been given to understand that there was some sort of agreement under which this had been done. Upon that Walker had a meeting with Maurice Lowe, who then produced the agreement of July 22, 1924. He did not then make any mention of the letter of the same date. Walker, looking at cl. 6 of the agreement, said that it purported to make the company a third party to the agreement without their seal, and that as it stood it was not binding on the company. A few days afterwards the letter of July 22 was produced for the first time. Walker then repudiated the idea of the company being bound ; a directors' meeting was held on Nov. 14, and George Lowe was removed from the board. At this time there had been a delivery of apples to the plaintiffs of which, as explained above, the bills of lading had not arrived. The plaintiffs applied for the bills of lading and were refused, whereupon, on Nov. 21, the plaintiffs raised the present action. This was met by a counterclaim for the sums due in respect of the company's apples, which had been sold by the plaintiffs, and of which the proceeds had been retained, either to the extent of 70 per cent., or altogether as set forth above.

The real question in the case is, therefore, whether the arrangement contained in the agreement of July 22 and the letter of the same date bind the company. Viewed as documents it is clear that neither the one nor the other can have that effect. The company is not a party to the agreement and the arrangement is of such a character as to be quite beyond the power of a secretary to impose on the company, there having admittedly been no meeting of directors to authorise the dispatch of the letter. The case of the plaintiffs is rested on quite different grounds and may be stated thus. It is a well-known custom of the fruit trade that the importers should make arrangements with brokers for advances, the latter being allowed to retain from the sales the amount of such advances. With the sanction of the whole of the directors of the respondent company, Nothard and Lowe (the Preserving company), of which Maurice Lowe was the acting director

in such matters, were empowered to make brokerage arrangements for the respondent company. True it is that such an authority to conclude brokerage arrangements would not authorise the impledgment of the company's apples for another person's debt. But then, to the knowledge of the directors, Nothard and Lowe acted not only for the company but also for themselves in the sale of Nova Scotian apples. Accordingly, the authorisation would include any arrangement which Nothard and Lowe made as to advances to them as managers of the pooled apples of the company and of the Preserving company. That was the arrangement made and that, they say, binds the company. Various arguments may be directed against this contention, but without stating them it is obvious that the keystone of the arch is the fact that the advances in respect of which retention is said to be authorised were made to Nothard and Lowe, as managers of the pooled apples. If the advance was not made to them in that capacity, but simply in their capacity of the Preserving company, the whole argument breaks down.

I am of opinion that the Court of Appeal was right in holding that the advances made by the appellants in respect of their agreement with Maurice Lowe were knowingly made to the Preserving company as the Preserving company ; and they looked to Maurice Lowe to obtain additionally the sanction of the respondent company to allow their apples to be subject to retention for these advances. This is clear from the first. In the letter of July 16 Dart says, in specifying the arrangements, "I should presume the arrangement with respect to Messrs. Nothard, Lowe, and Wills will have to be subscribed by them." Then came the formal agreement to which the Preserving company were parties and the defendant company was not. The advances are to be made to the party of the first part, that is, the Preserving company, and that it is not made to them as managers of a combined stock is made quite clear by cl. 6, which treats the binding of the defendant company as a separate arrangement which the Preserving company is to secure. It is perfectly plain from this that the appellants were still in the same mind that they were in when they wrote the letter of July 16. They knew they were making the advances to the Preserving company, and that, therefore, in order to pledge the property of the defendants' company for that debt, they would need special authorisation. They believed that Nothard and Lowe could get them that authorisation, and they bound the Preserving company to get it for them. They, in the sequel, rested content with the letter signed by the secretary. In doing so they took a risk which they must have known, namely, the risk that the letter was unauthorised. They took care to bind the Preserving company by the seal of the company ; they neglected that precaution with the defendant company and they must suffer for it. Unfortunately, not only Maurice Lowe, but Prescott was interested in procuring the arrangement, for Prescott was one of the individual guarantors under the agreement. I do not wish to use unnecessarily strong language or to sit in moral judgment on the persons concerned, but all that happened is but another instance of how perilous a thing it is for persons who are in a fiduciary position to entangle themselves with absolutely conflicting interests. The interests of the two Lowes and Prescott were bound up with the Preserving company and their duty to the respondent company suffered in consequence.

The appellants, for whom one cannot help feeling sympathy, for they were betrayed by their confidence, have, however, another ground of action, namely, estoppel. The class of estoppel is estoppel by conduct amounting to acquiescence. They say that the agreement was known to the respondent company through the Lowes, two of the directors, and was allowed to continue. That if it had been disclosed after the initial advance that the arrangement, so far as the respondent company, was unauthorised, they would have made no further advances. They say further that, apart from the knowledge of the Lowes, an inspection of the books would have disclosed the arrangement, and that the company were guilty of negligence in not having examined its own books. The state of knowledge of the various directors has already been set forth. It is quite clear that the only

directors who did know were the Lowes, who were active agents in leading the appellants to advances on an arrangement which they knew had not been authorised by the company. There can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the company is the knowledge of a director who is himself particeps criminis—that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement ? Common sense suggests the answer, but authority is not wanting. In *Re Hampshire Land Co., Ltd.* (1) VAUGHAN WILLIAMS, L.J., expresses himself thus ([1896] 2 Ch. at p. 749):

> "If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud, because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud ; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

The same view is to be found in the case of *Lacey* v. *Hill* (2), affirmed in the House of Lords, sub nom. *Read* v. *Bailey* (2). This law, in my view, applies to the present case. The only knowledge brought home to the company is through the Lowes and the secretary. They were all parties to the arrangement which was a fraud on the true interests of the company.

It only remains to consider whether negligence on the part of the unincriminated directors can found an estoppel against the company. I am of opinion that it cannot. It is no part of a director's duty to inspect accounts every day. There was nothing in the circumstances to arouse the suspicions of the two directors as to the existence of any such agreement. As soon as they were all at home the whole thing was found out and the arrangement stopped, and to hold that there was estoppel because Walker, during the month of August, near the end of it, did not inspect the accounts and find out the arrangement, would be, in my opinion, going much beyond what has ever been decided against a company. I am, therefore, of opinion that the judgment of the Court of Appeal is right and that this appeal should be dismissed with costs, and I move accordingly.

I am authorised by **LORD ATKINSON** to say that he concurs in the judgment I have delivered.

**VISCOUNT SUMNER**.—I agree in the motion proposed by my noble and learned friend on the Woolsack. The appellants' claim to retain as against the respondents, part of the sale proceeds of their fruit rests on express contract, or, in the alternative, on estoppel. The claim in contract really depends on the effect of the appellants' letter of July 16, 1924, to Mr. Maurice Lowe. This person, who was at the same time a director of the respondent company and managing director of the company, which has been spoken of as Nothard and Lowe, had been the intermediary, who discussed with Mr. Dart, the appellants' representative, the terms

on which the appellants would act as brokers for fruit imported by the respondent company and by Nothard and Lowe respectively. The terms, which the appellants were willing to agree upon as the result of this discussion were reduced by them into writing in this letter and were, in accordance with its terms, accepted in writing respectively by Nothard and Lowe and by the respondent company under the signature of Mr. A. V. Prescott, their secretary, on July 22, 1924. There is, in my view, no evidence on which it could be held that the appellants dealt with Nothard and Lowe and the respondents as clients, who were co-contractors, or agreeing with them to regard the whole business as done on their joint account. Had it been so, the appellants would have lent money to them as joint borrowers, against whom they could equally exercise a right of set-off without any special and inconsistent stipulation, such as they introduced. Had the two companies been engaged in a joint account, a loss on the respondents' American apples might have been made good out of profits made on Nothard and Lowe's imports from Nova Scotia and they must both have taken their share of the money advanced by the appellants. On Mr. Dart's letter it is quite plain (i) that the consignments to be dealt with were known to be the several property of Nothard and Lowe and of the respondent company, as the case might be; (ii) that the sales were to be made for the respective owners severally and not on any joint account; (iii) that all the money to be lent by the appellants was to be lent to Nothard and Lowe and to be secured by them and none of it was to be lent to the respondent company; and (iv) that the appellants were not willing to take and did not ask for or get the acceptance of their terms from Nothard and Lowe or from Maurice Lowe on behalf of and as agents for the respondent company. They were not prepared to give credit to him, but required the latter company's independent written assent in their own names. We need not, therefore, consider the extent of the authority, if any, which Nothard and Lowe may have had to act for the respondent company generally and to bind them in other matters, for it was not exercised on this occasion. When the nature of the bargain under discussion is considered, it becomes obvious that such an authority could not be inferred or implied, but would be credible only if expressed plainly and in writing. It is plain, too, that Mr. Dart saw, as any business man would see, that nothing but the respondent company's own written acceptance could be relied on and hence it was stipulated for. The bargain proposed was that the appellants, instead of paying over to the respondents their full sale proceeds less commission, should be at liberty to retain them up to 70 per cent. to satisfy any unpaid balance of the loans they had made to the other company. They were to apply the money of their creditors and clients, the respondent company, to satisfy claims on their other debtors, if they should be in default. No wonder Mr. Dart asked for something signed in the name of the respondent company itself. No wonder Maurice Lowe did not put his name to this bargain on the respondent company's behalf. He left that to the secretary. In the result, however, the letter that the appellants got, signed only by the secretary, could not bind the respondents, nor has it been contended that it did. The secretary had not, as such, any power to bind the respondent company by his signature to such an arrangement. Who had that authority, was a question which depended on their articles, and it was the appellants' business to ascertain from them where the power resided and to see that it purported to have been exercised. Under their articles only the board of directors could have bound the respondent company in this matter. I think Mr. Dart must at the time have had his doubts whether Mr. Prescott had any authority to bind his company at all. Why else should cll. 5 and 6 of the agreement of July 22, 1924, have been entered into? Why should the appellant company take the guarantee of Mr. Prescott himself, among others, that the appellants should be entitled to retain and apply the moneys in question. If Mr. Prescott's signature bound the respondent company, his guarantee was superfluous. I think this obvious intimation to the appellants that the respondents were not contractually bound may be material on the question of

A B C D E F G H I

A estoppel, for I doubt if the appellants, knowing so much, can be said to have changed their position on the faith of any standing-by on the respondent company's part. I think they acted throughout in the hope that Prescott and the Lowes would be able to see them safely through.

The appellants' case on the estoppel point is that the respondent company, knowing that they were acting on the faith of the contract which purported to have B been concluded between them, stood by and, apparently with assent and at any rate without objection, allowed them to change their position for the worse, upon the footing that the purported contract was valid. Of course, if this is made out, the respondents are beyond question estopped from disputing the contract. How do the appellants essay to prove that the respondent company knew that the alleged agreement purported to have been made and had been acted on accordingly—a C fact which they must establish or fail? They rely on two circumstances. One is, that the parties to the guarantee, Maurice Lowe and George Lowe, directors, and Prescott, secretary, of the respondent company, knew all about it. The other is that the account sales were rendered to the respondent company, in which 70 per cent. of the proceeds of their goods were treated as attributable to the extinction of the loans to Nothard and Lowe and were retained accordingly, of which D corresponding entries to the like effect were then made by their clerks in the respondent company's books. About the first there is no doubt. Of course the persons who gave the guarantee knew of the transaction which was its subject, and, as the respondent company's fruit department was managed by Maurice Lowe with the concurrence of the other two, we may assume their knowledge of the fact that the business was proceeding as arranged and that the respondent E company's books contained entries in accordance with it. The question is whether either of these things or both carry the appellants any further. When the case is clearly understood I think these entries in the respondent company's books become a mere matter of prejudice. Of course they are evidence against the respondent company, but evidence of what? Not of the company's knowledge of the 70 per F cent. arrangement nor of the system on which the account sales were being prepared. Neither did they constitute any representation to the appellants, for they were never communicated to them. At any time they might have been corrected or cancelled without affecting the appellants' rights, nor was it on the faith of these entries, of which they were unaware, that the appellants acted or changed their position at all. The documents that really matter are the account G sales. They did convey to those affected with knowledge of their contents what the respondents were doing and claimed to be entitled to do, but a company is not, without more, deemed to know what every letter received by it contains, so as to be estopped from asserting its rights unless those contents are promptly challenged.

There is a further circumstance that I think can be put aside as immaterial. The appellants, it is said, handed to Maurice Lowe the advances that they made H and such sale proceeds as they received and did not themselves retain, and must be deemed to have done so treating him as the agent not only for Nothard and Lowe, but for the respondent company. They certainly did not pay him the money lent as anything but the official of Nothard and Lowe, and I do not know to whom else they were to hand sale proceeds intended for the respondent company, whose fruit business he managed; but what then? This, if it is to amount to I anything, must be equivalent to a plea of payment. I cannot see that this is sound in fact. How could anything done by the appellants alter or enlarge Maurice Lowe's duty towards or his authority from the respondent company? How could they relieve themselves from their own liability by leaving Maurice Lowe to "adjust" matters, as it is called, between the two companies with which he was connected? The point is that they have sold the respondent company's goods for them and have kept back part of the money, and this they have to justify. They were brokers for the respondent company and they must settle with the respondent company themselves, and not with other people. If the result is that

they have to pay over again moneys that they have paid already, this is no answer. Those who pay the wrong persons, always have to pay over again, when the right ones come forward and get justice. Let the appellants sue their guarantors, Prescott and the Lowes, if they are worth proceeding against. In truth, this contention is a mere phrase. The appellants are not asked to pay over again. They have not already paid the proceeds of the respondent company's apples to others. The fact is that they have never paid over the sale proceeds in question at all. They lent their own money to others and they kept the respondent company's money themselves. It is plain law, and there are no hardships and no equities about it.

Has knowledge then been brought home to the respondent company on which to found the alleged standing-by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs, by which it receives knowledge so as to affect its rights, may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights, according as it is or is not followed by action, the knowledge which is relevant is that of directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows, or ought in the course of his duty to know, may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action which a fully informed corporation would proceed to take on the strength of it. There are two exceptions, however, to this rule, which are now material. The directors, other than the Lowes, did not in fact know till a late date what the Lowes had been doing, and when they found out they took prompt and proper action. The circumstances have been detailed by my noble and learned friend. It is plain, and I think uncontested, that they could not have been made personally liable for any neglect or misfeasance, and, if so, the company cannot be affected as if it had known from them what they neither knew nor could have been expected to know under the system of domestic management established by the company. On the other hand, the Lowes knew everything all along, and if, by their keeping the matter to themselves, their company could be estopped from denying that it was bound by the 70 per cent. arrangement, they would have relieved themselves and Mr. Prescott from personal liability under their guarantee at the sacrifice of their company's interests. Their silence was accordingly a notable breach of duty. It has long been recognised that it would be contrary to justice and common sense to treat the knowledge of such persons as that of their company as if one were to assume that they would make a clean breast of their delinquency. Hence, for the purpose of estopping the company, some knowledge other than theirs has to be brought home to other directors, who can be presumed not to be concerned to suppress it. This was laid down, following earlier cases, in *Hampshire Land Co., Ltd.* (1), and was even then treated as incontestable. So far as I know, it has never been doubted since. If so, there was in this case no standing-by and no estoppel. The cases on which the above propositions are based were not contested by counsel in his reply, nor were any authorities cited which conflicted with them. It is not for us to dispute settled law, and, accordingly, the appeal fails.

**LORD SHAW.**—A company of the name of George Wills & Sons, Ltd., and another company of the name of the Nothard and Low Fruit and Preserving Co., Ltd., had for some time traded in fresh fruit in Great Britain and other parts of the world in competition with each other. In the year 1920 they were minded

to form a new company, "being desirous of promoting and protecting their trade and of facilitating and economising the working of such trade." These words are taken from the preamble of an agreement of date July 14 of that year, and the preamble states, and states accurately, that they, the two companies mentioned, "have been instrumental in forming a new company of which they are the sole shareholders." The new company was in short a combine and will be so called in this judgment. Certain business, however, and this is a matter which has caused some confusion, was, so to speak, reserved for the Preserving company. For the purposes of this case the trade in apples purchased in Nova Scotia was trade reserved for Nothard, Lowe & Co., that is to say, for the Preserving company. Other trade, including the large American trade, was to be the business of the combine. In the practical working out of this scheme, it was expedient and advantageous that various other things should be done. In the first place, the combine should be really a combine in the sense of belonging to the same body of shareholders as those of the former companies. This was accomplished. Next, the interests of the two companies in the combine were practically halved. Thirdly, the purchases coming, say, from the other side of the Atlantic should be slumped so far as carriage was concerned, and from the first this also was done, the goods from Nova Scotia and those from other parts being shipped in the same vessels and dealt with on arrival under the same agency. Fourthly, as to management, the directors appointed were: two from the Wills company, namely, Messrs. Walker and Braund, and two from the Preserving company, namely, Messrs. Maurice Lowe and George Lowe. As will be afterwards seen, Mr. Maurice Lowe and Mr. George Lowe were directors, the former being the chairman of the Preserving company, and Mr. Maurice Lowe became also chairman and George Lowe a director of the combine. Fifthly, when the apples arrived in this country they were, according to the practice of the trade, sold through brokers. Lastly, according to the ordinary practice of this trade, advances were made by brokers on the security of the goods to be sold and accounts were sent forward. The new company or combine occupied the same offices as the Preserving company, Mr. Maurice Lowe being, as already stated, chairman of both companies and Mr. George Lowe a director. When the accounts arrived it was the duty of Mr. Maurice Lowe and his brother to segregate the business done and the receipts therefor according to the rights of the respective companies. With all that the brokers had no concern. I have no doubt whatsoever that in this distribution of the payments transmitted to London the respondent company of the combine treated, and were justified in treating, the Preserving company as its agent, not only for the receipt of the advances of their brokers, but for the distribution as against the appropriate cargoes of the moneys received from those brokers for the respective cargoes. It is not unnatural that the letters should pass to and from the same office sometimes in the name of the one company and sometimes in the name of the other.

The defence and counterclaim by the respondents, however, set up the case that there was no such agency for the combine and they contend that the appellant brokers, who unquestionably made the advances as against the total cargoes as already described, shall strike such advances out as against the combine and shall account to the combine for the proceeds of the apples realised in this country belonging to it and make payments therefor. The result would be, of course, that so far as the appellants, the brokers, were concerned, they would be in a position of making double payment in respect of the same goods. And so far as the combine is concerned, the result would be still more startling. It did not act as its own brokers, it required brokers not only to obtain delivery and realise the goods, but to make the advances necessary to release them. All this was done, and the combine now claims that it shall be credited with the goods and not debited with the advances made against them without which they would not have been delivered. In my opinion, this demand of the combine is a mere juggle

to defeat the plain equities of the case, and WRIGHT, J., properly declined to sanction it. A

The Preserving company, being in embarrassed circumstances, has for some time past been putting the advances from the plaintiffs, unknown to them, to their own, the Nothard-Lowe account and not passing the payments, so it is alleged, into the combine, or Nothard, Lowe, and Wills's account. In the view which I take of the case, it is accordingly most necessary to see what were the actual arrangements when the advances from the plaintiffs were got. I hold that the circumstances cannot be explained on any other footing than that these advances were made to both companies under the combined agency, that the responsibility for distribution inter se of the proceeds of cargoes lay with Nothard, Lowe, & Co., and, particularly, with Maurice Lowe, the director of both companies, who, so far as the combine was concerned, was the agent for receipt and distribution as already mentioned. So far as the outside markets were concerned, this is how their advertisements represented them: B C

> "Nothard and Lowe and Nothard, Lowe, and Wills, Ltd., Cotton's Wharf, Tooley Street, S.E.1; green fruit importers. We specialise in apples from all parts of the world, especially from Nova Scotia, and then from various other parts, namely, Ontario, British Columbia, &c." D

It is clear that a combination in the closest sense is thus intimated to traders. The evidence and correspondence are voluminous, but after hearing the full argument I am of opinion that the judgment reached by WRIGHT, J., both upon the facts and the law of the case, is sound. I see no reason for doubting the evidence of Mr. Dart, the senior partner in the plaintiff firm; it was uncontradicted, neither of the Messrs. Lowe giving evidence in the case; and what was said by Mr. Dart is confirmed both by the correspondence and the acting of parties. There being a desire to transfer the brokerage business to the plaintiff firm, Mr. Dart in December, 1923, met Mr. Walker, one of the directors who had formerly been a director of the Wills company, and, as Mr. Walker himself states in his evidence: "I told him (Mr. Dart) Mr. Maurice Lowe was looking after the selling end of the business." Without any doubt Mr. Maurice Lowe was doing, and continued to do, this. Mr. Dart's account of the interview is, that he, Walker, said: "You do not sell any of our apples and Maurice Lowe has the control of our apples and I will talk to him." It does not appear to me to be reasonable to say that Mr. Maurice Lowe was represented to be acting merely for his own firm, of which Mr. Walker was not a partner. The view taken was that which was reasonable, namely, that Mr. Maurice Lowe was representing the new company and all the business done, whether by the old or the new. E F G

It may now be mentioned that this manner of trading with brokers and of pooling and adjustment of accounts was by no means new, but had continued for years. One of the agents of the combine concerned was the Manchester Fruit Brokers, Ltd., who, on Dec. 19, 1922, wrote to Nothard and Lowe, H

> "As we have only the one account in our ledger, namely, in the name of Nothard and Lowe, we shall feel much obliged if you will kindly endorse the bills of lading accordingly in order to regularise matters."

To this Messrs. Nothard and Lowe replied:

> "We are afraid we cannot do this as the bills of lading are made out to Nothard, Lowe, and Wills, Ltd., and if we were to endorse them as Nothard and Lowe we would not be able to take delivery of same. With reference to this, it will not matter in any way if you place it to Nothard and Lowe's account; we will adjust and place to the proper account when we receive same from you." I

Similarly, in October, 1923, Messrs. James Adams, Sons & Co., of Liverpool, wrote to Mr. Maurice Lowe:

A "As arranged, we send you herewith cheque for £5,000, and perhaps you will be good enough to let me know if it is your wish that we should keep all your consignments under one account. So far the account in our books appears as Nothard and Lowe, and it would perhaps be more convenient if we continued in this way."

B The answer to this on the following day was:

"Many thanks for yours enclosing £5,000 to hand, and I shall be glad if you will kindly keep this under one account, as it makes things easier and we can do the adjusting this end."

This was signed, "per pro Nothard and Lowe, B. Metcalfe for Maurice A. Lowe."
C It may be noticed that the one account which is here referred to is an account headed "Messrs. Nothard, Lowe, and Wills, Ltd."

These instances are only given to show the completeness of what may be called the combination of the new firm, and the duty which it, through its chairman, undertook of adjusting the accounts as between the new and the old firm. I decline to believe that this course of business, including the dealings with large
D quantities of goods and the receipt of large remittances from brokers, which remittances were adjusted by the new firm in accordance with the rights of each constituent part—that all this was not perfectly well known to all engaged in managing the affairs of the combined company, including its directors. The case, accordingly, is not one in which it can be alleged that there was any novelty in brokers making these advances upon the goods of both companies and dealing on
E joint account.

This being the ordinary course of business, the transactions with which the present case has to do may be said to have begun by the following letter, written by Mr. Dart to Mr. Maurice Lowe:

"I understand that you wish my firm to advance to Messrs. Nothard and
F Lowe £10,000 now and another £5,000 on Aug. 25, and a final £5,000 some time in September, making a total of £20,000, and that you would give us the deeds of your packing house as security, which are worth some £13,000. Presumably, these documents you will have recorded at the Registry of Deeds in the usual way. You will guarantee a minimum of 15,000 barrels of Nova Scotian apples. Besides your Nova Scotian fruit, we will receive free of
G advance all the goods consigned to Messrs. Nothard, Lowe, and Wills at Liverpool, and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the case belonged to your firm or to Messrs. Nothard, Lowe, and Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe, and Wills would have to be subscribed to by them."

H On the 17th, Mr. Maurice Lowe replied:

"We agree that we will give you all goods consigned to the firm of Nothard, Lowe, and Wills, Ltd., at Liverpool. . . . You could keep back 70 per cent. of the goods whether they belonged to our firm or to Nothard, Lowe, and Wills, Ltd."

I And on July 22 Messrs. Nothard, Lowe, and Wills wrote by their secretary to the appellants as follows:

"We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made by Messrs. Nothard and Lowe in the same proportion and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard and Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to."

It seems to me that the three things, the pooling of the cargoes, the making of advances by the plaintiffs in respect of the cargoes so pooled, and the doing so on one account, are proved to have been matters of agreement as to the manner in which this business should be conducted. Had the appellants not conformed to that agreement and had they declined to make the advances, a question might have arisen as to the respective powers of those signing these letters for the respective companies, and the companies might have declined to have been bound. But once the advances were made, all such defects of authorisation appear to me to have been cleared away; the assumedly inchoate arrangements became an agreement which was complete. The principle of such completion is the familiar one both in England and Scotland, as approved and explained by LORD SELBORNE in *Maddison* v. *Alderson* (3). I shall show in a few moments that the large sums mentioned in these letters, amounting in all to £20,000, were actually advanced. The payments were accepted and goods were realised on one account and the entire transactions were carried out on this one joint account. To these circumstances it appear to me that the judgment of the Lord Chancellor in *Cairncross* v. *Lorimer* (4) is applicable (3 Macq. at p. 829):

> "The doctrine will apply which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

A difficulty in deciding this case upon this ground is said to arise in consequence of the fact that subsequent to the letters above quoted a written agreement was entered into of date July 22, 1924. That was an agreement between Nothard and Lowe Preserving Co. and the two Messrs. Lowe and Prescott, the secretary, as so-called guarantors, these on the one part and the appellants, the brokers, on the other part. It confirms the arrangement in the letters, adds to it the guarantee, and undertakes to consign not less than 50,000 barrels of Nova Scotian apples, making provision for the retention, after advance of £10,000, of the 70 per cent. of the net proceeds that would arise from the sale of those apples. It does not specifically mention the 120,000 tons of apples consigned to Liverpool to the combined company of Nothard, Lowe, and Wills, Ltd., but cl. 6 of the agreement is in these terms:

> "For the consideration aforesaid, the company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances 70 per cent. of the net proceeds of the sale of goods sold on behalf of, or as agents for, Nothard, Lowe, and Wills, Ltd."

There is, however, no separate agreement between this combined company and the appellants, as brokers. Had there been, the question would have been at an end; but cl. 6 seems undoubtedly not to go one step further than the arrangement embodied in the letters, because these letters covered goods from the combine and, in point of fact, the apples to be dealt with by the brokers included, along with the 50,000, 120,000 tons belonging to the combine. The reference in cl. 6 of Nothard and Lowe's agreement is a reference to an actual fact, an arrangement made, and it was upon the footing of that arrangement, which included the combine and its apples, that the advances were made. I should incline to the opinion that the letters in themselves form a complete and effective contract. Personally, I do not think it required to be followed by a formal agreement. I think it was in re mercatoria operative and effective. But for the reason about

A to be stated, I think this question, in the circumstances of this case, need not be so viewed in the abstract, for the actings of all parties—the combine and the Preserving company and the brokers—proceeded from day to day and from consignment to consignment upon the important footing that, on the one hand, large advances were made in cash and, on the other, they were so made as against goods pooled in the manner described. I can hardly bring myself to believe that B the law can sanction resiling from a contract so acted upon, to the brokers' great loss. It is an admitted fact that there is no element of fraud in the case; the advances were honestly made, and, in my opinion, the demand of the combine, which embraces a claim for payment again to them of the price of all their goods so realised, cannot be justified in law. The testing point of fact is that, upon the realisation of the apples received, the appellants, as brokers, having previously C made advances, were to retain 70 per cent. of the price and remit 30 per cent. to the companies. Was the allocation of that 30 per cent. and 70 per cent. respectively made? The answer is that it was made in repeated transactions following, say, in the months of August, September, and October, 1924, and the further answer is that it was made to the knowledge of all parties. To give one instance from the accounts: On Sept. 5, apples ex the *Celtic* and the *Cythia*, amounting in net value D to two sums of £429 and £423, in all £852, were sold. How was this sum disposed of? In point of fact, these two sums appear on the credit side of the account in order, but upon Sept. 6 not £825 but £255, being 30 per cent. thereof, are debited to the respondents. That is to say, on the very face of the accounts it appears clear that 70 per cent. has been retained and 30 per cent. paid, all as per the E arrangement in the letters described. Other instances might be given appearing from the accounts, and it is beyond all question clear that the brokers were carrying out, on their part, the three things which they had to do, namely, make advances, realise the goods, and remit 30 per cent. thereof to the vendors. This is admitted to be in no way an unusual transaction, and large masses of business appeared to be carried out on the same footing. It may be said, however, that F this was done behind the backs and without the assent of the combine. The fact is the other way, the entries showing the distribution of the realisations in 30 and 70 per cent. appear from Messrs. Houghton's, the appellants', account in the respondents', the combine's, own ledger. That is to say, that the combine stands committed in its own books to the 30 plus 70 per cent. arrangement. When it is noted that the demand of the combine now is that, notwithstanding this, they G shall now demand that 70 per cent. and refuse to give credit for the advances which the brokers were making, it will be seen how important in mercantile circles the case comes to be.

As to the advances themselves, the first £10,000 was, in fact, advanced by the plaintiffs on July 28. The cheque was made payable to Nothard and Lowe, but the receipt was in the following terms:

H "Messrs. Nothard and Lowe received from Messrs. J. Houghton & Co. cheque value £10,000, ten thousand pounds. Received with thanks. £10,000. 30th July 1924.—Nothard, Lowe and Wills, Ltd.—George H. Key."

This was the very first of the advances made which are now challenged as having been paid under an agreement with which the combine had nothing to do. I do I not think it is open for the combine, whose receipt has just been quoted, to deny the receipt of that money either for itself or as a payment made into the joint account.

Turning again to the combine's own books and to the account appearing in their own ledger, the first item of the allocation into 30 per cent. and 70 per cent. appears therein as on Aug. 22 and 25, 1924. Such a transaction was not repudiated; their accounts show that it was accepted, and a further instalment was advanced on the very next day, Aug. 26, £2,000. The advances of Sept. 5 and 6, giving the same allocation of 30 per cent. to the owner and 70 per cent. to the advancing

broker were preceded by one day by an advance of £3,000. At the end of September, on the 26th, similar transactions of considerable amount took place as to the allocation of the 30 and 70 per cent. and £5,000 was advanced on Oct. 7 following by the appellants. It appears to me impossible either in law or equity for the respondents to repudiate a transaction so followed up in important particulars from month to month. In my humble judgment, estoppel has been established, even on the assumption, which I myself could not make, that there was no concluded contract under the documents. It appears to me to be well established in this case that the combine is not entitled to put forward such a claim, having been committed to the course of dealing which I have described by illustrative instances. Of one thing there is no doubt—that, had it been indicated to the appellants that they were to make these advances without the security of the retention of the 70 per cent. of the proceeds of the cargoes, such advances would not have been made. The case has arisen solely because the combine and the companies constituting it have not sufficiently attended to the correct distribution of the moneys transmitted; the distribution inter se has been negligent. With such things, it does not appear to me that the appellants, the brokers, who acted and advanced their money honestly throughout, have anything to do. They can, in my view, have no bearing, as against an innocent third party, upon the plea of estoppel. After much consideration I am of opinion that the judgment of WRIGHT, J., should be restored, and that the appellants should succeed.

**LORD CARSON.**—I agree with the noble Lord on the Woolsack that this appeal fails. Looking at the contract of July 22, 1924, I think it is clear that the appellants were contracting with the Nothard and Lowe Fruit and Preserving Co., Ltd., alone and not with the respondent company, which in no way is made a party. It is formally executed on behalf of the Preserving company by Maurice Lowe and another director, and also by the secretary (Mr. Prescott) of the Preserving company, and, in addition, it is executed by Maurice Lowe, George Nothard Lowe, and the said Prescott as guarantors in their personal capacity up to the extent of £10,000. It is not suggested on the face of the contract, nor is it a fact, that the moneys to be advanced were in whole or in part for the benefit of the respondent company—on the contrary, the advance is truly stated to be made to the Preserving company. The agreement, it is to be observed, is strictly in accordance with the terms of the letter of July 16, 1924, written by Dart to Maurice Lowe (already quoted), and which upon the face of it states that the advance is to Nothard and Lowe, and that the goods which were to be received by them for sale on behalf of the respondents were to be free of advance. The question, therefore, of authority in Maurice Lowe to render the respondent company liable for the repayment of a loan made to another company does not, in my opinion, arise, as on the face of the documents it appears clear that he never purported to do any such thing, nor did the appellants even require that the respondent company should be made a party to the agreement. This is made still clearer by the terms of the letter referred to of July 16, 1924, in which Mr. Dart, as agent for the appellants, himself states: "I should presume the arrangement with respect to Messrs. Nothard, Lowe, and Wills would have to be subscribed by them." It is said, however, that the letter of July 22, 1924, purporting to be signed on behalf of the respondent company by the same Mr. Prescott as secretary, is binding upon the respondent company. I cannot find a particle of evidence that Mr. Prescott had any authority, actual or ostensible, to write such letter on behalf of the respondent company, or to create any such obligation as it purports to create, on the part of the respondent company; and I find it difficult to understand how the appellants could have been satisfied that Prescott had any such authority to enter into an agreement by which the proceeds of sale of the respondents' apples were to be made liable for a debt of another company and from which they derived no benefit. In addition, the appellants knew that Prescott was a director and secretary of the

Preserving company and was himself one of the guarantors of the advances proposed to be made to that company.

Finally the appellants raised, by an amendment of their original statement of claim, the question that the respondents were estopped from denying the agreement by reason of the method adopted for carrying on the business. The appellants mainly relied upon the fact that it appeared from the respondents' books that in case of apples, the subject-matter of the agreement, at first only 30 per cent. and ultimately no part of the proceeds were remitted to the respondent company, and this they alleged would be apparent at once to anyone looking at the books. Of course, if it was shown that the respondent company had notice of the course of dealings disclosed by the books there would be great force in their contention. But the only persons who had notice were the Lowes and the staff of the Preserving company by whom, under the arrangements entered into, the books were kept. It is, in my opinion, impossible to hold that the knowledge of the Lowes or of the Preserving company, who were the very persons who were obtaining a loan for themselves, which, as the Lowes knew, was not authorised by the defendant company was notice to the respondent company. Apart from such knowledge there is no evidence that the respondent company through their other directors had any notice whatever, and, in my opinion, this contention also fails. I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Gregory, Rowcliffe & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Kimber Bull, Howland, Clappé & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

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## GREAT WESTERN RAIL. CO. *v.* MOSTYN (OWNERS). THE MOSTYN

[House of Lords (Viscount Haldane, Viscount Dunedin, Lord Shaw, Lord Phillimore and Lord Blanesburgh), November 14, 15, 17, 18, December 19, 1927]

[Reported [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403; 92 J.P. 18; 44 T.L.R. 179; 72 Sol. Jo. 16; 26 L.G.R. 91; 17 Asp. M.L.C. 367]

*Dock—Damage to dock works by ships—No negligence by shipowner or his servants—Liability of shipowner—Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict., c.* 27), *s.* 74.

By the Harbours, Docks and Piers Clauses Act, 1847, s. 74: "The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done shall also be liable to make good the same. . . ." The respondents' vessel, in entering the appellants' docks, dragged her anchor which became engaged with an electrical cable laid at the bottom of the dock entrance, doing damage. There was no negligence on the part of the shipowners or those employed about the vessel.

**Held:** per Viscount Haldane, Lord Shaw, and Lord Blanesburgh (Viscount Dunedin and Lord Phillimore dissenting): liability of a ship-

owner under s. 47 was established on proof of damage done by the ship to a dock or works connected therewith and without proof of negligence or breach of duty, and, therefore, the respondents were liable for the damage done to the cables.

*River Wear Comrs.* v. *Adamson* (1), 2 App. Cas. 743, discussed and explained.

Decision of Court of Appeal, [1927] P. 25, reversed.

*Judgment—Judicial decision as authority—Binding on subsequent court—Ratio decidendi also binding.*

Per VISCOUNT DUNEDIN: When any tribunal is bound by the judgment of another court, either superior or co-ordinate, it is, of course, bound by the judgment itself and if from the opinions delivered it is clear—as is the case in most instances—as to what was the ratio decidendi which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.

*Judgment—Judicial decision as authority—Effect on subsequent court—Decision of House of Lords—Decision on fact—Decision on law.*

Per LORD SHAW: If the decision [in *River Wear Commissioners* v. *Adamson* (1)] rested on the special and peculiar circumstances of the case, it does not bind this House or any court by a general principle. But if it rested on a general doctrine it binds all courts and this House.

*Damages—Negligence—Damage not naturally to be expected.*

Per LORD PHILLIMORE: If there was negligence and that negligence caused damage, I doubt whether it would be a defence to say that the damage was not one naturally to be expected.

**Notes.** In *Workington Harbour & Dock Board* v. *S.S. Towerfield (Owners)*, [1950] 2 All E.R. 414, it was held that shipowners were liable under s. 74 notwithstanding contributory negligence by the harbour board.

Distinguished: *J. and J. Makin, Ltd.* v. *London and North Eastern Rail. Co.*, [1943] 1 All E.R. 645. Applied: *Workington Harbour and Dock Board* v. *Towerfield Steamship (Owners)*, [1950] 2 All E.R. 414. Referred to: *Dee Conservancy Board* v. *McConnell*, [1928] All E.R. Rep. 554; *The Millie*, [1940] P. 1; *Stonedale No. 1 (Owners)* v. *Manchester Ship Canal Co.*, [1955] 2 All E.R. 689.

As to liability for damage to docks see 30 HALSBURY'S LAWS (2nd Edn.) 985, 986; as to judicial decisions as authorities see ibid. (3rd Edn.) vol. 22, p. 796 et seq.; as to damages for negligence see ibid. (2nd Edn.) vol. 23, 722 et seq. For cases see 41 DIGEST 974, 975; 30 DIGEST (Repl.) 211 et seq.; 36 DIGEST (Repl.) 195 et seq., respectively.

Cases referred to:

(1) *River Wear Comrs.* v. *Adamson* (1876), 1 Q.B.D. 546; 46 L.J.Q.B. 83; 35 L.T. 118; 24 W.R. 872, C.A.; affirmed (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp. M.L.C. 521, H.L.; 36 Digest (Repl.) 166, *890*.

(2) *Dennis* v. *Tovell* (1872), L.R. 8 Q.B. 10; 42 L.J.M.C. 33; 27 L.T. 482; 37 J.P. 263; 21 W.R. 170; 2 Asp. M.L.C. 402, n.; 36 Digest (Repl.) 166, *888*.

(3) *Arrow Shipping Co., Ltd.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp. M.L.C. 513; 6. R. 258, H.L.; 41 Digest 822, *6807*.

(4) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

(5) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(6) *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 165, *880.*

(7) *The Merle* (1874), 31 L.T. 447; 2 Asp. M.L.C. 402; 36 Digest (Repl.) 166, *889.*

**Appeal** from the decision of the Court of Appeal (BANKS, ATKIN, and SARGANT, L.JJ.) reported [1927] P. 25.

The appellants, the Great Western Rail. Co., plaintiffs in the action and owners of the King's Dock, Swansea, sued the respondents, the owners of the steamship *Mostyn*, to recover an agreed sum of £226 4s. 6d. by way of damages for damage to electrical cables laid in the King's Dock entry, caused by the *Mostyn*. The facts appear in the opinion of LORD PHILLIMORE, post p. 129. The Court of Appeal (BANKES, ATKIN, and SARGANT, L.JJ.), affirming the decision of LORD MERRIVALE, P., held on the authority of *River Wear Comrs.* v. *Adamson* (1) that the appellants were not entitled to recover damages under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847. The appellants appealed.

*Raeburn, K.C.* and *Wilfrid Lewis* for the appellants.

*Langton, K.C.* and *Carpmael* for the respondents.

The House took time for consideration.

Dec. 19. The following opinions were read.

**VISCOUNT HALDANE.**—This was an action brought by the appellants against the respondents for damages for the negligence of the latter in so manœuvring the steamship *Mostyn* that, in navigating a concrete-laid channel of communication between the King's Dock at Swansea, belonging to the appellants, and the Prince of Wales' Dock, also belonging to them in common with the channel of communication, the *Mostyn* tore up and injured, to the extent of £226 4s. 6d., certain electric cables which crossed the bottom of the concrete-laid channel in a horizontal chase-way, open at the top. The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, which, it is said, does not require proof of negligence in order to render it applicable. The courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion, and I shall leave it to others of your Lordships to state the facts out of which this opinion has arisen. I wish, however, to guard myself from being supposed to concur unreservedly in the whole of the observations made by the President, LORD MERRIVALE, who tried the case, and also in all of the reasons given in the Court of Appeal, which affirmed his conclusion. In a case of this kind, tried after a prolonged interval and dealing with circumstances which have been difficult for the witnesses to observe accurately, it generally results that details of what has been said by witnesses are open to criticism. There has been a good deal of such criticism in the course of the argument for the appellants, and some of it was not without foundation. But reading the evidence as a whole, I have come to the clear conclusion that negligent navigation has not been established. In cases like this, judges and counsel alike are apt to fasten on details, rather than on the whole to which they belong. The details are sometimes of a kind on which it is not possible to form a reliable judgment. If they are not individually vital, the true method seems to me to be to study the evidence as a whole, and to recognise that its individual details cannot be exhaustively estimated. Reading the whole of the evidence in this macroscopic fashion is safer than the mere piecing together of microscopic estimates of particular incidents, which are misleading, apart from their context. The distinction between the two methods is to-day familiar in scientific investigation, which recognises that the macroscopic procedure is the only one which can afford a picture that is at all adequate of what has been

experienced. With this observation, I pass to the very serious question of law which is raised by the second branch of the appellants' argument, on the assumption that actual negligence has not been proved.

Section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, provides:

> "The owner of every vessel or float of timber shall be answerable to the undertakers [the persons authorised to construct the dock] for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or to the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same; Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

By s. 76 a remedy over is given to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge, or, if the owner has had to pay any penalty or costs, by reason of any act or omission of any other person, the person who actually did such damage or committed the offence is to indemnify the owner.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, s. 74 makes the owners answerable for the damage done in this case to the dock. I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. If the language of this section can legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the legislature. I do not know, and I feel myself precluded from even trying to inquire, or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision by this House which is binding on us that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends. In *River Wear Comrs.* v. *Adamson* (1) the question related to a vessel which had been driven on shore by a storm in endeavouring to make the port of Sunderland. The crew had been taken off with difficulty, and there was no control of the ship. Being a complete wreck she was driven by the winds and the waves against a pier belonging to the harbour, and damaged it. An action was brought by the commissioners against the owners, and damages had been awarded at the trial against them. It was held by the Court of Appeal that the

A action would not lie. Jessel, M.R., was of opinion that the general words of the section did not cover a case where the event causing damage occurred by the act of God or the Sovereign's enemies. It would have been equally difficult to hold that there was liability if the damage had been caused by the action of the undertakers themselves. The proviso exempting the owners of the vessel where there was compulsory pilotage showed that the words were not to be interpreted B without restriction. As the result he held that the words were to be construed by the analogy of the common-law principle that where a duty is imposed by a merely generally expressed rule, that rule is not to be interpreted as covering such causes as the act of God. Kelly, C.B., thought that the rule of construction was that no one can be made liable, excepting by express contract, for injury occasioned by the act of God, and that this rule applied to the general words of the Act of Parliament C before them. But he went further on this language itself, for the section goes on to refer to the master, a person having the charge of such vessel "afloat," and says that if he is negligent he shall "also" be liable. This, and the exemption in case of compulsory pilotage, seemed to Kelly, C.B., to show that the word "also" imported only the super-adding to the negligent act of the person in actual charge, a liability of the same kind imposed on the owner. Mellish, L.J., agreed. He D considered that the statute did mean to extend the liability of the owner beyond that at common law, because apart from such an intention it was difficult to see the object of the section. But he held that it contemplated only a case where the running against the pier was caused "through the act of man," and reading the language as a whole the lord justice said (1 Q.B.D. at p. 554)

E > "it looks as though the legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable."

F The court was, therefore, justified in construing the general words, in accordance with the general rule of construction excluding the act of God. Denman, J., agreed that the section exempted the act of God. The words were strong, but they did not, in his view, include a case where the liability was not caused by the owner or his servants, but by the Act of God. The words imposing liability on the person in charge confirmed this view, although there might be cases coming within them where the owner would be liable when no person was in charge, but G someone ought to have been. But here the act of God was the sole cause. Pollock, B., concurred, though he said that his reasons were not the same as those of the other members of the court. He did not know whether damage done by a float of timber arising from a cause not provided against by human providence would in itself be enough for exemption. He was not sure that this could be H said to be the act of God. But here the vessel was extraneous to the dock authority, and had become derelict. It was only by the force of the elements that she was driven against the pier, and that was not an event against which the statutes provided. On these somewhat varying grounds the Court of Appeal reversed the judgment and decided against the commissioners. It is important to know what was really laid down in this judgment, which was affirmed by the House I of Lords. I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned judges were at least agreed on this, that when the cause was not human agency but a vis major beyond human control, it did not come within the words.

In the case before us there was no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is, therefore, important to see whether the grounds of the decision in this House in *River Wear Comrs.* v. *Adamson* (1) laid down for us any different principle which was held to take the

case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion. Taking first LORD CAIRN'S view, I think that he held that it was to go too far to follow the Court of Appeal in saying that, where even a vis major had been the operative cause, the case was one which would have been outside the language used in the section. He found it, however (2 App. Cas. at p. 751),

> "difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts, the legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create a new right, and a new liability to damages unknown to the common law."

By common law the owner was not liable merely because he was the owner, unless it were shown that those navigating the ship were his servants. All the section does, according to LORD CAIRNS, is to take the owner and declare him to be the person who may be sued for the damage done. Under the subsequent words he may recover over against the master or crew for any act of omission. The clause was, therefore, in substance a clause of procedure only, dealing with the mode in which a right of action already existing is to be asserted, and does not create any new right of action for damages. Although he did not concur in the reasoning of the judges of the Court of Appeal, he, therefore, thought that their conclusion was right, and that the appeal should be dismissed. The massive legal intelligence, even of LORD CAIRNS, does not seem to me to have wholly disposed of the question before us. He was dealing with a case in which human agency had been superseded. Here we are dealing with one in which there was human agency, although there was no breach of duty. I think that he meant to go further, and to suggest that even if there was human agency there would be no liability created provided that there was no breach of duty at common law. But that question was not before him, and what he suggests was not necessary for the decision of the *Adamson Case* (1). It is, therefore, important to see whether his suggestion was concurred in by the other noble and learned Lords who took part in the decision. The very power of rhetoric which LORD CAIRNS commanded when stating his conclusions about matters of legal principle, makes it the more desirable to see that we are following the substance rather than the form of his propositions. Even if we accept his view that the section is one creating a new procedure, that of suing the owner while giving him a right to recover over, I am quite unable to see how this leaves the existing substantive law intact and relates to procedure alone. The owner could not be sued under that law unless he had violated some duty. If he can be sued at all, even with a right to recover over, it must be because some new substantive liability has been imposed on him by the statute. I think, therefore, that it follows that the common law has been altered, and that a new right of action has been created depending on the alteration. This is much more than mere procedure. Did his colleagues who heard the appeal with him accept his view as I interpret it ? I think they did not.

I have studied their opinions. LORD HATHERLEY and LORD GORDON seem to me to have been impressed, as I own that I myself have been impressed, by the difficulty of reading the words of the Act as not altering the common law by including at least the case of an owner who personally or through his servants was navigating the ship when the damage was caused. LORD HATHERLEY was a very careful judge. I think that his disposition here was to hold that the words of the Act were so free from ambiguity that they covered cases in which there was no human agency, though he did not say so in terms. He was content to express his general agreement with the view of MELLISH, L.J., that the statute only applied where human agency had intervened, and that it was because it was absent in the *Adamson Case* (1), that he concurred in the judgment of the Court of Appeal. I doubt whether LORD HATHERLEY himself was ready to accept even this restriction

of its scope, but he thought it at least a possible one, and if true it was enough to take the circumstances in the case before him, where there was no human agency, outside the language of the Act. That Lord Hatherley did not in terms dissent from the general result reached by the majority I cannot regard as an important circumstance in ascertaining his opinion. Lord Gordon expressly dissented. At the conclusion of an elaborate judgment he expressed the opinion that the statute ought not to be construed as if it contained any exemption from liability where it occurred even from the act of God. The words appeared to him to be express and unambiguous, and, being so, he thought that they ought to be read according to their ordinary construction.

There remain to be considered the opinions of Lord O'Hagan and Lord Blackburn, with a view to ascertaining whether these noble and learned Lords concurred in the view which had been expressed by Lord Cairns, L.C., that no new right of action at all was created, whether or not human agency was present. Upon scrutiny of the words used by Lord O'Hagan, I have come to the clear conclusion that he did not concur in the dictum of the Lord Chancellor, so far as it went beyond the facts of the case before him, that the statute created no new right of action, but was confined in its scope to procedure only. The language, Lord O'Hagan thought, was primâ facie sufficient to cover all cases, including those in which human agency came in. But he was of opinion that, reading the whole of the section, and particularly the reference to "such" vessel in the words declaring the liability of the master or person having charge of it, an intention was expressed to confine the liability of the owner to vessels "in charge of a master or someone else." On this point he expressed his concurrence with Mellish, L.J. The owner is, therefore, placed in a worse position than he would have been at common law, but not so bad as that in which he would have been had he been made liable when no one had charge on his behalf. The proviso as to the compulsory pilot seemed to Lord O'Hagan to confirm this conclusion. In his view the statute did, as Lord Cairns had said, simply introduce new procedure to the advantage of the dockowner, but it did not enlarge the liability beyond the limits he had indicated. On the question whether the act of God was excepted it was, therefore, unnecessary for himself to express an opinion, for it did not arise. In *Dennis* v. *Tovell* (2) the vessel was perhaps not derelict and the owner might properly be held liable.

In Lord Blackburn's opinion a statute was an instrument in writing, to be construed on the same principles as other such instruments. He thought that, on every construction of the statute which he had heard suggested, the legislature had intended to impose on the owner of the ship a liability occasioned by persons for whom he would not have been liable at common law. But he did not think that the legislature could have meant to shift the burden of a misfortune befalling the owner of the pier from its owner, who at common law would bear it, to the owner of a ship wholly free from blame and involved, without fault of his, in a common misfortune. Lord Blackburn was of opinion that the purpose of the legislature was to give the owners of the pier more protection than they had. With a view to this it had enacted that the remedy was to be that the owner, who was generally really liable (for the acts of his agents) though it was difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or of proving how the mischief happened, and that this is expressed by saying that the owner shall be "answerable for any damage done by the vessel, or by any person employed about the same" to the harbour. Lord Blackburn goes on (2 App. Cas. at p. 769):

> "As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occure so seldom, or when they occurred would probably be of such small amount, that the

shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune, befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words."

He comes to the conclusion that this was the scheme of the legislature ; the mischief being the expense of litigation ; the remedy that the owner should be liable without proof of how the accident occurred. He dissented from his own judgment in *Dennis* v. *Tovell* (2), but with great doubt and hesitation. He expressed himself as adverse to the view taken in the court below that where a statute is made which might have expressed, but has not expressed, an exception of the act of God, the courts should introduce it. He observed that MELLISH, L.J., and LORD CAIRNS had thought that the words might be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man ; damages for which someone is answerable at common law. But he could not see anything in the words to justify what was, in the opinion of some of the judges in the Court of Appeal and, he thought, of LORD O'HAGAN, that the language was confined to cases in which someone was in actual charge of the ship. Even if it were so, this would not, in his view, help the owner in the case before him, for he was in possession of the ship until it was driven on the bank, after which the tide floated it in. The owner was still owner when this ship struck the pier, and it was no mere "congeries of planks," nor was it, in his opinion, a derelict. He had great doubt and hesitation in affirming the judgment of the Court of Appeal, but he would not dissent from the proposal to do so. It was conceivable, as MELLISH, L.J., had thought, that the words referring to "damage done by the ship" might have the restricted sense of injuria cum damno. When the expressions used by LORD BLACKBURN are considered, I cannot find in them concurrence with the dictum of LORD CAIRNS that no new right of action was created, even where human agency came in, and that the wide words at the beginning of the section were intended to introduce nothing more than what LORD CAIRNS had spoken of as a new form of procedure, which would indeed assist the dockowner to pursue a new kind of remedy, but conferred on him no fresh substantive right.

On this point the opinions delivered appear to me to leave us under the duty of deciding, unfettered by authority, whether when the vessel which caused the damage was under the control of the owner's agents, he is liable notwithstanding that there was no breach of the duty not to be negligent on their and his part. I do not think that *River Wear Comrs.* v. *Adamson* (1) settles the point of non-liability where the vessel was in charge, at the time of the accident, of the owners' agents. It seems to me that the words of the statute are too clear to admit of this conclusion, and that the decision of this House in the earlier case is not in truth any authority for it. We do not know enough of the facts in *Dennis* v. *Tovell* (2) to enable us to say whether that case was one of a derelict or whether anyone remained in charge of the vessel. If there was no human agency, then what I have said does not apply in that case. I comment on the decision in *River Wear Comrs.* v. *Adamson* (1) on the assumption that, notwithstanding what was said by LORD BLACKBURN, there was no such human agency. For if there was, that, in my view, brings the case within the uncontrolled words, and would render it analogous to the present case. But on the facts set out in the report I think that the vessel must be taken to have become out of human control.

We appear to me to be bound by the authority of *River Wear Comrs.* v. *Adamson* (1) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is, for instance, derelict. When there are facts to which it applies it effects an alteration in the

common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law. If these things are true I think that on the facts established in the present case we must find the owners liable, reverse the judgments of the court below in their favour, and give judgment for the appellant railway company for damages, the agreed amount of which is £226 4s. 6d. The appellants are entitled to the general costs here and below, excepting the costs on the issue of negligence, on which they have failed. These costs they must pay to the respondents.

**VISCOUNT DUNEDIN.**—I have had the advantage of reading LORD PHILLIMORE'S judgment. He has dealt exhaustively with the question whether there was negligence on the part of those in command of the *Mostyn*, and has come to the conclusion there was none. I agree with his statement and his reasons.

I come to the point on the statute. The opinions of the noble Lords who decided *River Wear Comrs.* v. *Adamson* (1) have been analysed again and again. I do not propose to analyse them again, because I do not think I could add anything helpful to what has been said by LORD HERSCHELL, L.C., in *Arrow Shipping Co., Ltd.* v. *Tyne Improvement Comrs.*, *The Crystal* (3), and by the learned judges of the Court of Appeal in this case. At the same time, I do not agree with the method of treatment which those learned judges took in dealing with *River Wear Comrs.* v. *Adamson* (1). I think it quite necessary to say this because there is, in truth, no difference in the position of the Court of Appeal in this matter, and that of your Lordships in this House. *River Wear Comrs.* v. *Adamson* (1) is binding equally on both tribunals. Now, when any tribunal is bound by the judgment of another court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear—as is the case in most instances—as to what was the ratio decidendi which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it. That is what the Court of Appeal has done here. With great hesitation they have added the opinion of LORD HATHERLEY to that of LORD CAIRNS and then, with still greater difficulty, that of LORD BLACKBURN, and so have secured what they think was a majority in favour of LORD CAIRN'S very clear view. I do not think that the respect which they hold and have expressed for the judgments of your Lordships' House compelled them to go through this difficult and most unsatisfactory performance. As I have said, our own position is just the same as theirs, and I say unhesitatingly that I agree with LORD HERSCHELL that you cannot extract from the judgments in *River Wear Comrs.* v. *Adamson* (1) such a ratio decidendi as is binding. That, however, is far from wiping *River Wear Comrs.* v. *Adamson* (1) off the slate. It remains for two purposes. First, for the judgment itself, and, second, for the opinions of the noble Lords, which are entitled to the greatest respect. Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it was applied to the facts of *River Wear Comrs.* v. *Adamson* (1), lead to a different result. In other words, LORD GORDON'S view is not open to us. Then, LORD GORDON'S view being gone, there are, in my opinion, just three different rationes decidendi on which the result can rest.

There is, first, SIR GEORGE JESSEL'S view, namely that the words of s. 74, absolute in their terms, must be held as having added to them an exception in the case of an act of God, or, in other words, that the exception of an act of God to a duty or liability cast on a person by the common law is equally true of a duty or liability cast on him by an Act of Parliament. I think that that view was in terms disapproved by their Lordships in this House, and I entirely agree with them.

I had prepared my opinion so far, but I am bound to add a word or two in view of what is going to be said by my noble friend LORD BLANESBURGH. He has taken the view which, although *River Wear Comrs.* v. *Adamson* (1) has been again and again considered, I do not think has before been taken, that SIR GEORGE JESSEL'S opinion rests particularly on the pilotage exception. I am not at one with my noble and learned friend about that. I think SIR GEORGE JESSEL'S view was this. No doubt, he took the pilotage exception, but he took it in this way. He said in effect: "Here you must revert to the general doctrine of law that there is an exception to a duty at common law of the act of God, and if you do that you find the pilotage exception exactly fits." But I do not think it matters whether I am right about that or not because whatever SIR GEORGE JESSEL said there is no question that KELLY, C.B., and DENMAN, J., put the matter quite clearly that there was the same exception to an Act of Parliament as there is to a duty cast by common law, and that view was undoubtedly disapproved by this House. LORD CAIRNS, first of all, deals with it, and after taking the other view of what SIR GEORGE JESSEL had said, and then adding the view of the Chief Baron and DENMAN, J., he says (2 App. Cas. at p. 750):

> "In my opinion these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care, but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God."

LORD BLACKBURN is just as explicit (2 App. Cas. at p. 771), where he says, speaking of the old case of *Paradine* v. *Jane* (4):

> "The really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that in construing a statute where the legislature might have expressed, but did not express, such an exception, the court should introduce it."

With those opinions I humbly concur, and I have made this digression because I think it would be very unfortunate that there should be any doubt left that that doctrine has been contemned by the House. My noble friend also says that he would have been content to decide the case upon *Fletcher* v. *Rylands* (5) and *Nichols* v. *Marsland* (6). With great deference to him I think that analogy is quite a false one.

This leaves the other two views. (i) The view of LORD CAIRNS that damage in the section must be read as confined to actionable damage, and (ii) the view suggested by MELLISH, L.J., and favoured by some of the noble Lords that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute. It becomes necessary —for I can see no other alternative—to choose between these two views. On very anxious consideration of what is obviously a difficult and obscure question, I have

come to be of opinion that the view of LORD CAIRNS is the preferable view. I am moved by two considerations. First, I think it is easier to interpret a word used, i.e., damage, in a certain sense rather than to read into the section words which are not there, but which are to be gathered from a general view of the section as a whole. Second, I think that the compulsory pilot exception fits LORD CAIRN'S view better than it fits the other. It is obvious that the reflected light which this clause gives as to the interpretation of the preceding part in an Act of 1847 cannot be affected by a change of the law in the Act of 1913. Now, the position, of the clause to LORD CAIRNS'S view may be found in his own words (2 App. Cas. at p. 752):

> "This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable."

On the other view, the effect of the clause is very one-sided and illogical. The vessel is in fault or is not in fault while the pilot is in charge, then the owner is not liable. But the vessel is in charge of a person for whom the owner is not responsible, e.g., a repairer in dock, and the owner at once becomes responsible, fault or no fault.

In the result, therefore, though I must needs admit the matter is difficult when so many distinguished persons have differed, I end by agreeing with LORD CAIRNS that damage must be actionable damage, and that, therefore, in the present case the owner is not liable. It follows that the appeal should be dismissed. Although I am not in agreement with the majority of your Lordships, who prefer what I have called MELLISH, L.J.'s view, I am glad that there will at least be a clear rule for future cases, namely, that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute.

**LORD SHAW.**—My noble and learned friend on the Woolsack has in his judgment narrated the circumstances in which damage was done by the anchor of the steamship *Mostyn* to certain electrical cables lying in the bottom of a waterway or communication passage extending between the King's Dock and the Prince of Wales' Dock, Swansea. These works were part of the undertaking of the Swansea Harbour, vested by statute in the appellants. When the misadventure occurred, the vessel had been in no way abandoned: her officers and crew were all on board. This House agrees that the damage was done without negligence on the part of either owner or master or their representatives, in respect of which the common law would attach liability for damage. I entirely assent to that view of the facts. The appellants, however, raise the further question whether, notwithstanding negligence not being established, the shipowners are, under the provisions of s. 74 of the Harbour, Docks, and Piers Clauses Act, 1847, liable to them, the dockowners, for the damage done by the ship to the dock. That section is in the following terms:

> "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker

may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

While upon the construction of the words of the statute itself I feel free to confess that I would not personally have found difficulty, yet it has long been plain that most serious difficulty does arise in consequence of the judicial opinions expressed in the House of Lords in the *River Wear Comrs.* v. *Adamson* (1). The solution of that difficulty is of wide importance. Prior to that case, the section, when under consideration in courts of law, had been construed according to what was held to be the plain and comprehensive tenor of its language used in the Act, and the shipowner was made, according to that language and subject to the pilotage exception, answerable for all damage done by the vessel to the harbour or its connected works and that in any circumstances. A powerful Court of Queen's Bench, consisting of COCKBURN, C.J., BLACKBURN, J., and QUAIN, J., decided *Dennis* v. *Tovell* (2), and in delivering the leading judgment BLACKBURN, J., used these words:

"The legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril, and be answerable for any injury such animal may do. It enacts simply that the owner shall be liable for whatever damage the vessel may occasion. It appears to me that the legislature has clearly said so, whether it intended it or not."

This judgment was expressly followed in *The Merle* (7), decided in the Court of Admiralty in 1874 by SIR R. PHILLIMORE.

If this law was not completely overturned by the House of Lords in *River Wear Comrs.* v. *Adamson* (1), it must be conceded that it was severely shaken thereby. So long as that House of Lords judgment stands, the doctrine that the shipowners are liable to the dockowners for all damage to the works caused by the ship, in all circumstances and in whatsoever manner, can no longer be maintained. Nearly every judge who has spoken upon the subject, not only in *Adamson's Case* (1), but in the various cases thereafter in which *Adamson's Case* (1) has been referred to, has admitted that, while the restriction of liability enforced by this House has, of course, to be deferred to, yet the imposition of unrestricted and comprehensive liability appears, nevertheless, to be in entire accord with the plain and express words of the statute. This is not a remarkable, but it is a notable fact. There seems, indeed, no reason to doubt that the learned judges of the Court of Appeal in the present case would not have reached any restricted view of the statutory words had it not been for *River Wear Comrs.* v. *Adamson* (1). All the learned judges make that pretty plainly appear from the opinions which they have delivered. With regard to *River Wear Comrs.* v. *Adamson* (1) itself, they also indicate the great difficulty which they have either in reconciling that decision with the statute, or in understanding its scope, or discovering, if any, its ratio decidendi. In *Arrow Shipping Co., Ltd.* v. *Tyne Improvement Comrs., The Crystal* (3) this House, and especially LORD HERSCHELL, plainly found themselves in the same plight. It is the same plight also in which I find myself in this appeal.

The difficulty in regard to *River Wear Comrs.* v. *Adamson* (1) pointedly arises upon the words used by the noble and learned Lord then on the Woolsack, LORD CAIRNS. It is, nevertheless, our task to escape, if possible, from the "bewilderment" (to use a not inappropriate expression of SCRUTTON, L.J.) caused by the variety of opinions delivered in this House. My own humble efforts have resulted as follows. It is beyond all things important in considering the *Adamson Case* (1), to bear in mind its very special circumstances. These are concisely given in the Lord Chancellor's own words commencing his judgment (2 App. Cas. 749):

A "On the 17th Dec. 1872 the steamship *Natalian* was attempting, under stress of weather to enter the Sunderland Docks, belonging to the appellants; while it was still in the open sea, about forty or fifty yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time; and as the tide rose the flood and the storm drifted B the ship against the pier and caused damage."

As I read the argument for the shipowners, their main reliance was upon this fact—that the ship was no more than a helpless log; that all aboard her had been rescued by the rocket apparatus, and that she had been abandoned and was derelict. Sir John Holker, for the owners, put that in the forefront of his argument C (2 App. Cas. at p. 747). He says:

"There may be nothing unreasonable in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the legislature never could have intended to make him liable for damage occurring when the ship was no better than a helpless log upon the water, when the master and crew were with difficulty saved from death, and the owner had not any means D whatever of exercising any possible control over the vessel."

In the course of the appellant's argument, the Lord Chancellor, upon *Dennis* v. *Tovell* (2) being cited, interjected the observation: "The facts there were not the same." It is to be observed accordingly that the one point which was before this House on that occasion was whether such an extremely special case, namely, E that of a completely derelict ship, was within the words of the statute. That is to say, whether the owners could have a liability imposed upon them in the case of a ship abandoned, and beyond all human control, and left to the mercy of the elements. It would be unnecessary to dwell upon this but for the fact that a careful scrutiny of the judgments delivered seems, to my mind, to point conclusively to this, that every one of the judges overcomes the misgivings with F which manifestly he viewed a pretty apparent infraction of the comprehensive application of the statute by the explanation of this singularity of fact and his conception as to the element of hardship which thus entered the case.

The two main elements of fact were simply: (i) a derelict ship, all means or chance of possible control over which by human agency had disappeared; (ii) damage to a pier by a ship in that state. It was to a case resting on those G special facts that the decision of *River Wear Comrs.* v. *Adamson* (1) applied. So far as the judgment of the Lord Chancellor was concerned, it is clear that the grounds taken by the learned judges of the Court of Appeal were grounds in which he did not concur. "I do not concur," said he, "in the reasoning of the learned judges of the Court of Appeal." The noble Lord reached the conclusion which they had reached on a different ground—a ground which has given H rise to much disturbance of the legal mind for two generations. It may be noted in passing that while the noble Lord stated that if a duty was cast upon an individual by common law, the act of God would excuse him from its performance, yet it was a different case where a man, by contract, accepted the liability, and he further put a statutory liability on precisely the same ground as that of contract, saying (2 App. Cas. at p. 750):

I "There is nothing impossible in that which, on such a hypothesis he has contracted to do, or which he is, by the statute, ordered to do, namely, to be liable for the damages."

Having thus sheared away all reasons for questioning the competency of the statute—to impose effectively a comprehensive liability, his Lordship then states the common law obligation resting upon negligence, by which common law obligation owners of vessels and those representing them, were bound, and he then adds the crucial words (2 App. Cas. at p. 751):

"In my opinion, it was to meet this state of the law that this section (s. 74) was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God."

Later he adds:

"The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before."

I am of opinion that the question is whether the decision of this House rested upon the special and peculiar circumstances of the case or whether it rested upon a general doctrine of which the first of those sentences is the expression. If the former, the case does not bind this House, or any court, by a general principle; if the latter it binds all courts and this House, the statute must be read in accordance with the doctrine so announced, and that doctrine is part of the law of the land until the legislature be moved to interfere.

The situation accordingly is: Shipowners, as such, are by statute liable to dock-owners for "any damage done by such a vessel . . . to the harbour, dock, or pier." Whereas by the doctrine of EARL CAIRNS in *River Wear Comrs.* v. *Adamson* (1) they are not so liable unless the damage was occasioned by negligence. The statute, in short, does not increase the common-law liability. As I view the case, the doctrine so expressed, constituting this important exception from express statutory liability, neither was necessary for, nor did it truly underlie, the decision in *River Wear Comrs.* v. *Adamson* (1). It is a doctrine, I may be allowed to say, very different from that which as lawyers we have been brought up to believe, holding as we do with BLACKSTONE I, 89, "where the common law and a statute differ, the common law gives place to the statute." It is, accordingly most necessary to consider whether the doctrine so expressed by the Lord Chancellor as to this statute received the assent of this House at large. I am of opinion that it did not.

Before I consider the utterances of the other noble Lords, I may observe that the judgment of MELLISH, L.J., in the Court of Appeal, which was received with great deference by other noble Lords who addressed the House, itself contained a very striking repudiation of any such doctrine. Said MELLISH, L.J. (1 Q.B.D. at p. 553):

"I think, looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law; because, if that is not the intention, it is not easy to see the object of the section at all."

I do not find in any of the judgments in the House of Lords a repudiation of that view, and yet it is an undoubted repudiation of the view of LORD CAIRNS, L.C. I proceed to the judgment of LORD HATHERLEY. He says (2 App. Cas. at p. 752):

"I cannot concur in the views expressed in the Court of Appeal by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in law courts the act of God, namely a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however misconstrued, from the consequences of that mischief."

That appears to me to be a complete contradiction of the view of LORD CAIRNS, and a denial of the doctrine laid down by him. "The act of God would excuse the owner under the section," says LORD CAIRNS. "The act of God would not

A excuse him," says Lord Hatherley. Lord Hatherley goes further into a separate point in the case, namely, whether there is excuse even in the special circumstances of the vessel having been derelict or abandoned, and he appears to incline to the view that the owners were liable even in the special circumstances of a derelict ship. That, however, is apart from the general doctrine of Lord Cairns to which I have alluded. Lord Hatherley's judgment, along with the judgment of Mellish,
B L.J., to which I have alluded, appears to be, in substance, in direct conflict with the doctrine now being investigated.

Lord O'Hagan bases his judgment entirely upon the peculiar circumstances. He says (2 App. Cas. at p. 758):

> "It does seem hard that the respondent, having had his ship so injured by
C the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against the pier, should not only have lost its value, £10,000, save in so far as it was insured, but, in addition, nearly £3,000 for mischief done admittedly without fault of his and by the act of God. We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to
D Parliament the intention of injustice so very flagrant, without coercive necessity. I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us."

One would have great difficulty as to Lord O'Hagan's judgment, but that it is an
E affirmation of the general doctrine laid down by Lord Cairns, L.C. can hardly be suggested in view of his own words, where he recurs to the general point in this way (ibid at p. 761):

> "You may have noted that my reasoning has not been precisely that of the Court of Appeal, and that I have not based it altogether upon the legal doctrine as to the act of God. The only case cited as touching the present one (*Dennis*
F v. *Tovell* (2)) has no application to it."

The House will be pleased to know the reason why. The reason is this:

> "There the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Pollock, B., 'out on the high seas she met with certain risks and injuries which compelled her crew
G to leave her, and she became derelict.' And, in my judgment, this ship should be dealt with as if it had been abandoned at the Antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at Sunderland."

Lord O'Hagan's affirmation gives no ground for assertion that he attached the weight of his authority to the general doctrine under discussion of the liability
H of owners only in case of negligence. It only established and it does establish that, in his judgment, the owners of the *Natalian* were not liable in the circumstances because she was a derelict ship.

In the result, at the point we have reached, I hold that the general doctrine has not only not been adopted by the two learned Lords last referred to, but has been in substance either dis-affirmed, or shown to be in no way the ground of the
I judgment to which they themselves ultimately inclined. The opinion of Lord Blackburn contains much valuable matter, as one would have expected, but it is extremely difficult to extract from it any affirmation of what I might call the Cairns doctrine. It does contain a complete disclaimer of the idea that the statute was not to add, as Lord Cairns's words seem to imply, anything to common law liability. Lord Blackburn (2 App. Cas. at p. 768), said:

> "Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the

object of the legislature was to give the owners of harbours, docks, and piers more protection than they had." A

The remedy, his Lordship added, against the trouble of fixing particular persons with liability was:

"that the owner who was generally really liable (although it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel, or by any person employed about the same,' to the harbour." B

I cannot read that as in any sense confirming the view that this statute was to be interpreted upon the footing that the shipowners escaped all liability except liability that grounded upon negligence. On the contrary, it seems to me to affirm the proposition that a further and separate liability was imposed by statute, and that it was imposed on the owners quâ owners. To use the language of a Roman lawyer, the liability imposed is not a liability ex delicto, nor is it a liability quasi ex delicto; but it is expressly a liability ex dominio. It is laid upon the owner as owner, and it humbly appears to me that this view is in entire accord with the dicta just cited from Lord Blackburn, and it is in entire dis-accord with the idea that he concurred in the general doctrine which Lord Cairns had laid down. I am further of the opinion that Lord Blackburn misconstrued the true import of the judgment of Mellish, L.J., a topic upon which I understand my noble and learned friend who is to follow me will deliver a fuller opinion. The final opinion in *River Wear Comrs.* v. *Adamson* (1) was delivered by Lord Gordon. That learned Lord, after a full survey of the legislative circumstances preceding the Act of 1847, and of that statute itself, dissents from the judgment of the House. C D E

In the result, I am humbly of opinion that the liability of owners for damages done by their vessels to piers and harbours was not limited to damages caused by negligence, and that the dictum of Lord Cairns to that effect was not a part either of the text or of the ratio of the judgment of this House. I do not conceal from your Lordships that I have seldom known a case which has produced so much judicial uneasiness. The most able judgments of the Court of Appeal in this case disclose that. All of these judgments are valuable, and I am not sure that the analysis made by Atkin, L.J., differs very much from the results which I have independently come to. I think the Court of Appeal, however, erred in treating the dictum of one judge of the greatest eminence as the judgment of this House, and, therefore, as necessarily having an effect so general as to include the present case. It may be asked,—if the general doctrine of non-liability except in cases of negligence, was not decided in *River Wear Comrs.* v. *Adamson* (1), what was decided? To that I reply that *River Wear Comrs.* v. *Adamson* (1) was a conspicuous instance of a derelict ship from which all human agency had been withdrawn, and it was on that footing, and upon that speciality, and to that extent alone, that the judgment in *River Wear Comrs.* v. *Adamson* (1) can be applied. I do not say whether or not that can be characterised as a ratio decidendi, and I desire to utter no disrespectful word on that subject, but I must in duty declare that this statute seems to me still to abide in its full and comprehensive application of liability to owners, but that the sole exception, plus the statutory exception of pilotage, is the derelict or abandoned ship case. Respect must be had alike (i) to the statute in its express and general effect and (ii) to the decision of this House of an implied and particular exception. Such an exception ought not to be extended or expanded. This House and courts of law should resist that. As to *River Wear Comrs.* v. *Adamson* (1), I would only add that if it were construed in the broad sense which with so much misgiving it appear to have been taken to mean, it would seem to me to form a curious intrusion of the judiciary into the province of the legislature, for I cannot doubt that it was the legislature, F G H I

and the legislature alone (the plain and clear words of the statute being before us) upon whom lay the duty of cutting into those words by an exception equivalent to a pro tanto but a large repeal. The case recalls much older times when the judiciary attempted that. It is recorded that

> "when counsel in a case in 1305 argued for a certain construction of the statute of the Westminster Second of 1285, he was cut short by the Chief Justice with the remark: 'Do not gloss the statute; we understand it better than you, for we made it'."

In these times apparently the statute is to be eviscerated not by conceptions of the judges who made the law, but by their conception of what was the true and correct line of policy which must be supposed to have impliedly conditioned the words of those who made the statute. I humbly think this to be both legally and constitutionally unsound, even though it be put forward under the guise of construction. Parliament can and does change its own mind, and it will not under the constitution allow that the judiciary should change its mind for it.

In my opinion, we best adhere to both legal and constitutional principle when we affirm the statute, and decline to accept—unless it be where there is the clearest judicial decision to that effect—a vital and fundamental alternative which should deeply cut into the comprehensive words plainly employed by the legislature. I agree with Viscount Haldane and in the motion which he is to propose to the House.

**LORD PHILLIMORE** (read by Viscount Dunedin).—About 10.30 p.m. on Oct. 26, 1923, the steamship *Mostyn* was inside the docks of Swansea, and about to proceed from the King's Dock to the Prince of Wales' Dock. She was light in water ballast with a high side out of the water, not assisted by a tug but with a dock pilot on board to help the captain, and with an anchor clear and ready to let go as required by one of the by-laws of the harbour. The wind was blowing a gale from about S.W. In these circumstances it was observed that a small steamship, which was preceding the *Mostyn*, had suddenly stopped, it is supposed because of some breakdown of her machinery. But at the trial nothing was proved with regard to the cause. The approach to the dock being thus blocked, the *Mostyn* put her engines astern to take off her way and dropped her anchor to assist in checking herself and to keep herself straight, as otherwise her quarter would have been caught by the wind, and she would have been brought diagonally athwart the entrance. It is not disputed that these were proper and necessary manœuvres. By them the ship was brought up, and then her engines were stopped. After a short while, the leading steamship was able to move on and out of the way, and the *Mostyn* proceeded to get her anchor in, and at the same time to steam ahead. She had not paid out much chain. The fifteen-fathom shackle had not reached the windlass. The depth of the water was 30ft., and there would be several feet from the hawse to the water's edge, so that there would not be much chain dragging on the ground. Now it happens that in these docks just in front of the communication passage leading from the King's Dock to the Prince of Wales' Dock, there is an electric cable belonging to the Postmaster-General lying along the bottom, which at that part is ordinary gravel or sand; and that in the communication passage some little way in where the bottom is cemented there is a bundle of about ten electric cables, which belong to the dock owners and carry light and power about the docks. They lie in a chase-way and are uncovered, but are not higher than the bottom of the dock. Shortly after the vessel moved and as the chain was still being got in, all the lights all over the dock went out, and the dockmaster in charge, realising that the anchor of the *Mostyn* must have fouled some of these cables, ordered her to go astern and let her anchor down. This she did and tied up against the quay wall in the King's Dock for the night. Next day the divers went down and found two out of the bundle of ten cables underneath the claws of the anchor not absolutely

broken, but pulled out of their place and so damaged that the electric current was cut off. They also noticed that a third cable had been drawn out of its place, though it was no longer under the anchor. Besides this they found a part of the Post Office cable which had been absolutely broken lying on top of the anchor near the shackle. The Postmaster-General made his own claim with regard to the damage done to his cable, as to which there are certain statutory provisions. The cost of repairing the dock cables came to £226 4s. 6d., and it is for this sum that the appellants, the Great Western Railway, as owners of the dock, brought the present suit.

The plaintiffs put their case on two grounds. First, they said that it was bad navigation and negligence on the part of those in charge of the *Mostyn*, to go ahead before they were certain that their anchor was clear of the ground and that it was this going ahead and the dragging of the anchor on the ground that caused the fouling of the dock cables. Secondly, they said that, whether it was negligence or not, they were entitled as dockowners, under the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, to have compensation for any damage done to their works by a vessel. The case was tried before the President, assisted by Trinity Masters. He came to the conclusion that there was no bad navigation, and that upon the authority of *River Wear Comrs.* v. *Adamson* (1) the statutory claim could not be maintained, and he, therefore, dismissed the action. The case came before the Court of Appeal, assisted by nautical advisers, and the result was the same on both points. The railway company have now appealed to your Lordships' House.

The President was advised by the Trinity Masters that those on board the *Mostyn* could not properly be found guilty of negligence, and he came to the same conclusion. But he appears to have been brought to this conclusion in some measure because he thought that the sequence of events was that the *Mostyn* caught the Post Office cable first, catching it apparently when she first let go her anchor, and that this encumbrance afterwards prevented her from getting her anchor off the ground before she began to move forward again and so weighed the anchor down that it made it catch the dock cables as she moved forward. This conclusion was attacked because it was founded, at any rate in part, on the view that the first officer had seen the Post Office cable foul of the anchor when the latter was being raised, while he never said this, nor indeed did he say that he sighted the anchor or anything fouling the anchor at all. He knew that there was something foul of the anchor, but he might very well infer this from the fact that it did not come up in the usual way, or that the chain continued to lead aft. It remains, therefore, a matter of uncertainty whether the Post Office cable was fouled in the first instance, as the vessel went in, or whether as counsel for the appellants contended, the *Mostyn* when going astern in obedience to the directions of the dockmaster and dragging some of the dock cables with her, then first came into contact with and broke the Post Office cable. It would seem to me that though the President's conclusion was partly founded upon a wrong premise, it is quite as likely to be right as the conclusions contended for by the appellants. For reasons, however, which I am about to give, it seems to me unnecessary to decide this point.

The President went on to accept the contention that it was primâ facie negligence to proceed with the anchor dragging on the bottom, or, in other words, to go ahead till they were certain that the anchor was either up to the hawse, or, at any rate, hanging in the water. But notwithstanding this he exonerated the *Mostyn* because he thought that but for the unexpected incubus the anchor would have been up, and that those in charge of the *Mostyn*, though in some respects negligent, were not responsible for a consequence of their negligence which they could not have foreseen. I am not quite sure whether this was the view accepted by Bankes and Atkin, L.JJ., in the Court of Appeal. It is one on which I should hesitate to put my judgment. If there was negligence and that negligence caused

damage, I doubt whether it would be a defence to say that the damage was not one naturally to be expected. I think the matter may be put on a broader ground which is that which was explicitly taken by Sargant, L.J., and, as I gather, by the nautical assessors in the Court of Appeal. In my view those in charge of the *Mostyn* did their best in difficult circumstances. This, I may add, is the opinion of the nautical assessors who have advised this House, and I, therefore, conclude that there was no negligence in the navigation of the *Mostyn*.

I have now to consider the claim of the railway company preferred by it as owner of the dock under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, and I have to construe that section in the light of the construction placed upon it by this House in the case which I have already quoted of *River Wear Comrs.* v. *Adamson* (1). The literal language of the section would lead me to accept the construction put upon the words by Lord Gordon, namely, that they make the owner of any ship which comes into collision with and does damage to the works of a dock responsible for such damage, whether the collision be a fault of himself or his servants or no—that, in fact, the shipowner is made an insurer. But the decision of this House, passed in conformity with the opinions of the majority of the noble Lords who sat, forbids me to give so wide an application to the section. At the opposite end of the line comes the suggestion that the section gives no rights to the dockowner other than those which he possesses at common law and only gives him a power to ensure that those rights shall be fruitful by enabling him to detain the ship till satisfaction is made. No doubt, this by itself would in the year 1847 have been a valuable privilege, because till the Admiralty Court Act, 1861, the Admiralty Court would have had no jurisdiction in such a matter, and, therefore, the ship could not have been arrested. Neither would the Act 9 & 10 Vict. c. 99, s. 41 [relating to wreck and salvage: repealed by Merchant Shipping Repeal Act, 1854] have helped, because that only gives the power of detention in the case of damage to ships buoys or beacons and applies only to foreign ships. It was not till 1854 that the Merchant Shipping Act of that year, by s. 27, gave the power which is now reproduced in the Merchant Shipping Act, 1894, s. 688, and even so, the power of detention is only in respect of foreign ships.

Valuable, however, as this privilege of detention was and still is, at any rate for England and Ireland, it is obvious that the section does more than give this privilege. It does confer rights and create liabilities not known to the common law, and this was clearly the view of the House in *River Wear Comrs.* v. *Adamson* (1). We must find some halfway position between these two extremes, and the question is where the line is to be drawn. When the *River Wear Case* (1) was before the Court of Appeal, the judges differed in the reasons which they gave for absolving the shipowners from liability. Pollock, B., decided the case upon a point of his own connected with the special circumstances of that accident. Sir George Jessel, M.R., Kelly, C.B., and Denman, J., thought that in every Act of Parliament imposing a duty or a liability, however general and absolute the language might be, it was always to be supposed that there was an exception for accidents occasioned by an act of God or of the King's enemies, and that the misfortune in that particular case could be said to have been due to an act of God. This untheological expression is well understood by lawyers, and I should not myself have said that in the *River Wear Case* (1) the misfortune was the result of an act of God in its accepted legal sense. It was merely an ordinary case of perils of the seas. But, however that may be, this House discarded this reasoning and refused to read into the statute this unexpressed exception. Kelly, C.B., and Denman, J., also relied upon the fact that at the moment when the vessel made its impact on the pier, there was no one on board, and, therefore, no one in charge of the vessel, and they thought that the reference in s. 74 to the liability of the master or person in charge implied that the owner of the abandoned vessel was not to be made liable for its drift. But neither did that view commend itself to your Lordships' House. Lord Blackburn pointed out that a

ship was not a derelict, and, if in any case a ship by the act of man is brought to such a position that in the ordinary course with tide or wind she will thereafter come into collision with a pier, the fact that she is then left by her master and crew, ought not in reason to affect the question of the owner's liability. There are two ways of reading the judgment of MELLISH, L.J. According to one view the liability would accrue whenever the accident was due to some act of man. According to the other it would only accrue when the accident was due to the negligent act of some man, it does not matter who. This latter is the view of his judgment taken by LORD BLACKBURN, though apparently not by LORD CAIRNS.

However this may be, it seems to me that the ratio decidendi in this House is to be found in the adoption of the latter view by LORD CAIRNS, L.C., by LORD BLACKBURN, and, in very hesitating terms, by LORD HATHERLEY, and not expressly dissented from by LORD O'HAGAN, that the shipowner is intended to be made liable in cases where the damage can be traced to the actionable negligence of some person, or, to put it in other words, to negligent human agency, the idea being that in this case the shipowner should be, as it were, the medium through which the dockowner recovers his damage, that he should directly compensate the dockowner and bear the loss if it is due to the negligence of himself or those for whom he is responsible, but get reimbursement from any ulterior person who is the real cause of the mischief. For instance, if ship A, by its bad navigation, forced ship B into collision with a pier, the owner of ship B would pay the pier-owner and look to recover over against the owner of ship A ; or if a shipowner has placed his ship in the hands of a ship-repairer, and the ship-repairer or his servants has done damage to a dock, the shipowner would have to pay the dockowner and seek his remedy against the ship-repairer, while at the same time the right of an employer to recover against his own negligent servants is affirmed. LORD CAIRNS calls the section a clause of procedure only, and says that it deals with the mode in which a right of action for damages already existing should be asserted and does not create a new right. This, speaking with all respect, is a juridicial idea of an unusual nature, because a right in A to recover from B is a different right from that of A to recover from C. But for the purpose of the statute, LORD CAIRNS treats the right as one in the abstract which exists in A and can be transferred from being one against B to being one against C. Actionable human agency is, therefore, according to these judgments, the test. This view receives confirmation, as he says, from the fact that an exception is made in the case of compulsory pilotage. I read LORD HERSCHELL, L.C.'s, judgment in *Arrow Shipping Co., Ltd.* v. *Tyne Improvement Comrs., The Crystal* (3) as putting this construction upon the judgment in the *River Wear Case* (1).

The contention of the railway company before your Lordships was that human agency of any kind, though innocent, made a shipowner liable, and if that were so, they would succeed in the present suit. But the result of my study has brought me to the conclusion that this is not what is intended by the judgment of the House in the *River Wear Case* (1). And as the proof given at the trial in the present case does not indicate that there was negligence on the part of anyone, I think the shipowners are entitled to succeed. If it had appeared that the leading steamship had been negligent, and that the ultimate misfortune was the consequence of that negligence, then I suppose the shipowners would have had to pay, and to look to recover over against the owners of the leading steamship.

**LORD BLANESBURGH.**—I accept with all your Lordships the view just expressed by LORD PHILLIMORE that the master and dock pilot of the *Mostyn* are to be absolved from any imputation of personal negligence in connection with the navigation of their vessel on this occasion. I reach that conclusion for the reasons given by my noble friend, and I proceed at once to the inquiry whether in view of that finding the statutory liability of the respondents as owners of the *Mostyn* is at an end or whether it still subsists.

A The hypotheses of fact upon which this inquiry must proceed are now made clear. It is convenient to collect them. They are first, that at the relevant time the Mostyn was not under compulsory pilotage, or, in other words, that the respondents are not entitled to rely on the pilotage exception in s. 74. Secondly, the damage done by the *Mostyn* to the appellants' harbour properly resulted from the voluntary act of her master and pilot. But, thirdly, it was not due to any B negligence on the part either of the respondents, the master or pilot, or of any persons on board of or connected with the vessel at the time. I have myself been helped by the statement, for it discloses, as in a flash, the correspondence between the facts of the present case and the words of the section in relation to a state of things to which the section has direct reference. The correspondence is striking, so striking, indeed, that one is tempted to affirm that had the present C dispute been the first to call for judicial determination, it would have seemed that this statutory liability of the respondents was too plain for argument.

The general intent of the section is now, I think, generally accepted. It has been judicially described in varying terms, but with no different result. I take as a specially apt description that of MELLISH, L.J., in *Adamson's Case* (1). He says (1 Q.B.D. at p. 553):

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> "I think, looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by the common law ; because, if that is not the intention, it is not easy to see the object of the section at all."

E That assertion begs no question as to the precise limits of the extension of liability effected by the section, but it does warn a court of construction against the danger of denying its plain meaning to any expression found there, merely in order to avoid the imposition of a liability upon owners of vessels which had not hitherto been part of the law of the land. Thus duly warned, I find on referring to the words of the section that the owner of every vessel is thereby made "answer- F able" to the undertakers "for any damage done by such vessel to the harbour or works connected therewith," and if there be any doubt as to the generality of that liability, in relation, at all events, to the presence or absence of negligence, with which alone the House is, in the present case, concerned, that doubt is, I suggest, resolved by the contrast to be found in the words which immediately follow "and the master or person having the charge of such vessel through whose wilful act or G negligence any such damage is done shall also be liable to make good the same." The meaning of these latter words is surely quite clear. It is that the master or person having charge of the vessel is by them only made liable if the damage done is attributable to his wilful act or negligence. That such is the case is the view, among others, of LORD CAIRNS, expressed in his judgment in *Adamson's Case* (1) (2 App. Cas. at p. 731), of LORD HATHERLEY (2 App. Cas. at p. 753), and of MELLISH, H L.J. (1 Q.B.D. at p. 553). I fortify myself by reference to these authorities only because of the somewhat different signification attributed to the words by SARGANT, L.J., here.

It is now possible to arrive at the full effect of the section so far as it applies to a case like the present. It is that the owner of a vessel as such without any I qualification in regard to the presence or imputation or otherwise of negligence on his part is made answerable for damage to harbour property done by his vessel: that the master or person having charge of the vessel is also fixed with liability to make good the same damage, but in his case only if the damage be due to his wilful act or negligence, and not otherwise. And I would here observe that this contrast in the nature of the liability which by the section is imposed upon the owner, on the one hand, and the master, using that term compendiously, on the other, is heightened by the terms of the pilotage exception to which some reference must now be made. That exception, it will be remembered, extends to the

"owners" only. It does not touch the "master" clearly, in my suggestion, because the liability of the owner under the section exists apart from any question of fault on his part, while in the case of the master his liability is conditioned on personal negligence not to be excused by the presence of any pilot on board. This leads me here to add one further statement as to the section, more general in its application. It is that this statutory liability is confined to two classes of persons and to them only. First, the owner ; second, the "master," with, in his case, the qualification just stated. There is nothing on the face of the section to indicate that the owner's liability is in any sense representative. It is, so far as the section is concerned, as final and as personal as is that of the master. The significance of this, together with the fact that his liability presupposes no fault on his part, will emerge later. By these statements progress is made in resolving the one further difficulty which, so far as the present case is concerned, seems to be presented by the wording of the section. That is as to the connotation of the word "damage" as there used. The word, I venture to think, is employed to denote physical or material damage or injury to the harbour or works. If there were any doubt as to its signification when used in relation to the owner, there can, I suggest, be none, when in reference to the same "damage" the master is required "to make it good." Not only by this indication is it shown that the word is being used in a material sense and not as a juridical term. Section 74 is one of a fasciculus of sections (69–76) grouped under the heading: "And with respect to the protection of the harbour dock and pier and the vessels therein from fire or other injury be it enacted as follows:" Just as that heading refers to "fire or other injury," so it will be found that the penal sections, 69–73, are all directed to the protection and safeguarding of the harbour and shipping against physical injury of one kind or another. Accordingly, I cannot myself doubt that this word "damage," where it occurs in s. 74 is used in that sense also. In the result I can see no escape from the conclusion that, on the plain words of the section, the liability of the respondents thereunder for the damage here sued for is in the circumstances now disclosed, clearly established.

At this point I would observe that in the case of liability imposed upon an "owner" by s. 56 of the Act in words not more express than the words of s. 74, where also an unqualified construction is not assisted by such a contrasted provision as is found in s. 74, a majority of this House in *Arrow Shipping Co., Ltd.* v. *Tyne Improvement Comrs., The Crystal* (3), held that an owner was thereby made liable without negligence on the part of himself or of his servants for damage for which, apart from such negligence, he was at common law under no liability at all. I use this case only to indicate that if your Lordships do finally attach liability to the respondents in the present case, you will to this extent merely be bringing s. 74 of this statute into line with s. 56, as already interpreted in this House.

But, while such a decision would involve no new principle and while it is necessary fully to appreciate, as applied to the facts of the present case, the unambiguous clarity of provisions which must be ignored if the respondents here are to escape liability, I necessarily recognise that the real difficulty which confronts the House now, is to keep within its proper limits, as applicable to the facts here, its own decision in *Adamson's Case* (1). For I agree of course at once, that by the ratio decidendi of that case—if it can be discovered—and by the decision itself—whether its ratio decidendi can be discovered or not—this House is as much bound as is at least every English court.

There is, however, one circumstance in *Adamson's Case* (1) not yet alluded to which may require this House in the present case to regard that decision from a very special point of view. Curiously enough—helpfully enough perhaps one ought to say—three of the noble lords out of the four who there decided that there was, under s. 74, no liability on the owner, concurred at the same time in the view that on the true construction of the section an owner, on the facts of the present case, would be and remain liable for the harbour damage. That conclusion is

A clearly implied in LORD HATHERLEY's speech in the two middle paragraphs, which I refrain from setting forth only in the interests of economy and space. It is expressly so stated by LORD O'HAGAN and by LORD BLACKBURN. LORD O'HAGAN says (2 App. Cas. at p. 760):

> "The legislature may have fairly said that greater protection was due to [the undertakers] than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly the legislature made the owner—a person easily and always to be found—'answerable' as owner, and dispensed with the proof of negligence or any other proof, save the fact of injury by the vessel—in all the cases contemplated by the Act."

C Among these cases, as LORD O'HAGAN had previously held, was the case where, as here, the vessel was in charge of a master at the time of the damage done. But LORD BLACKBURN is the most express of all. He says (2 App. Cas. at p. 768):

> "My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the legislature was to give the owners of harbours docks and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed ; and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it) should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

When you find that three out of four noble Lords who were at one in exempting from liability the owners in *Adamson's Case* (1), are there equally in agreement in the view that owners in the circumstances of this case would be liable, does it, for present purposes, matter what the ratio decidendi of all or any of them was ? I greatly doubt. In any case, at the least, these views so expressed strengthen the conclusion at which I would have arrived independently, that LORD CAIRNS alone in *Adamson's Case* (1) committed himself to what I may call the "procedure" view of the section, the only view of it adequate to protect the respondents here from liability. From which consideration this consequence also follows—that if this House, following LORD CAIRNS, are minded now affirmatively to treat this section as a section of procedure, thereby exonerating the respondents, it must be prepared also to dissent from the views of the section, as applied to such a case as the present, taken and expressed by a majority of the House in *Adamson's Case* (1) itself. For myself, for reasons already given, I am not prepared to do anything of the kind, and to avoid being under that necessity, I am encouraged to examine with a freedom which otherwise I would have regarded as presumptuous the view that s. 74 is a procedure section only.

An examination of LORD CAIRN's judgment shows that he was led to this conclusion in the expectation and belief that two main results were thereby attained. First the undertakers were relieved of the burden of finding, for the purposes of suit, the real wrongdoer. The owner in every case was the only necessary defendant, and that was a great concession to the undertakers. Secondly, the owner was not seriously embarrassed by the burden so placed upon him, because s. 76 gave him a right over against the actual wrongdoer, whoever he might be. If LORD CAIRNS had had the opportunity of weighing and considering some of the observations since made upon his judgment, he must, I think, have found that neither of

these expectations was realised by the effect he attributed to the section. He must, I think, have seen that so far as the undertakers were concerned the advantage presented to them was almost illusory, and he would have realised that, so far as the owner was concerned, to call the section merely a procedure section was to speak of peace when there was no peace. But, in my view, if I may respectively state it, the main objection to the procedure theory is that it is really denied to a court of construction by the very terms of the section itself.

I will deal with these points in their order. As to the first, ATKIN, L.J., has pointed out with striking force how negligence cannot be treated as a thing separate from the person alleged to be guilty of it. May I for myself add how difficult both for plaintiff and defendant and how unprecedented it would be to conduct and frame a suit in which negligence had to be proved against him, but to which the actual wrongdoer need be neither party nor privy. The section on this view of it, while it would apparently sanction a procedure altogether novel, would really be of no advantage to the undertakers. Now take the position of the owner. LORD CAIRN'S view was that the statute in every case gave him his right over against the wrongdoer, and this conclusion encouraged him to read the section as he did so far as it related to the owner. But here, if I may most respectfully say so, LORD CAIRNS overlooked the fact that, just as the section itself imposes its statutory liability only upon the owner, and, subject to conditions, upon the "master," so by s. 76 it is, as you would expect, only against the negligent "master" that the owner is given a right of recourse. If the negligence causing the damage was that of anyone else—the hirer, the ship repairer, anyone on board but not in charge—the section on this procedure view of it would leave the owner to bear the burden himself, a consequence not anticipated by LORD CAIRNS. Is there not to be found in this consideration the strongest argument of all against this procedure view of the section ? That section, as an enactment, imposes liability for the benefit of the undertakers on two classes exclusively, viz., owners and masters of vessels. Section 76 adjusts the incidence of that liability between these two, and it goes no further in the way of adjustment because there is no other liability to adjust. But lastly the procedure view of the section is, I very respectfully suggest, not open on the construction of the section itself. The procedure construction gives no weight to the distinction in this matter of negligence drawn by the section between the liability thereby imposed upon the owner and that imposed by the master. That construction requiring also, as it does, personal or imputed negligence on the part of the owner in every case gives the go-by to the limited terms of the pilotage exception already alluded to. Lastly, it does not inquire how the conception of unrestricted representative liability is, on construction, permissible, when by the section itself the statutory liability is confined to the owner and the master exclusively.

For all these reasons, treating this matter as one open to the House to determine, I express the view with the utmost reverence for any opinion of LORD CAIRNS that this procedure construction of the section is not admissible. But I may properly be asked whether in saying this I loyally recognise that the House is bound by its own order in *Adamson's Case* (1), and whether I have governed myself accordingly. I am glad to be bound by the decision in *River Wear Comrs.* v. *Adamson* (1). Had I then been a member of this House I would have agreed entirely with the view of the majority. Accepting, in the words of LORD CAIRNS, the position that the injury in that case was one that could not have been prevented by any human instrumentality, but that it was occasioned by a vis major, namely, by the act of God in the violence of the tempest, I should have reached the conclusion that the owners were free of liability on two separate grounds, each quite satisfactory to myself. The first would have been that the liability imposed by the section on the owner in relation to his ship was of the *Rylands* v. *Fletcher* (5) type and was subject, as that liability always is, to the reservation that the damage is not attributable to an act of God, being what LORD BLACKBURN in *Adamson's Case* (1)

called a common misfortune. Alternatively, I should have arrived at the same conclusion on the ground stated by SIR GEORGE JESSEL, M.R., to which, as I read his judgment, no answer has so far as I can find ever been given and which is to me quite satisfactory. SIR GEORGE JESSEL—I refer to him alone, and I except from the reference both KELLY, C.B., and DENMAN, J.—found the key to the section on this point, not, as has been so often supposed, but, as I venture to think, under a misapprehension of his meaning, in the words of the substantive enactment alone, but in these words, taken in connection with the pilotage exception. Here I entirely agree with VISCOUNT DUNEDIN, if I may respectfully say so, that this House in *Adamson's Case* (1) must be taken to have been of opinion that an exception of an act of God could not be read into the words of the enactment here standing alone. But SIR GEORGE JESSEL, unlike KELLY, C.B. and DENMAN, J., did not find the exception in these words alone ; he found it in them taken in connection with the pilotage exception. He pointed out that under that exception where a vessel in charge of a pilot was overwhelmed by tempest there would be no liability either on the owner, by reason of the exception, or on the pilot under the law. In that case, therefore, any damage done by the vessel to the harbour would have to be borne by the undertakers. Could it in these circumstances be supposed that the legislature had in the same event by the substantive words of the clause imposed a liability on the owner for the irrelevant reason that there was no pilot on board ? The same view might perhaps be expressed thus. As LORD BLACKBURN said in *Adamson's Case* (1), the exception of an act of God may be implied in the terms of an instrument imposing the liability ; it need not be expressed. Is not such an exception necessarily implied in this section by the presence there of the pilotage exception ? The legislature has exempted the owner from liability when his vessel at the time of doing the harbour damage is in the hands of a pilot to whose appointment he has had to submit by the constraint of temporal authority. Is it to be supposed that the legislature when giving this exemption was not proceeding upon the footing that under the section apart from the exception the owner was already immune in a case where the navigation of the ship had been taken out of the owner's control, not by a mere pilot imposed upon him by administrative constraint, but by an irresistible and unsearchable Providence nullifying all human effort ? The announcement by some of the noble Lords in *Adamson's Case* (1) to the effect that the Court of Appeal had been too ready to imply from a liability imposed by statute an exception in favour of an act of God, may preclude me from expressing, as now permissible, the first of the reasons above given. But I do not find that what SIR GEORGE JESSEL really, as I believe, said has ever been dealt with adversely by anyone in this House, and it seems to me that LORD BLACKBURN and LORD O'HAGAN were in no way opposed to his view, while MELLISH, L.J.'s, human agency limitation was merely a paraphrase of it stated as a result. I believe, therefore, that I am still entitled to hold and express it. But if I must, in view of the decision in *Adamson's Case* (1), cherish both of these grounds only for my own private and personal satisfaction, I have still remaining a sufficient justification for the opinion I hold that a decision in favour of the respondents here is quite consistent with the decision in *Adamson's Case* (1). I find that justification in the fact that it was the opinion also of three of the Lords who concurred in the decision in *River Wear Comrs.* v. *Adamson* (1), and I am not required to particularise the reasons they gave for that conclusion.

The result, in my view, is that the owner of a vessel has, under this section, been made answerable to the undertakers for the damage referred to in the section, with no obligation on the part of the undertakers to prove more against him than that the damage was done by his vessel and that he was her owner at the time. To such a claim when so far proved only two defences are open to the owner: (a) the pilotage exception ; (b) that the damage was in fact attributable to the agency of what, in the language of a simpler age, is known to the law as an act of God. The object of the section being to provide exceptional protection for the undertakers,

I do not myself think that the enactment on this view of it imposes on owners of vessels a burden that can fairly be regarded as oppressive. On the whole case I concur in the motion made by VISCOUNT HALDANE.

*Appeal allowed.*

Solicitors: *A. G. Hubbard ; Ingledew, Sons & Brown*, for *Ingledew, Sons & Crawford, Swansea.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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## BARKWELL *v.* BARKWELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), November 29, 30, December 20, 1927]

[Reported [1928] P. 91; 97 L.J.P. 53; 138 L.T. 526; 44 T.L.R. 207; 72 Sol. Jo. 69]

*Probate—Evidence—Declarations of testator—Execution of will—Contents of will.*

Declarations made by a testator after the execution of a will are inadmissible to prove due execution, but where a question of fact is in dispute, e.g., whether a will, presumed to have been destroyed animo revocandi, contained a revocation clause, statements by the testator as to the contents of the will, made after the execution of the will, are admissible under the common law as being the best evidence available for proof of that fact.

**Notes.** As to proof of execution of a will, see 16 HALSBURY'S LAWS (3rd Edn.) 188; and for cases see 23 DIGEST (Repl.) 98 et seq.

Cases referred to:

(1) *Woodward* v. *Goulstone* (1886), 11 App. Cas. 469; 56 L.J.P. 1; 55 L.T. 790; 51 J.P. 307; 35 W.R. 337, H.L.; 23 Digest (Repl.) 105, *1057.*

(2) *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 369, 372; 24 W.R. 478, 860, C.A.; 23 Digest (Repl.) 105, *1061.*

(3) *Newton* v. *Newton* (1861), 5 L.T. 218; 12 I.Ch.R. 118, 128; 44 Digest 353, *1850i.*

(4) *In the Goods of Hodgkinson*, [1893] P. 339; 62 L.J.P. 116; 69 L.T. 540; 9 T.L.R. 650; 37 Sol. Jo. 700, C.A.; 44 Digest 340, *1701.*

(5) *Brown* v. *Brown* (1858), 8 E. & B. 876; 27 L.J.Q.B. 173; 30 L.T.O.S. 273; 4 Jur. N.S. 163; 120 E.R. 327; 44 Digest 343, *1724.*

(6) *In the Goods of Brown* (1858), 1 Sw. & Tr. 32; 27 L.J.P. & M. 20; 30 L.T.O.S. 353; 4 Jur. N.S. 244; 164 E.R. 615; 44 Digest 356, *1875.*

**Probate Action.**

The plaintiff, as sole surviving executor, propounded a will, dated July 16, 1891, of the testator, Richard Herbert Barkwell, his brother, who died on Oct. 26, 1926, and claimed revocation of letters of administration which had been granted to the defendant on December 2, 1926. The defendant, the only son of the testator, in his defence denied that the will of July 16, 1891, was duly executed, and said that, if it were duly executed, it had been revoked by several later wills, the most recent of which had been duly executed by the testator in March, 1925. He further pleaded that all these later wills had been revoked by the testator and claimed an intestacy.

A The following statement of facts is taken from the judgment. The testator died at an advanced age, possessed of property estimated as of gross value of about £16,000. He was a man of eccentric habits, very pronounced views on many subjects, much addicted to what might be called testamentary exercises, and very apt to change his testamentary intentions on sudden provocation. In his later life he also showed himself apt in correspondence with his relations overseas to attract B them to him on a prospect of benefits to be secured to them by will. During the time under review, the testator's difficulties with his wife, and in recent years an unfavourable view he had taken of the defendant, were powerful incentives in his decisions about the disposal of his estate. The plaintiff sought to establish a will made in July, 1891, before the birth of the defendant, but in the midst of his father's disagreements with his mother. The plaintiff lived in Canada, and the will C was sent to him there. He was the survivor of the two executors named in the will. The plaintiff had brought in a will of 1888—apparently holograph. It commenced with a revocation clause, bestowed some exiguous gifts to the wife, and consisted mainly of dispositions in favour of the plaintiff and others of his family. The will propounded by the plaintiff also began with a revocation clause of like tenor with that of 1888. By written and oral evidence, it was established that, D in 1901, the testator declared that he had recently made a will leaving all he possessed to his son, the defendant. In 1902, his solicitor drafted a will to dispose of all the testator's property, which he suggested should take the place of an instrument the testator had apparently forwarded to him, and as to which the solicitor wrote: "The inconsistent statements and directions which you made in E your so-called will would only lead to the whole matter being thrown into Chancery for the protection of your trustee." Amongst the testator's papers there was found at his death the draft or copy of a purported will in his handwriting disposing of all his estate, bearing date August, 1908, and representing itself to have been signed by the testator and two witnesses. Nothing was known of this document, however, except what appeared on its face. In April, 1910, F the testator produced to Mr. Forbes a paper signed by himself, which he described as his will, and as to which he said he had thereby made Mr. Forbes his executor and left him one-fourth and his son the remaining three-fourths of his property. As described by Mr. Forbes, the paper appeared to be in the form of a will with the attestation clause in the usual position. In 1925, the testator identified as a will, in the making of which he was engaged, a writing on a will form recently G purchased at his direction, and, after he had completed the writing, he signed the document in the presence of two witnesses, Alfred Day and Emily Whilde, who duly attested his signature, and one of whom was called as a witness. On this instrument the questions between the parties mainly depended. After the death of the testator search was made and, no will being found, the defendant as next of kin made the necessary affidavit for obtaining letters of administration, and a H grant was thereupon made in the usual course. Shortly afterwards the plaintiff arrived in England and produced the will of 1891 for which he claimed probate.

*D. Cotes-Preedy*, *K.C.*, and *R. Bush-James* for the plaintiff.

*Sir Patrick Hastings*, *K.C.*, *R. F. Bayford*, *K.C.*, and *Walter Frampton* for the defendant.

I *Cur. adv. vult.*

Dec. 20.—**LORD MERRIVALE, P.,** read the following judgment: In this suit as to the estate of Richard Herbert Barkwell, deceased, legal questions of considerable importance were raised, and I thought it advisable to give considered reasons for the conclusions at which I have arrived. [HIS LORDSHIP stated the facts, and continued:] At the hearing proof was given of due execution of the will propounded by the plaintiff, and the substantial question in the case came to be whether it had been revoked. Counsel for the defendant submitted that, whatever

else was in doubt, there could be no doubt that the testator at all material times intended to revoke the will of 1891, and to leave it revoked. They also claimed to have proved the contents of a will of August, 1908, and the contents and execution of a will of 1910, each of them revocatory of every anterior will. They likewise contended that they had shown that, in the spring of 1925, the testator made a will which expressly revoked any earlier will. Finally, as no such will could be found at the testator's death, and as many letters he wrote in 1925 discussed his testamentary position on the footing that this will had been revoked, they submitted that intestacy was proved. On the plaintiff's behalf, two main contentions were made. It was argued that, on a correct view of the authorities, ex post facto declarations of the testator as to the various wills said to have been made by him after 1891 were inadmissible. It was also urged that, inasmuch as the alleged will of 1925 was asserted by the defendant's pleadings to be a revoked will, no secondary evidence of its contents could be admitted.

The question what declarations of a testator are admissible in evidence to establish testamentary dispositions, stands to-day where it was left by the statement of LORD HERSCHELL, L.C., in the House of Lords, in *Woodward* v. *Goulstone* (1) on consideration of the judgment of the Court of Appeal in relation to this matter in *Sugden* v. *Lord St. Leonards* (2), that is to say, it remains doubtful and difficult. As regards the admissibility of statements of a testator as to the contents of an intended will made before the execution of a will, *Sugden* v. *Lord St. Leonards* (2) confirmed numerous earlier decisions, and there is no uncertainty. The Court of Appeal in *Sugden* v. *Lord St. Leonards* (2) held that certain statements made by the testator in that case after the execution of a will were admissible, and, as matters stand—notwithstanding the doubts expressed in *Woodward* v. *Goulstone* (1)—the judgment in *Sugden* v. *Lord St. Leonards* (2) must be regarded as having declared the law so far as it has been authoritatively declared. As to the application of the rule which was considered in *Sugden* v. *Lord St. Leonards* (2), two well-known principles are always to be borne in mind. Inasmuch as the Wills Act, 1837, denies all effect to any will unless it shall be made in writing, and executed in the prescribed manner, that statute plainly ought not to be evaded by the admission of parol statements, made after the event, to make out execution. Under the common law, however, which since 1857 has governed proceedings in this jurisdiction, a fact which is in issue may, subject to the provisions of the Wills Act, 1837, be proved by any kind of lawful evidence, provided it be the best available. To exclude a subsequent statement of a testator as to the fact of execution of a will is one thing ; to exclude or to admit his statements as to the contents of a writing no longer in being is another. It may be that the observance of this distinction will some day help in the decision of the vexed question what statements of the testator can be given in proof.

In the present case, it is not pretended that there is legal proof of due execution of any will of the testator in 1901, 1902 or 1908. A negative finding on the allegations of the defence as to the wills suggested to have been made between 1891 and 1910 is not resisted. As to the paper produced to Mr. Forbes in 1910, there are reasons for believing it was a duly executed will. It bore the testator's signature. It had what appeared to be an attestation clause. It was described as his will by a man uncommonly versed in such matters. I think a verdict of a jury that it was duly executed might be sustained, but I do not make such a finding, because no signatures of witnesses were made out, and I am not convinced that they were there. The case depends then on the view to be taken of the alleged will of 1925. As to this instrument, there is the evidence of one of the witnesses of the fact of execution. There is a good deal of testimony as to statements of the testator before and during the preparation of the document and after the date when it was signed, concerning the contents or effect of what he called his will. Counsel for the plaintiff, however, contended that, apart from the question of admissibility raised in *Woodward* v. *Goulstone* (1), none of this

material is available by reason that the will, if it ever existed, is declared by the defendant to have been revoked in the lifetime of the testator.

To the proposition that a revoked will must be treated as non-existent, there are obvious limitations. No one would doubt, I suppose, that, after the death of the testator, a document executed by him as a will, but afterwards revoked, could be used to show his knowledge during life of matters of fact of which it contained evidence. Again, in a suit wherein due execution, validity, revocation and republication come in question as to one will, its origin and its contents might be among the main facts for the consideration of the court. Further, in the case of a testator who has made successive complementary dispositions by will or codicil and has revoked some of them by a will, subsequently itself revoked by cancellation, the ascertainment of the true effect of these several testamentary acts would be impossible if the rule were as contended, even though every material document were in being. Yet no rule of evidence under the common law, so far as I know, presents any such impediment to the administration of justice. What is said for the plaintiff is that the rule contended for has been established by various decided cases based on the Wills Act, 1837, and it is set forth in text-books of recognised authority. The citation mainly relied upon and which does seem to be in point, is that made from Williams on Executors (11th Edn.) p. 258, in the words following:

> "Since a will which has been destroyed animo revocandi cannot be revived by a subsequent codicil, for, not being in existence, it cannot be incorporated in or republished by such codicil by reference, it follows that secondary evidence of what the contents of the destroyed will were is not admissible."

None of the cases cited in Williams on Executors is of direct authority for the proposition therein enunciated. Indeed, they seem on the whole to impugn it. In the Irish case of *Newton* v. *Newton* (3), which is one of these decisions, Keating, J., who tried the action, said this:

> "If, indeed [the testator] had made no will or codicil subsequently to [a will the execution of which was proved] and on his death the will of that date could not be found, and there was no evidence to rebut the presumption that he had himself destroyed it, and consequently parol evidence could be given of its contents, and it became necessary to go into such evidence either to show that it contained a clause of revocation, or for any other purpose; then the draft might be good evidence of its contents at the time of execution."

There is, moreover, something like direct authority against the proposition made on behalf of the plaintiff. *In the Goods of Hodgkinson* (4) is a case in point. There a will had been revoked by the testator by cutting off his signature. Evidence of its contents was received, which showed that this will had revoked some only of the dispositions in an earlier will. In this Division and in the Court of Appeal, the effect of the revoked will on the earlier will was adjudicated on. Here it was held that the earlier will stood entire and unaffected by the will made later and revoked, but the Court of Appeal decided that the revoked will had effectually rescinded the dispositions in the earlier will to which it related, and that probate of the earlier will must be limited to the parts of the testator's estate to which the second will did not relate. The view taken in that case is entirely in accordance with the judgment given in the well-known case of *Brown* v. *Brown* (5). There an heir-at-law was claiming realty as on an intestacy, and he was held entitled, in support of an allegation of intestacy, to give evidence of the contents of a will which he alleged to have been revoked, in order to show that that will contained a clause revocatory of an earlier will.

It is proper to say that the passage in Williams on Executors which is relied on has not the authority of Sir Edward Vaughan Williams and has no place in the editions of his work which were published during his life. Looking at the

matter in principle, there can, I think, be no doubt as to the true rule. A question of fact is in dispute, namely, whether the will of 1925 contained a revocation clause. The document cannot be found, and presumably it was destroyed by the testator. Apart from statute, the evidence to be required is what is called in the opening sentences of ROSCOE'S NISI PRIUS EVIDENCE: "The best evidence, or rather the highest kind of evidence . . . of which the nature of the case admits." The only relevant statute is the Wills Act, 1837. Section 9 of that Act enacts that no will shall be valid unless it shall be in writing, and executed in the prescribed manner. Section 18 and s. 20 prescribe the means whereby a will may be revoked. Section 22 directs that no revoked will shall be revived otherwise than by re-execution or by codicil duly executed showing intention to revive. All that the statute really requires here is that I should see whether what the defendant seeks to do is to revive the will of 1925. In my judgment, it is not. What he seeks is to show that, when the testator attached his signature to the will of 1925, it was, within the terms of s. 20 of the Wills Act, 1837, "another will or codicil . . . or some writing declaring an intention to revoke." Section 24 of the Act has no relevant effect. The language of this section is plain. A will is to be construed "with reference to the real estate and personal estate comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The intention which appeared by this will was that, on its execution, all previous wills should be revoked. Cases beyond number have made it clear that words of revocation contained in a will operate immediately on its execution, so effectually, that, without some express act of revivor, the revoked testament has thenceforward no existence as a will. The principle is illustrated in *Brown v. Brown*, (5), and *In the Goods of Brown* (6).

What remains is to ascertain whether the writing of the testator witnessed by Alfred Day and Emily Whilde in 1925 was a will which expressly or by implication revoked any will previously in being. I know as to the substance of the transaction many material facts. The testator, for a substantial period before his signature was witnessed, had been engaged, according to his own statement, fortified by abundance of corroborative circumstances, in the preparation of a will. He wrote on a printed form what he said was his will. He named persons whom he intended to benefit. He concluded the document with sentences expressive of pious opinions such as he had often before expressed in the like connection. The printed form was one of two brought to him by his messenger from the shop of a firm of law stationers at Bournemouth, and it contained a revocation clause in absolute terms. Bearing in mind the practical experience of the testator, the knowledge he had of will making, and the numerous occasions on which he had demonstrated it, I am satisfied that the document witnessed by Mr. Day and Miss Whilde was the will of the testator, and that he thereby in express terms revoked all earlier wills. Having ascertained the fact of revocation, I have no concern with the declarations of the testator, sooner or later, as to the contents of the will in question, or with any statements concerning subsequent testamentary acts, or intentions. No later will appears, and, in respect of all these matters, the extent of the rule of law which excludes some declarations and includes others becomes immaterial.

The defendant is entitled to judgment in the action. I, therefore, pronounce against the will propounded by the plaintiff and direct that the letters of administration granted to the defendant in his proceedings in common form may be handed out to him.

Solicitors: *Barrow, Rogers & Nevill; Reid, Sharman & Co.*

[*Reported by* R. WAVELL-PAXTON, ESQ., *Barrister-at-Law.*]

A

## Re ANDERSON-BERRY. HARRIS *v.* GRIFFITH

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), December 1, 1927]

[Reported [1928] Ch. 290; 97 L.J.Ch. 111; 138 L.T. 354]

B *Intestacy—Administration—Threat by administrator to distribute estate without providing for contingent liability—Right of sureties to administration bond to bring quia timet action.*

The sureties to a bond for administration of the estate of an intestate are entitled to bring a quia timet action if the administrator, after being informed of a contingent liability on the estate, states that nevertheless he will distribute the estate, and in such action will be granted an order restraining the administrator from distributing the estate until the contingent liability has been provided for.

C

Decision of Clauson, J., [1928] Ch. 290, affirmed.

**Notes.** As to remedies on an administration bond, see 16 Halsbury's Laws (3rd Edn.) 268–269; and for cases see 23 Digest (Repl.) 233–237.

D

Cases referred to:

(1) *Re Ledgard, Attenborough* v. *Ledgard* (1922), 66 Sol. Jo. 405; 26 Digest 128, *917*.

(2) *Morrison* v. *Barking Chemicals Co., Ltd.*, [1919] 2 Ch. 325; 88 L.J.Ch. 314; 122 L.T. 423; 35 T.L.R. 196; 63 Sol. Jo. 302; 26 Digest 128, *916*.

E

(3) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1882), 22 Ch.D. 561; 52 L.J.Ch. 418; 48 L.T. 107; 31 W.R. 285; 26 Digest 128, *913*.

(4) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318; 26 Digest 127, *902*.

(5) *Bradford* v. *Gammon*, [1925]1 Ch. 132; 94 L.J.Ch. 193; 132 L.T. 342; 69 Sol. Jo. 160; 26 Digest 128, *918*.

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(6) *Simmons* v. *Bolland* (1817), 3 Mer. 547; 36 E.R. 210; 24 Digest (Repl.) 661, *6491*.

(7) *Wooldridge* v. *Norris* (1868), L.R. 6 Eq. 410; 37 L.J.Ch. 640; 19 L.T. 144; 16 W.R. 965; 24 Digest (Repl.) 870, *8653*.

(8) *Lord Ranelaugh* v. *Hayes* (1683), 1 Vern. 189; 2 Cas. in Ch. 146; 23 E.R. 405; 26 Digest 127, *898*.

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**Appeal** from a decision of Clauson, J.

Mrs. Gertrude Anderson-Berry died intestate on Dec. 13, 1926 leaving as next of kin five brothers and sisters including the defendant, Murray Griffith. At the time of her death Mrs. Berry was entitled to one-fifth share of and in certain tenement houses in Glasgow which had been in the family a very long time and had passed to her by various devolutions, but not by any conveyance. The property in question was subject to heritable bonds (or mortgages) for £3,600 and £2,900 created before 1862. Under the Scottish Conveyancing Act, 1874, persons taking by gift or devise are personally liable for mortgages on the property so taken if they accept such gift or devise, so that Mrs. Berry would be liable not only to the extent of her one-fifth share, but also as a surety for the persons interested in the remaining four-fifths if they could not pay, and such liability could have been enforced in a Scottish court. Those with the right to enforce the liability would also be recognised in English courts as creditors of the estate. The property was difficult to realise, part of it being liable to be condemned as being unfit for human habitation. On Jan. 20, 1927, administration of the estate of Mrs. Berry was granted to the defendant, who was called on to provide two sureties to enter into a bond for proper administration. The plaintiffs in this action, Mr. Harris and Mr. Barr, became sureties to the bond in the penal sum of £3,336, and

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the effect of the bond was that they became liable if the defendant did not well and truly administer the estate. One of the two sureties, the plaintiff Mr. Harris, was a member of the firm of solicitors who acted for Mrs. Berry during her lifetime, and, after her death, for the members of her family in the matter of the estate. The opinion of an eminent member of the Scottish Bar was taken on the position by the plaintiff Mr. Harris, and, on Feb. 14, 1927, he wrote to the defendant and communicated the opinion of counsel so obtained explaining the position in Scottish law. As a result, the defendant had knowledge that the estate ought not to be distributed whilst the mortgages were still subsisting. On Mar. 17, 1927, the plaintiff Mr. Harris informed the defendant that the sum of £1,576 was in the hands of the solicitors, Messrs. Ford, Lloyd, Bartlett & Michelmore (of which firm Mr. Harris was a member). He suggested that the liability under the mortgages should be provided for out of this sum, that the balance of it should be placed on deposit in the Westminster Bank, and that only after these steps had been taken should the estate be distributed. The defendant did not agree that the cash held on his account as administrator should be placed on deposit for an indefinite period, and was prepared to risk the liability under the mortgages.

The plaintiff Mr. Harris declined to assent to any distribution, and reminded the defendant of the administration bond. The latter persisted in the view that he alone had any voice in the administration, and, accordingly, the sureties issued a writ claiming an injunction to restrain the defendant from distributing the estate without first making provision for the mortgage liabilities. In addition, the sureties took out a policy of insurance for their protection, and they also moved for the appointment of a receiver of the sum of £1,573 6s. 7d. forming part of the estate of the deceased, Mrs. Berry, and being then in the hands of the solicitors.

On July 1, 1927, on the motion coming before the court, it was agreed that it should be treated as the trial of the action, and the questions were whether the plaintiffs were justified in bringing an action against the defendant, and how the costs of the action and the motion should be borne. CLAUSON, J., held that the action had been properly commenced, and ordered that the defendant pay the costs, including the costs of the policy taken out to protect the plaintiffs. The defendant appealed.

*Preston, K.C.*, and *F. W. Beney*, for the defendant, referred to *Re Ledgard, Attenborough* v. *Ledgard* (1), *Morrison* v. *Barking Chemicals Co., Ltd.* (2), *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3), *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (4), and *Bradford* v. *Gammon* (5).

*Sir Thomas Hughes, K.C.*, and *L. F. Potts* for the plaintiffs.

**LORD HANWORTH, M.R.**—This is an appeal from a decision of CLAUSON, J., who, on a motion made in the course of the action, by consent treated the motion as the trial of the action and made an order the effect of which was that the plaintiff secured relief and was awarded the costs of the action. I say that because the particular relief which was secured was alternative to some which might have been given at the direction of the court, but was adopted by the parties, and wisely adopted, on the suggestion of the learned judge. But the appeal comes before us on the ground that CLAUSON, J.'s intervention in the action with its consequent results and an order against the defendant to pay the costs of the trial was unwarranted because the plaintiff when he was before him had no right to bring his suit or to ask for his intervention.

The case arises in this way. On Dec. 13, 1926, Mrs. Gertrude Anderson-Berry died. She was the widow of a doctor, and she had, up to the date of her death, enjoyed some property which had been settled on her. That property was situated in Glasgow and was what might be called small house or shop property. The gross income from that property was some £3,000 a year; but the nature of the property is illustrated by the fact that a very large amount had to be spent on repairs. There were a number of outgoings and the net income from it, after

A interest on certain mortgage bonds had been defrayed, was not more than £500 a year. Mrs. Anderson-Berry was entitled to one-fifth of the net annual income, and that amounted to approximately £100 a year. That property had been settled on her in the year 1888—I suppose at the time of her marriage—and the property was subject to mortgage bonds; one dated Nov. 11, 1856, and the other May 31, 1860. There were, I think, in all three mortgage bonds on some property; B but the mortgage bonds which we have to consider in this case total up to the sum of £6,600, and are for two separate amounts. It appears that, according to the law of Scotland, which is not disputed, there is what might be called a personal covenant on the part of the mortgagor to defray the amount due, and that the amount due, or, rather, the liability, is estimated in a particular way. The value of the property is considered as at the time when it was settled and when first the C lady came into possession of it; which was in 1888; and the Scottish courts would ascertain the amount that she would receive quantum lucratus according to the amount by which she was advantaged by the receipt of this property, and to the extent to which she has been advantaged there is apparently a liability on her and on her estate to make good any deficiency which is discovered at the time when the mortgage money is required to be paid, and if the mortgaged property fails D to realise sufficient to defray the mortgage money. When, therefore, she died in December last her estate was in peril of having to make good a sum in respect of these mortgages if the mortgaged property was insufficient to meet the sum required. As I have said, the property was of a poor nature; and, more than that, it is of such a poor nature that it is in danger of an order being made for its clearance when it would be cleared away without compensation in consequence E of its present condition.

From the materials that are before us, it is plain that the property is of such a nature that, although its value, as valued by what they call in Scotland a valuator, might be estimated at sufficient to pay the mortgage money, yet it is impossible to overlook the prospect that a demand might be made on the estate F of the late Mrs. Anderson-Berry to make good the deficiency quantum lucratus. After her death it was discovered that she had died intestate, and so an application was made for letters of administration to be issued to her brother, Mr. Murray Griffith, the defendant. He is, we understand, a gentleman of position; a well-known member of the Stock Exchange; a business man, and of good position and substance. Letters of administration were granted to him on Jan. 20, 1927, G but before he was able to get the grant completed to him he had, as every intending administrator has, to enter into a bond with the Registrar of the Probate, Divorce and Admiralty Division, and to secure two others to act in effect as between him and them as sureties; but as between themselves and the court the registrar has proposed, for the due performance of the duties as administrator, the defendant. That bond is dated Jan. 7, 1927, and by that bond both the defendant, the H plaintiff Mr. Henry Harris, and the plaintiff Mr. Edwin Barr, are jointly and severally bound as proposed to the registrar in the sum of £3,336 for the due administration of the estate. In particular, one of the conditions of the bond is that the administrator in the said estate will well and truly administer according to law. For that due administration according to law both the plaintiffs are directly responsible on the bond to the court. Mr. Harris is a member of a I firm of solicitors who carry on business at 53, Russell Square. That firm apparently acted for Mrs. Anderson-Berry and were acting for the defendant, the administrator, in relation to the estate. We have had a number of letters read to us. It is important, however, that I should refer not to all of them but to one or two of them. It appeared that, putting together the moneys of which Mrs. Anderson-Berry was possessed at the time of her death, some moneys in her bank on deposit and on current account, it was found that there was a credit in her favour of £1,576. Information to that effect was given to the defendant on Mar. 17 of this year by a letter, and the letter continues after giving the information:

"I cannot advise the distribution having regard to Mr. Gray's opinion with regard to the liability of the estate to make up a deficiency for any of the mortgages."

We are told that the beneficiaries who would take a portion of this fund on the distribution are four brothers and sisters of Mrs. Anderson-Berry including the defendant. It is clear, however, that, at the same time that this fund was ascertained to exist up to the amount of which notice is given to the defendant, he was informed that his solicitors could not advise any distribution because the gentleman named in this letter, who is a distinguished King's Counsel practising at the Scottish Bar, had advised that there was a liability which might mature in respect of these mortgage bonds to which I have referred. A letter or two passes, but on Mar. 30, the defendant writes this letter,

"I am sorry I do not agree with you that the cash you hold on my account as administrator should be placed on deposit for an indefinite period, and after reading the report of the surveyor I see no reason why the money should not be distributed at once, which course, acting as administrator, I propose to take."

Counsel for the defendant has said it must be borne in mind that the defendant is a layman; that he did not appreciate fully what his duties were as administrator; but the defendant is a business man of good standing and good repute, and I am quite sure that he knew what his words meant in that letter. He may know, and well know, what a risk is; and it is plain from the sentence I have read that, although the surveyor had communicated the fact that the property might not, if sold, realise sufficient to pay off the bond with the consequence that there would be a deficiency to make up, yet he says: "I see no reason why the money should not be distributed at once, which course, acting as administrator, I propose to take." I should read that letter rather in this light, that the defendant, being a man well able to stand a small liability in reference to a sum like £1,500, or the amount required to make up the deficiency, was prepared to take such risk as was involved, and, if necessary, to replenish the sum required from his own resources which were abundant. To that the plaintiff, Mr. Harris, replies on Mar. 31,

"I regret very much that I am unable to advise you to make any distribution of the estate until the question of the final liability, if any, of Mrs. Anderson-Berry in reference to the Glasgow mortgages, has been ascertained."

And not unnaturally he continues: "I must therefore ask you to be good enough to accept my advice in the matter."

Then a suggestion is made, if it had not been made before, that the money should be paid over into a bank to be held in the three names of the two plaintiff bondsmen and the defendant. On April 2, the plaintiff, Mr. Harris, wrote back that he proposed to put the money on deposit at the Westminster Bank, Bloomsbury Branch, in the joint names of the defendant and his two sureties, if the defendant would consent to that course. Pausing there for a moment it is clear that he made a sensible suggestion: Let us put the money in the names of the three persons who are interested, one as principal administrator, the other two as sureties, and let us bear in mind, as I am bound to remind you, that there is a possible liability on the mortgages, and, more than that, there is a claim, if the mortgaged property has a value to the estate, against you for legacy duty in respect of it. After that some letters passed, and the solicitor, or I suppose it is the signet in Scotland, writes to the solicitors and says: "We fear that this property in Glasgow could not be sold at a price sufficient to pay off the mortgages." That is a clear indication that there will be a deficiency to be made up out of the estate.

Then on April 14 the defendant, by this time apparently somewhat annoyed,

A wrote that, as administrator and also trustee of the estate, he must insist on a cheque being sent to him for the amount and the money paid to his private account at a bank indicated. There was a reply to that letter, suggesting that the matter should be left in abeyance, but on April 26 the plaintiff, Mr. Harris, received what I shall call a final letter from the defendant, requesting a cheque at once, and stating that he did not see why counsel's opinion should be taken before B handing over to him the cash which the plaintiff, Mr. Harris, held for him personally, as he, the defendant, was personally responsible for its distribution to the proper persons. Taking the purport of the letters to which I have referred together, it is plain beyond any question, to my mind that the defendant at that time was asking, and indeed insisting, on the cheque being handed over to him personally, or that the money should be placed in his own private account; that C he rejected the course suggested, that the money should be put into the names of himself and his bondsmen, and that the purpose for which he required the money to be paid over was its distribution for which he was responsible, and that he was prepared to say that, whether there was a liability on the Glasgow property or not, he was ready and able to take that risk and that his judgment ought to prevail in the matter.

D On that, and I think in spite of the point counsel for the defendant makes that, after the letter written on April 26, we might have supposed there might be a delay before the writ was issued, I think that, as soon as the plaintiffs had received the letter which appears in our file as dated April 25, they were justified in taking whatever action they could to protect themselves on the ground that there was a danger of this money being claimed and, if handed over, used by E the defendant in the way in which he had expressed his intention—that there was a danger of that distribution being imminent and immediate, and that there was clear evidence that, if that was done, the estate would be depleted and there would be substantial damage to it, and that, if that course was adopted by the defendant, there would not be a fulfilment of the conditions of the bond F that the defendant would well and truly administer according to law.

What was the position of the defendant administrator at that time? He had not reached the point at which the estate was ripe for distribution; no finality had been reached as to the debt payable by the estate; if the property was of little value, as was feared, there was a direct liability in respect of the deficiency. If the property was of value so as to leave a margin beyond the mortgage debt, there was legacy duty immediately payable. It could not be contended by anyone G who was accustomed to the administration of an estate that, on April 27 the administrator was minded to well and truly administer according to law, for he was prepared to hand over to the beneficiaries entitled in the distribution the moneys and leave the estate bare of cash, and that at a time when he was warned and advised that there were liabilities still outstanding and not yet determined. H It seems to me plain that, on April 27, the defendant's duty towards the Probate Court was to hold the estate, and that his intention had been unequivocally expressed that he intended to misapply the estate if it was placed in his hands.

The writ was issued on April 27. It is said that, at that time, the bondsmen, who are the plaintiffs, had no right at law or in equity to take any steps at all against the defendant. It is not contested by counsel for the defendant that I there is a right on the part of the surety to exoneration by his principal, and that, as soon as any definite sum of money has become payable to the creditor, the surety has a right to have it paid by the principal, and his own liability in respect of it brought to an end. But it is said that that right only arises as and when a definite sum of money has become payable. I think that is too narrow a view to present. I think that, from the cases which have been cited, there is a right on the surety to ask that he should be protected from a cloud that hangs over him if and when it is quite clear there is a cloud hanging over him, and if there is a liability, even though the amount of that liability will be ascertained

in subsequent proceedings, I think the surety has a right to ask for protection. There is the liability, quantified though it may be by subsequent proceedings, and at a subsequent date; but once the liability has appeared, then I think the right of the surety has accrued.

Up to that moment the two plaintiffs were bondsmen for the due administration according to law of this estate. In certain events there was clearly a liability to legacy duty; in other events there was a clear liability for the deficiency on the property; and I think it would be a negation of the due and just appreciation of the facts to say that, on April 27, the bondsmen were not in imminent and serious peril. It is true they would be able to recover, or to ask the defendant to repay the money if he wrongly distributed a portion of the estate—and let me accept that he could do so—but that is not the duty of the bondsmen. They are to see that the estate is properly administered; and the estate must not be dissipated even if there would be no difficulty in replacing funds improperly distributed. To well and truly administer according to law means to distribute properly and not to distribute improperly and afterwards replace.

I need not refer in detail to many of the cases to which reference has been made, but I think *Simmons* v. *Bolland* (6) is an illustration of what has been done, and what ought to be done, in similar cases. There it was determined by the court that it would give protection to the executor by giving him a security in case of his being made liable in respect of a future breach of covenant; and the same good sense which applied in that case seems, to my mind, to have been exercised by CLAUSON, J., in the present case.

The only other case to which I wish to refer is *Wooldridge* v. *Norris* (7), where the learned judge held that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for payment of the debt and indemnity. I am not going through a number of cases, but I will add this, that in *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3), to which we have been referred, some doubt was thrown by FRY, J., on *Lord Ranelaugh* v. *Hayes* (8). I do not think it is true to hold that the learned judge cast doubt on the case, but it was referred to in the later case of *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (4) by SWINFEN EADY, J., and he referred to the passage.

Having regard to the cases which have been cited, and to the view I take of the facts, it seems to me that CLAUSON, J., was quite right. It is said that this is a quia timet action. Be it so. But that, I think, is a course of procedure which prevents the court from allowing it to be stultified. It seems to me the court is being asked, although it has before it clear facts which will end in loss or damage occurring to one party, not to grant immediate relief which would have the effect of safeguarding the interests of all parties.

In the present case, on the view of the facts that I take, I think the plaintiffs were entitled to come to the court, because the defendant had made it plain that he was not administering, or intending to administer, the estate well and truly and according to law. They were entitled to bring this quia timet action on that clear and definite attitude of the defendant to ask and to invoke the assistance of the court. I think that CLAUSON, J., is clearly right in the course which he took in saying that the plaintiffs had a right to bring the matter before the court, and thus the order which he made is one which is justified, and the appeal, therefore, must be dismissed with costs.

**SARGANT, L.J.**—I am of the same opinion. As regards the question of fact I entirely agree with what has fallen from my Lord, and I have come, like him, to this conclusion, that, at the date when the writ was issued, the defendant had deliberately intimated to the plaintiffs that he intended to distribute the fund amongst the five beneficiaries without paying attention to the necessary provision for liabilities that were hanging over the estate. I think it is impossible to read the correspondence without seeing that he was claiming the right to receive from

his solicitors this sum of £1,700 odd, and to use his position as administrator, and as the sole person entitled to decide what should be done, for the purpose of making this distribution.

That being so, what was the position of the sureties? Were they bound to wait until the wrong had been done and then bring their action against the administrator to have the wrong put right? It seems to me clear that, if the administrator had paid over the money in the way in which he threatened to pay it, the sureties would have been entitled immediately afterwards, being then under an accrued liability, to bring their action against the administrator for the purpose of having that money replaced. In that state of things, I do not think the court would allow its jurisdiction to be stultified if, when there was a clear threat to do that which would have involved the replacement of the money, the court should have confessed its inability to prevent the funds of the estate from being applied in this wrong manner. I think the origin of quia timet may be one illustration of the rule that prevention is better than cure, and certainly in a case of this kind the cure may be uncertain. I do not say the defendant may not have been perfectly solvent: I have not a word to say against him ; but, still, there is not the same certainty that exists if you have the fund itself kept and applied to the purposes for which it is applicable; and it would be a poor state of things if the court was unable to prevent this clear definite wrong being done and had to wait until the wrong had been done and then to give such relief as would in all probability but not with absolute certainty cure the evil results of the commission of the wrong. In such cases as *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (4), the jurisdiction which was exercised was to a considerable extent quia timet, because there the position was this, that the five directors of the company had given a guarantee; then one of them died and the bank were quite satisfied to rest on the guarantee. The deceased director had left a large estate and they were perfectly satisfied with his guarantee together with the other guarantees, and they were prepared to let the guarantee go on indefinitely. They had ascertained the amount and the result would have been that the company could have gone on trading with the benefit of the guarantee on which this sum of £17,000 had already accrued, and it would not have been necessary for the new directors, or directors who came in, to join in any guarantee to the same extent to which the original guarantor had joined in the guarantee. I only mention those facts because I was counsel in that case, and I have some special acquaintance with the facts, for the purpose of pointing out that there was no probability at all at that time of the debt of the executors of the testator being due within any measurable distance of time, and yet it was held that they were entitled to come to the court and get an order on the company to pay the bank because this cloud should not be left hanging over the estate. That is an instance of quia timet. *Wooldridge* v. *Norris* (7), which is relied on very much by the learned judge in *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (4), was an even clearer case of the application of the doctrine of quia timet. That being so, and the doctrine being applied in cases of guarantee, I think there could hardly be a clearer instance of a case in which that doctrine is applicable, because here you have a definite fund with a definite threat to apply it to purposes to which the fund is not applicable, and you have persons the sureties to the bond who will come under the definite liability to make that wrong good if and when the wrong is committed. It seems to me all the features are present in such a case which render the jurisdiction of the court to prevent the commission of the wrong applicable. I think, therefore, that CLAUSON, J., was quite right in the view which he took, and that this appeal should be dismissed.

**LAWRENCE, L.J.**—I agree. Counsel for the defendant has relied on two grounds in support of the appeal, the first being that this action being a quia timet action the threat to do the wrongful act did not continue down to the issue

of the writ, and that therefore it was premature. On that point my Lord has said all that there is to be said. It is, to say the least, unfortunate, if the defendant changed his mind after Mar. 30, that he did not tell the plaintiff, Mr. Harris, that he had done so. I understand he made an affidavit and said that he had changed his mind. He ought to have stated that to the plaintiff, Mr. Harris. I think in the circumstances the writ was fully justified from that point of view. A

The second point was that this is a case in which there is no right to bring a quia timet action at all; and, in support of that proposition, counsel for the defendant has cited a number of cases. I think he has lost sight of the facts of the present case, because to my mind those cases are not applicable to a case of this kind. Here what was guaranteed was not the payment of a sum of money which might, or might not, become payable as between the principal debtor and creditor; there might be credit given on one side or the other. This case was a case where the guarantee was the fulfilment of the due administration according to law of a particular fund, and the act which was about to be committed was the maladministration of that fund; that is to say, the doing away with that which the surety had guaranteed should be done. In that case, I think the surety is entitled to bring an action before the act has been done; if it was only to protect his own liability to get the principal debtor to discharge a debt of his own, it may very well be that the circumstances would have to be very special before a quia timet action lay; but, as my Lord has pointed out, even in those cases quia timet actions have been entertained. I should have thought, in a case like this, the court would not hesitate to protect the surety from liability which must immediately accrue due owing to a wrongful act being done on the part of the person for whom he has become surety. B C D E

I agree with CLAUSON, J., that the view which he has taken is the right one and that this appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors : *Peachey & Co.; Ford, Lloyd, Bartlett & Michelmore.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

# BELL AND ANOTHER v. HARKER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), October 13, 14, 1927]

[Reported [1928] 1 K.B. 368; 97 L.J.K.B. 155; 138 L.T. 226; 91 J.P. 189; 44 T.L.R. 33; 25 L.G.R. 505; 28 Cox, C.C. 451]

*Insurance—Industrial assurance—Transfer of insured person from one society to another—Person already assured in both societies—"Transfer"—Industrial Assurance Act*, 1923 (13 & 14 *Geo.* 5, *c.* 8), *s.* 26 (1), *s.* 39 (3).

In 1913 and 1915 P. took out in the R. industrial assurance company several policies of which one was on the life of her son. In 1918 she took out another policy on the life of the same son in the B. society, a collecting society carrying on industrial assurance business, and the premiums on this policy were collected by the wife of the first appellant. The last premium paid on this policy was paid on April 19, 1926, when P. decided to discontinue payment. On April 26, 1926, when the policies taken out with the R. society were still in force, both appellants, acting on behalf of the R. society, obtained from P. a proposal for a fresh policy assuring her son in that society, and the policy was issued without P.'s written consent in the form required by s. 26 (1) of the Industrial Assurance Act, 1923, and without the other formalities required by that Act. P. paid the first premium within a week after April 26, 1926. In May, 1926, the B. society issued a lapse notice, and the policy in that society lapsed on June 10, 1926. The appellants were convicted of being concerned in the transfer of P. from one society to the other without the written consent in the form prescribed by the Industrial Assurance Act, 1913, s. 26. On appeal,

**Held:** s. 26 applied both to the transfer of membership as a whole and to the transfer of a particular policy, and, therefore, the convictions must stand, and it made no difference that before the transaction the person assured was a member of both societies or had policies in both societies.

*Pearl Life Assurance Co., Ltd.* v. *Scottish Legal Life Assurance Society, Ltd.* (1), [1901] 1 K.B. 528, and *Salvation Army Life Assurance Society, Ltd.* v. *British Legal Life Assurance Co., Ltd.* (2), 1908 S.C. 1138, applied.

**Notes.** As to transfer of members of one industrial assurance society to another, see 21 HALSBURY'S LAWS (3rd Edn.) 87–89; and for cases, see 25 DIGEST 293. For the Industrial Assurance Act, 1923, s. 26, s. 39, see 10 HALSBURY'S STATUTES (2nd Edn.) 613, 619.

Cases referred to:

(1) *Pearl Life Assurance Co., Ltd.* v. *Scottish Legal Life Assurance Society, Ltd.*, [1901] 1 K.B. 528; 70 L.J.K.B. 360; 84 L.T. 153; 49 W.R. 493; 17 T.L.R. 238; 45 Sol. Jo. 260, D.C.; 25 Digest, 293, *35*.

(2) *Salvation Army Life Assurance Society, Ltd.* v. *British Legal Life Assurance Co., Ltd.*, 1908 S.C. 1138; 45 Sc.L.R. 843; 16 S.L.T. 276; 25 Digest 293, *k*.

**Case Stated** by Stockport justices.

At a court of summary jurisdiction sitting at Stockport an information was preferred by Harold Parkinson Harker (hereinafter called "the respondent") under the Industrial Assurance Act, 1923, against Ethelbert Bell and T. Heaword (hereinafter called "the appellants"), for that they were guilty of an offence under s. 39 of that Act, in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Ltd., an industrial assurance company, without her written consent in the form prescribed by s. 26 of the said Act and

the regulations made thereunder. The following were the particulars: Mrs. Annie Parkinson lived at 19, Stanhope Street, Stockport. The policies concerned in the charge were policies in the British Empire Collecting Society and the Royal London Mutual Insurance Society, Ltd., respectively, assuring the life of John Parkinson for a premium of 3d. a week. The information was heard on Mar. 15, 1927. At the hearing of the information, one witness only was called, namely, Annie Parkinson, the wife of Christopher Parkinson, and she attended on Crown Office subpœna. The documents produced or referred to at the hearing were admitted by the appellants' solicitor without formal proof. The following facts were proved or admitted: (i) Before and on April 26, 1926, Annie Parkinson held policies in the British Empire Collecting Society, including a policy No. 15,818 on the life of her son John, in respect of which the sum of £9 9s. was payable on her said son's attaining the age of sixteen years, the premium being 3d. per week. The policy was taken out on April 29, 1918. The premiums on the policy were collected by Mrs. Bell, the wife of the appellant Ethelbert Bell, who had not himself collected any premiums. (ii) The last premium paid in respect of the policy was paid on April 19, 1926. Some weeks elapsed before Annie Parkinson received from the British Empire Collecting Society a lapse notice. The policy lapsed on June 10, 1926, on twenty-eight days' notice. (iii) Annie Parkinson stopped paying the premiums on the British Empire Collecting Society's policies because she was dissatisfied with them, through having seen a report derogatory of the Society in a newspaper. (iv) On Feb. 22, 1915, Annie Parkinson had taken out a policy on the life of her son John in the Royal London Mutual Insurance Society, Ltd., and this policy was in force on April 26, 1926. (v) Annie Parkinson had, on Aug. 11, 1913, taken out two other policies in the same company on the lives of herself and of a William Bywater respectively, which, with a large number of other policies subsequently taken out by her in the same company, were in force on April 26, 1926. (vi) The appellant Ethelbert Bell called on Annie Parkinson shortly before April 26, 1926, and asked her if she would give him some new business as he was taking a book of the Royal London Mutual Insurance Society, Ltd., and he asked if he might bring the superintendent of that company to talk the matter over with her husband. (vii) On April 26, 1926, both the appellants called, and the appellant Heaword told Annie Parkinson that the policies in the British Empire Collecting Society could not be transferred. Of this Annie Parkinson said that she was aware, and that she had decided to give him new business. She thereupon signed a proposal form assuring her son John in the Royal London Mutual Insurance Society, Ltd. She also signed a number of other proposal forms of the same company. The proposal form for assuring her son John in the Royal London Mutual Insurance Society, Ltd., was filled up by one or other of the appellants, the particulars being supplied by her. The policy assuring her son John in the British Empire Collecting Society was not then produced and was not at any time handed to the appellants or to either of them. She could not say why no answer was given to question fourteen in the proposal forms, which was as follows:—"Do you, or does any other person to your knowledge, hold a policy on this life issued by any other office? If so, give particulars hereunder. If none, state 'Nil'." She did not pay the premiums on the new policies in the Royal London Mutual Insurance Society, Ltd., on that day, but she did so later in the same week. (viii) The new policy was for the sum of £6 15s., payable at the expiration of ten years if her son John should then be living. The premium was 3d. per week. (ix) Annie Parkinson could not remember whether she signed any other proposal forms, nor could she say whether she signed a form similar to the form then shown to her. The form then shown to her was a print of the Industrial Assurance (Individual Transfer) Regulations, 1923, dated Dec. 11, 1923 (S.R. & O. 1923 No. 1495), containing the prescribed form of consent under s. 26 of the Industrial Assurance Act, 1923.

A preliminary objection was taken by the appellants' solicitor that under s. 11

of the Summary Jurisdiction Act, 1848, the information should have been laid within six calendar months from the time when the matter of complaint arose —namely, within six months after April 26, 1926, and that of s. 39 (5) of the Industrial Assurance Act, 1923, under which proceedings for offences under that Act could be commenced at any time within a year, applied only to collecting societies and not to industrial insurance companies. The justices in overruling the objection ordered a note thereof to be made.

The appellants' solicitor submitted that there was no case to answer, and he did not call any evidence. He contended:—(a) That s. 26 (1) of the Industrial Assurance Act, 1923, under which the information was laid, had no application to the present case, inasmuch as Annie Parkinson and her son John were at the date of the alleged offence, and had for many years prior thereto, and prior to the issue of the policy in the British Empire Collecting Society, been members of and insured with the Royal London Mutual Insurance Society, Ltd., with which the new policy was effected, and that there was no transfer of a member of the British Empire Collecting Society, and the policy therein lapsed in consequence of Annie Parkinson's ceasing to pay the premiums payable in respect thereof. There was no transfer of agency, the appellant Bell not having been proved to have collected any premiums from Annie Parkinson in respect of the policy issued by the British Empire Collecting Society on the life of her son John on April 29, 1918. (b) That s. 26 (1) of the Act did not apply to the transfer of a policy only, and, in any event, there was no evidence of such transfer. The respondent's solicitor referred to *Pearl Life Assurance Co., Ltd.*, v. *Scottish Legal Life Assurance Society, Ltd.* (1), and contended that the decision in that case disposed of the appellant's contention, and that there was a transfer of a person assured with one company to another company within the meaning of the section.

The justices, being of opinion that there had been a transfer of a person assured with one company to another company without the written consent of the assured, and that the appellants were officers of the company to which the assured person had been transferred, and were concerned in such transfer, convicted the appellants and fined each of them 10s., and ordered them to pay the witnesses' expenses and £5 5s. special costs. The appellants now appealed.

*Matthews*, K.C., and *A. F. Englebach* for the appellants.

*H. M. Giveen* for the respondent.

**LORD HEWART, C.J.**—This is a Case Stated by justices for the county borough of Stockport. The question arises out of an information preferred by the respondent against the appellants under the Industrial Assurance Act, 1923. The complaint was that the appellants were guilty of an offence under s. 39 of that Act, in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Ltd., an industrial insurance company, without the written consent of the said Annie Parkinson in the form prescribed by s. 26 of the Act and the regulations made under it. In the result, the justices convicted the appellants and imposed a small fine on each of them, and ordered them to pay certain expenses and special costs. It is against that conviction that the appellants now appeal by a Case Stated, and the question for this court is whether, on the facts, the justices came to a correct determination and decision in point of law. It is not necessary to repeat all the facts, which are carefully set out in this well-stated Case ; it is enough to refer to some of them. [HIS LORDSHIP stated the facts, and continued:] Those being the material facts, the justices had to decide whether it was proved that an offence had been committed, and that task was the quite usual one of ascertaining the real and true nature of the transaction as distinguished from its superficial form. What is the offence which is referred to ? By s. 39 (3) of the Act of 1923, it is provided:

"If any collector of a collecting society or industrial assurance company, or any other person, contravenes or fails to comply with any of the provisions of this Act affecting such collector or other person, he shall be guilty of an offence under this Act and liable on summary conviction"

to a certain penalty. The section under which the offence here was said to have been committed is s. 26, and that section is concerned with what are called transfers from one society or company to another. Sub-section (1) provides as follows:

"A member of or person assured with a collecting society or industrial assurance company shall not [except in cases which for the present purposes are not material] be transferred from the society or company in which he was so assured so as to become or be made a member of or be assured with any other such society or company without his written consent, or, in the case of an infant, without the like consent of his parent or other guardian, and any society or company and any collector or other officer of any society or company concerned in such a transfer shall, if the provisions of this section are not complied with, be deemed to have contravened the provisions of this Act."

That first sub-section having made obligatory a consent in writing, sub-s. (2) proceeds to deal with that consent. That consent is to be in the prescribed form; it is to have annexed to it a document in the prescribed form to be furnished by the society or company to which the transfer is to be made, setting out the terms of and rights under the existing policy and the terms of and rights under the policy to which the assured will become entitled on transfer, and the consideration, if any, which has been or is to be paid for the transfer, and the person to whom such consideration has been or will be paid. Then sub-s. (3) goes on to provide:

"The society or company to which the assured is sought to be transferred shall furnish to the person by whom such consent as aforesaid is signed a copy of such consent and of the document annexed thereto, and shall, within seven days from the date when such consent is signed, give to the society or company from which the assured is sought to be transferred notice of the proposed transfer containing full particulars of the name and address of the assured and the number of his policy, together with such consent as aforesaid, and the document annexed thereto,"

and then follow consequential provisions in sub-s. (4). This section, therefore, is obviously dealing with insurance companies or collecting societies of this particular kind, and with what it calls transfers from one society or company to another. It is to be observed that the section begins by drawing a distinction between two sets of cases. The transfer may be a transfer of a member of one society to another society, but it may be a transfer of a person assured with one society to another society, or, in other words, it may be a partial transfer or it may be a complete transfer. It may be a change of membership or it may be the substitution, in effect, of one policy for another, and where such transfers or substitutions or changes are to be made the Act provides that they shall be made subject only to certain exceedingly strict conditions.

The reason for such legislation is quite obvious. Several of the various reasons for it were referred to in the Scottish case of *Salvation Army Life Assurance Society, Ltd.* v. *British Legal Life Assurance Co., Ltd.* (2). In that case, LORD STORMONTH-DARLING referred to at least three mischiefs which the similar Act of that time had in view, and LORD LOW said:

" I imagine that the main object of that enactment is to protect persons insured against the solicitations of collecting agents of such societies or companies. I suppose that such agents are paid by results, and that therefore the interest of each agent is to obtain as much business as possible for the society or company which he represents."

The Lord Justice-Clerk, in his judgment, referred specifically to another obvious mischief. He said that one evil against which the small insurer in industrial insurance organisations had to be protected was that the companies, or societies, had to be restrained from cutting off the insured from the benefit of the insurance, and so holding past premiums, while getting rid of their obligation.

In this case, in the court below two points were taken. It was urged, first of all, that s. 26 (1) of the Act of 1923 did not apply, for the reason that Annie Parkinson and her son John were, on April 26, 1926, and had for some time been, members of, and insured with, the new society, the Royal London Mutual Insurance Society, and that, therefore, there was no transfer. Secondly, it was urged that the section did not apply to the transfer of a policy only, as distinguished from the transfer of a member. Those were the arguments, and the only arguments, adduced below. It has been attempted, in accordance with common practice, to raise another point in this court—namely, the point that in the information, Mrs. Parkinson is spoken of as a member of the British Empire Collecting Society, whereas, in fact, she was not a member, but the case finds again and again that she was a member and held policies in the society ; and no such point is open to the appellants on this case as it is stated.

With regard to the two contentions that were raised in the court below, it seems to me that they are clearly disposed of by the combined effort of two cases which have already been decided. One is *Pearl Life Assurance Co., Ltd.* v. *Scottish Legal Life Assurance Society, Ltd.* (1), where, on facts not quite the same as these, but to some extent the same, WILLS, J., said ([1901] 1 K.B. at p. 530) :

> "The Act of Parliament is not very artificially drawn. Probably the language used is understood by the class of persons who are most concerned with dealings under the Act ; but, however this may be, it is clear that the language used in the Act is popular rather than artificial. One knows that frauds are frequently perpetrated in transactions of this kind, and s. 4 [that is to say, s. 4 of the corresponding Act of 1896] is intended to check the proceedings of the people who carry out these frauds. The first check is imposed by sub-s. (1) : in order that there may be evidence of a transfer, the written consent of the person to be transferred is required."

PHILLIMORE, J., in giving judgment to the same effect, said that the clause was strange, and strangely worded. But in that case it was argued, with success, that, notwithstanding that the old policy overlapped the new one so that the two policies were, for a brief period, co-existent, nevertheless that which had taken place was a transfer. That case was followed, and, indeed, supplemented by, the Scottish case already referred to where, as in the present case, the member had, if I may use the expression, his foot in both camps. There were insurances in both societies. In that case LORD STORMONTH-DARLING used these words :

> "It is always desirable that in the construction of an imperial statute the courts of the two countries should speak with the same voice, though a Scottish court may not, strictly speaking, be bound by the decision of an English one. The only case in which this statute has been construed in England is that of *Pearl Life Assurance Co., Ltd.* v. *Scottish Legal Life Assurance Society, Ltd.* (1). There an alderman of the City of London had held that there was no transfer, or seeking to transfer, where no two insurances had been shown to co-exist. But a Divisional Court, consisting of WILLS, J., and PHILLIMORE, J., reversed his decision, holding that there was a seeking to transfer in the sense of the Act."

Also in the Scottish case, as LORD STORMONTH DARLING pointed out, there was a co-existence for a short time of two insurances substantially securing the same benefits in return for the same contributions, although the persons concerned in the transactions may not have known or intended it.

It seems to me that the effect of these two cases is to cover the present case. Indeed, apart altogether from any such decision, when one looks at the words of this Act—whether they be truly described as "strange" or as "popular"—bearing in mind the notorious mischiefs which this Act was intended to meet, I think that the distinction which is drawn at the outset of s. 26 between a member on the one hand, and a person assured with one of these insurance societies on the other hand, makes it plain that the transfer is complete, whether it be a transfer of a member as such, or whether it be a transfer of a particular policy, and it matters not that, before the transaction has taken place, the member is a member of both societies in question, or has policies in both of the societies in question. What is being dealt with is the individual transaction, whether it effects the member as a whole, or whether it is limited to a particular policy. The Act provides that the individual transaction whether it be called a transfer, or a substitution, or a change, shall be carried out in so formal a manner, subject to necessary notices, as to prevent the kind of evil which the Act was brought into existence to meet. I cannot see any reason whatever for the contention that the mischief does not arise, and that the Act does not apply, where that which is transferred is not the whole, but a part of the whole, not all the policies, but some or one of them, not the member quâ member, but the policy quâ policy. If that were the true interpretation of this statute, it seems to me that it could easily be rendered nugatory. Indeed, the argument had to go to the length of saying that the Act would not apply if a person having twenty-seven policies transferred only twenty-six, retaining the twenty-seventh, so as not to cease to be a member of the old society. That, with great respect to the argument, seems to me to be ludicrous, and I cannot find any support in the vocabulary of this statute for the view that that is what the legislature intended. I, therefore, think that this appeal fails, and ought to be dismissed.

**AVORY, J.**—I am of the same opinion. For the purpose of my judgment, I assume that Mrs. Parkinson was a member of, and a person assured with, the British Empire Collecting Society. Then the only question which really remains is whether there was a transfer within the meaning of s. 26 of the Industrial Assurance Act, 1923, or whether there was evidence on which the justices could find that there was a transfer. Having regard to the two authorities to which my Lord has referred, I have come to the conclusion that there was evidence on which the justices could find that the circumstances of this case constituted a transfer within the meaning of that section. Therefore, I agree that the appeal should be dismissed.

**SALTER, J.**—I agree.

*Appeal dismissed.*

Solicitors: *Wilberforce, Allen & Bryant; Treasury Solicitor.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

# Re MONK. GIFFEN *v.* WEDD

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), January 13, 14, February 2, 1927]

B [Reported [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; 43 T.L.R. 256]

*Charity—Surplus beyond needs of charity—Possible future surplus—General charitable intention—Charity immediately effective—Validity of gift—Application of cy près doctrine.*

By cl. 7 of his will, dated June 10, the testator directed his trustees to pay and transfer his residuary estate, the value of which was some £20,000, to the C official trustees of charitable funds, thereinafter referred to as "the charity trustees," and to hold the same to an account to be entitled the "Robert Monk's Foxton Charity Loans Fund," and to apply the capital and income thereof "in making loans to poor and deserving inhabitants of the parish of F. in manner hereinafter provided." He then directed that no loan should exceed D £100, only one-sixth part of the loan fund should be lent in any one year, the borrowers were to be inhabitants or residents of F. not over thirty-five years of age, and the period of repayment was not to exceed nine years. No interest was to be charged, but no borrower could be granted more than one loan. By cl. 23 all surplus money forming part of the loans fund over and above the sum of £500 and not required for loans should be invested by the charity trustees, E but all investments purchased should be from time to time sold for the purpose of advancing the produce thereof in loans if and when required. The testator died on Aug. 5, 1916. The limitations placed on this trust narrowed the number of possible borrowers to a small one, and it was contended by the testator's next of kin that there was no prospect that borrowers so qualified in F. would become so numerous as to exhaust the resources of the charity F trustees, and so there was a surplus as to which there was an intestacy.

**Held:** (i) the court leaning in favour of a charitable purpose, there appeared to be a general intention on the part of the testator to devote this residue to charity ; the charity could be started at once even though the property given were more than enough to satisfy the purpose expressed in the will ; it was not admissible to consider how far there might be accumulations of income at G some time beyond the legal limit ; and, therefore, there was an immediate and effective gift of the residue for charity, displacing the claims of the next of kin.

(ii) there being a general charitable intention, the doctrine of cy près could at once be applied, if it became necessary to do so, to any surplus income after the expiration of the period relating to accumulations allowed by law.

H Per Lawrence, L.J. : To constitute a partial failure of a charitable trust such as this the next of kin would have to prove that it was impossible that the whole sum could ever be required for the purposes of the trust—a fact which, in view of the nature and scope of the trust, is incapable of proof.

**Notes.** Applied : *Re Bradwell's Will Trusts, Goode* v. *Board of Trustees for* I *Methodist Church Purposes*, [1952] 2 All E.R. 286; *Re Cattom's Will Trusts, Midland Bank Executor and Trustee Co.* v. *Huddersfield Corpn.*, [1955] 3 All E.R. 704. Referred to : *I.R. Comrs.* v. *Roberts Marine Mansions Trustees* (1927), 43 T.L.R. 270; *Re Royce, Turner* v. *Wormald*, [1940] 2 All E.R. 291; *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1945] 2 All E.R. 711; *Re Hillier, Hillier* v. *A.-G.*, [1954] 2 All E.R. 59; *Re Ulverston and District New Hospital Building Fund, Birkett* v. *Barrow and Furness Hospital Management Committee*, [1956] 3 All E.R. 164.

As to postponed charitable gifts see 4 Halsbury's Laws (3rd Edn.) 286, as to

surplus income see ibid. 303, and as to cy près see ibid. 317 et seq. For cases see 8 DIGEST (Repl.) 408 et seq., 443 et seq., 459 et seq.

Cases referred to:

(1) *Re Wilson, Twentyman* v. *Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 57 Sol. Jo. 245; 8 Digest (Repl.) 422, *1132*.

(2) *Re White's Trusts* (1886), 33 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 34 W.R. 771; 2 T.L.R. 830; 8 Digest (Repl.) 447, *1399*.

(3) *Re Packe, Sanders* v. *A.-G.*, [1918] 1 Ch. 437; 87 L.J.Ch. 300; 118 L.T. 693; 62 Sol. Jo. 488; 8 Digest (Repl.) 477, *1400*.

(4) *Re Stanford, Cambridge University* v. *A.-G.*, [1924] 1 Ch. 73; 93 L.J.Ch. 109; 130 L.T. 309; 40 T.L.R. 3; 68 Sol. Jo. 59; 8 Digest (Repl.) 468, *1701*.

(5) *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498; 8 Digest (Repl.) 453, **493*.

(6) *Re Davis, Hannen* v. *Hillyer*, [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317; 8 Digest (Repl.) 417, *1086*.

(7) *Biscoe* v. *Jackson* (1887), 35 Ch.D. 460; 56 L.J.Ch. 540; 56 L.T. 753; 35 W.R. 554; 3 T.L.R. 577, C.A.; 8 Digest (Repl.) 461 *1621*.

(8) *A.-G.* v. *Bishop of Chester* (1785), 1 Bro. C.C. 444; 28 E.R. 1229, L.C.; 8 Digest (Repl.) 422, *1129*.

(9) *Wallis* v. *Solicitor-General for New Zealand*, [1903] A.C. 173; 72 L.J.P.C. 37; 88 L.T. 65; 19 T.L.R. 230, P.C.; 8 Digest (Repl.) 439, *1302*.

(10) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.JJ.; 8 Digest (Repl.) 439, *1299*.

(11) *A.-G.* v. *Oglander* (1790), 3 Bro. C.C. 166; 1 Ves. 246; 29 E.R. 468, L.C.; 8 Digest (Repl.) 461, *1622*.

(12) *A.-G.* v. *Earl of Winchelsea* (1791), 3 Bro. C.C. 373; 28 E.R. 591; 8 Digest (Repl.) 445, *1360*.

(13) *Thetford School Case* (1609), 8 Co. Rep. 130 b; 77 E.R. 671; 8 Digest (Repl.) 443, *1328*.

(14) *Re Avenon's Charity, A.-G.* v. *Pelly*, [1913] 2 Ch. 261; 82 L.J.Ch. 398; 109 L.T. 98; 57 Sol. Jo. 626; 8 Digest (Repl.) 459, *1593*.

(15) *Martin* v. *Margham* (1844), 14 Sim. 230; 13 L.J.Ch. 392; 3 L.T.O.S. 433; 8 J.P. 532; 8 Jur. 609; 60 E.R. 346; 8 Digest (Repl.) 461, *1618*.

(16) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence* v. *Tierney, Lassence* v. *Lescher*, 14 Jur. 182, H.L.; 43 Digest 643, *790*.

(17) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, *792*.

(18) *Moryoseph* v. *Moryoseph*, [1920] 2 Ch. 33; 89 L.J.Ch. 376; 123 L.T. 569; 64 Sol. Jo. 497; 43 Digest 644, *796*.

(19) *Re Harrison, Hunter* v. *Bush*, [1918] 2 Ch. 59; 87 L.J.Ch. 433; 118 L.T. 756; 62 Sol. Jo. 568; 43 Digest 644, *795*.

(20) *Re Atkinson, Atkinson* v. *Weightman* [1925] W.N. 30, C.A.; 43 Digest 644, *797*.

**Appeal** from an order of TOMLIN, J., on an originating summons to determine the true effect of the disposition of the testator's residuary estate.

The facts appear in the judgment of the Master of the Rolls.

*The Attorney-General* (*Sir Douglas Hogg, K.C.*) and *Dighton Pollock* for the Crown.

*J. Rolt, K.C., C. E. Loseby*, and *J. P. Stimson* for the trustees of the will.

*Gavin T. Simonds, K.C.* and *C. A. J. Bonner* for the respondents, the next of kin.

Feb. 2. The following judgments were read. *Cur. adv. vult.*

**LORD HANWORTH, M.R.,** read the following judgment. Robert Monk, the testator, who was the proprietor of the Robin Hood hotel at Leicester,

made his will dated June 10, 1913, and died on Aug. 5, 1916. By his will he gave a life interest in his estate to his widow, and subject thereto he gave certain legacies, and subject to the payment of them and the duties thereon, he left the residue of his estate to be dealt with in the manner that gives rise to the questions to be determined herein. His widow died on May 22, 1924. He was a native of the parish of Foxton, a small parish some three and a half miles distant from Market Harborough, and in his will desired to be buried there. The population of Foxton is under 400. The value of the estate proved was £21,457. Upon the death of his widow legacies were to be paid to the value of over £5,000, but owing to the rise in the value of the estate since his death the amount of the residue is about £20,000. The question to be decided is whether there was a general charitable intention expressed by the testator as to the whole of this considerable sum, or whether, after making what is to be supposed to be adequate provision for the charities particularised by the testator, there is an intestacy as to the surplus to which the next of kin would be entitled. Tomlin, J., found the question to be one of difficulty. He declared that the will did not contain any charitable intention in respect of the surplus of the residuary estate, and held that there was an intestacy of the surplus not required for the payment of the legacies and duties, and making provision for the "coal fund" and "loan fund" hereinafter mentioned, and he directed certain inquiries. From that decision the Attorney-General brings this appeal.

Under the terms of the will the testator appointed certain persons trustees of his property who were thereafter called "my original trustees," and gave directions to them. By cl. 7:

> "Subject to the payment of the aforesaid legacies and any duties thereon, I direct my original trustees to pay and transfer my residuary trust estate to the parish council of the parish of Foxton if formed at the date of the death of my said wife, but if there shall not be any such parish council then in existence then my original trustees shall pay and transfer my residuary trust estate to the official trustees of charitable funds, which parish council or official trustees, as the case may be, are hereinafter referred to as 'the charity trustees,' to be held upon the trusts and for the purposes hereinafter declared and contained."

No parish council has ever been formed for Foxton, hence the "charity trustees" are the official trustees of charitable funds, who were constituted and empowered by s. 51 of the Charitable Trusts Act, 1853, and by s. 1 (1) of the Charitable Trusts Act, 1925, have been made a body corporate. By cl. 10 of the will the charity trustees are to set aside a sum of £800 for the purpose of establishing a "coal fund," the income to be used for the purchase of coal to be distributed among such poor and deserving inhabitants of Foxton, as a committee, which the testator prescribes, may in their absolute discretion think fit. The "charity trustees" are to hold all the rest of the residuary estate to an account to be entitled in their books "The Robert Monk's Foxton Charity Loans Fund," and they are to apply the capital and income of the fund, under the direction of the same committee as that set up for the "coal fund," "in making loans to poor and deserving inhabitants of the said parish of Foxton in manner hereinafter provided." There follow specific directions, which it is unnecessary to refer to except to notice that no loan is to exceed the sum of £100; only one-sixth part of the loan fund is to be lent in any one year; the borrowers are to be inhabitants or residents of Foxton not above the age of thirty-five years; the period for the repayment of the loan is not to exceed nine years, and no interest is to be charged, but no borrower can be granted more than one loan. It is plain that these limitations narrow the number of possible borrowers in the parish to a small one, and that, even if they can do so at present, it would not be possible for the committee, in the course of a few years as matters stand at present, to submit a sufficient number of applicants to exhaust the total limit of the advances that can be made in any one year. The testator, however,

contemplated that there might be a surplus ; and by cl. 23 of his will "all surplus money forming part of or arising from the loans fund over and above the sum of £500, and not required for loans, shall be invested by the "charity trustees" under the direction of the committee . . . but all investments purchased shall be from time to time sold for the purpose of advancing the produce thereof in loans if and when required."

It is not questioned that there is a good charitable trust as to so much of the residuary surplus, beyond that required for the legacies, duties, and "coal fund," as it may be thought wise to reserve for the purpose of the "loans fund"; but it is said that, so far as can be anticipated reasonably at the present time, there is no prospect that the qualified borrowers in Foxton will become so numerous as to exhaust the resources of the charity trustees ; that, as to the sum not required according to present anticipations, there is a surplus undisposed of ; that thus it may be deduced that the gift is for a particular purpose ; and that, there being no paramount and general intention of a charitable purpose as to the whole, the gift fails, pro tanto, with the result that there is an intestacy in respect of this unrequired surplus. The authority of the judgment of PARKER, J., in *Re Wilson* (1) is invoked where he denies broadly two categories into which the cases decided may be divided. The first where

> "it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention according to the true construction of the will, is to give the property in the first instance for a general charitable purpose, rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect."

In such cases, even though the precise directions cannot be carried out, the gift for the general charitable purpose will remain, and be perfectly good and the doctrine of cy près applied. The other category is

> "where on the true construction of the will no such paramount general intention can be inferred, and where the gift, being in the form of a particular gift—a gift for a particular purpose—and it being impossible to carry out the particular purpose, the whole gift is held to fail."

PARKER, J., concludes with the statement of his opinion that the question whether a particular case falls within the one or the other of the above categories is simply a question of the construction of the particular instrument. It is contended that the present case falls within the second category. PARKER, J., in the particular case before him, where the bequest was to provide the salary of a schoolmaster, who was to teach in a school house to be provided aliunde, held that "the whole gift was in the testator's mind dependent upon it being feasible and possible to carry out these particular directions." As those directions could not be carried out, he held that the bequest failed, as he could find no general and paramount charitable intention. He felt that it was not justifiable to infer a general intention from the particular directions, or to disregard the particularity of the gift, and to give effect to a general, as opposed to the particular, intention, which latter was the only one expressed. Other illustrations of the second category in the above division were offered as in *Re White's Trusts* (2) where the legacy was for a sum for the building of almshouses on a site to be obtained ; *Re Packe* (3), a house in a remote place inconvenient for the purpose, offered to the Poor Clergy Relief Corporation, which they or any like society felt unable to accept ; *Re Stanford* (4), where a balance was left of a fund provided to finance the publication of a particular literary work. In these cases the legacy was given clearly in favour of a particular purpose,

A and in the first three, conditions precedent had to be fulfilled before the purpose to which the legacy was to be devoted could be effective. Other cases were cited to us by the Attorney-General: *Incorporated Society* v. *Price* (5), where a rentcharge was given to the support of a school which after continuing over eighty years was discontinued; *Re Davis* (6), a legacy to the Home for the Homeless which did not exist; *Biscoe* v. *Jackson* (7), a sum to establish a soup kitchen and cottage B hospital for a particular parish where land for it could not be found. In these cases a paramount charitable intention was found to exist, even though the particular form expressed for it ceased, or was discovered to be not practicable as precisely intended.

It has been suggested, and I accept the suggestion, that the best principle on which such distinctions can be logically based is, that when the gift can be read C as devoting the property to charity and adding a condition subsequent to the gift, then, if the performance of the condition becomes impossible, the gift becomes absolute, whereas if the condition is precedent to the gift, and the condition becomes impossible, the gift fails altogether. If this principle is applied to the present case it is at once seen that the loans fund is practicable at the present time, if not in the full measure which the sum available makes possible. This element D does not make the gift bad if the paramount intention is found: see *A.-G.* v. *Bishop of Chester* (8), where a legacy towards establishing a bishop in America was held not void, though none had been appointed. Lord Thurlow said the money must "remain in court till it shall be seen whether any such appointment shall take place." Lord Macnaghten refers to this case in his judgment in *Wallis* v. *Solicitor-General for New Zealand* (9) with approval, as being a recognised authority. He E says, and I agree with Tomlin, J., that he is dealing with cases where there is a paramount charitable intention, that

> "it is well settled that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect F within any definite limit of time, and may never take effect at all."

He refers to *Chamberlayne* v. *Brockett* (10), before Lord Selborne, who accepts Lord Cottenham's words that where personal estate has been given in perpetuity to charity effectually it is neither more nor less alienable because there is an indefinite suspense, or abeyance, of its actual application, or of its capability of G being applied to the particular use for which it is destined. Another illustration was given in *A.-G.* v. *Oglander* (11), a gift for widows when there were no widows at the date of the gift. The next of kin can only base their claim upon a mistake of quantum as to the loans fund in the purpose of the testator, and that was held in *A.-G.* v. *Earl of Winchelsea* (12) not to be a sufficient ground for upsetting the testator's charitable intention:

H > "Whenever the intention has been to dispose of the whole property to certain purposes, as in the early case of *Thetford School* (13)—the whole has been applied . . . the intention has been considered as such, and it has been only inferred that the testator has been mistaken merely as to quantum."

See per Lord Alvanley, M.R. (3 Bro. C.C. at p. 379). It may prove necessary I in some cases, if there is a large increase in value of the sum bequeathed after the testator's death, to invoke later on the doctrine of cy près, as in *Re Avenon's Charity* (14), where some land was given in 1580 to trustees, who out of the rents and profits were to make a distribution of small sums, and some bread, to twenty-four persons of a parish now included in the metropolitan area, and to pay for a sermon to be preached once a year. The sum which was thus available was £21 in 1833, and had recently reached the amount of £320. The whole fund was held devoted to charity, and a scheme to exhaust the surplus authorised. Where the charity can be started at once there is no reason to defeat the general intention of

the testator because it is prophesied that in time the quantum of his gift will be found too large for its purpose. A

Applying these principles to the present case, and remembering that the court leans in favour of a charitable purpose, there appears to me to be a general intention on the part of the testator to devote this residue to charity. It is to be handed over by the original trustees to those whom he refers to as charity trustees. He establishes two specific funds, the coal fund and the loans fund: the latter, as well as the former, can be immediately utilised for its purpose. He contemplates an excess in the loans fund, and directs how that surplus, not at the moment required for loans, is to be dealt with. It is conceivable—if not probable—that all the loans fund may be required in a not remote future. It seems impossible to set aside that general intention of charity expressed in the will as to a scheme feasible at the present time. The fully qualified borrowers may present themselves, just as the bishop, or the widows, might have appeared in the cases already cited. B C

There remains, however, a further and difficult question. The testator died on Aug. 5, 1916. The limit of time, therefore, within which the direction as to accumulations can be effective ends on Aug. 5, 1937—that is ten and a half years from now. It is said to be clear that within that limit of time, or at any rate, when it is reached, the sum appropriated to the loans fund cannot be utilised, and thus that there must be an intestacy in respect of such overplus of income beyond that which will be absorbed in making loans from and after that date. It may be so, and if the event proves that the prognostications now made are correct an application might then be made as to such surplus of income, as was indicated as a possibility in *A.-G.* v. *Earl of Winchelsea* (12). But in the present case, in my judgment, the question can be solved otherwise. The same point arose in 1844 in *Martin* v. *Margham* (15) where Sir James Wigram, V.-C., having decided that there was a paramount intention to devote the whole property, directed this intention to be carried into effect cy près. In that case the accumulations must have exceeded the legal period ; but the Vice-Chancellor stated his opinion that where a testator has expressed his intention that his personal estate shall be in substance applied for charitable purposes, and there is in effect a devotion of it to charitable purposes, the next of kin have no claim at all to his property. The rule is that you are not to look at the event which actually happens for determining the validity of the gift. If the present is to be regarded, there is a charitable bequest now good. If so, are the possibilities that may eventuate ten years hence to have a reflex effect upon the present, and to prevent a declaration now that the gift is valid, even though the application of the cy près doctrine may come to be invoked hereafter ? Turning again to *Chamberlayne* v. *Brockett* (10) the bequest was a sum of £10,000 with which to build almshouses "so soon as land shall at any time be given for the purpose" of a site for them. Lord Romilly held this gift of the residue void as being a perpetuity. He said: D E F G

> "Suppose a testator gave £1,000 to be accumulated until some heirs of John Jones should select a descendant of A.B. to receive it. That would be void on the ground of perpetuity because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless, and until, some person gives land for the purpose of the charity which may not happen for an indefinite period." H

It was argued for the respondents in the appeal to the Court of Appeal that there was nothing to protect a gift which does not devote the property to charity until the happening of a further event which may be beyond the period allowed by the rule against perpetuities. Lord Selborne and James and Mellish, L.JJ., rejected these arguments. Lord Selborne, giving the judgment of the court, said: I

> "If there was an immediate gift of the whole of the residue for charitable uses, the authorities mentioned during the argument (*A.-G.* v. *Bishop of Chester* (8))

prove that such gift was valid, and that there was no resulting trust for the next-of-kin, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness."

I have already given reasons for my judgment that there is in the present case an immediate and effective gift of the whole of the residue for charity. The next of kin are thus displaced. The purpose can be set in force at once. It would be contrary to the decision just cited, and binding upon this court to consider the prospect, uncertain as it is, as to how far there may be accumulations—so called —at a time beyond the limit allowed. That would be to contemplate the occurrence of events in their nature contingent and uncertain. Indeed, there being, as I have held, a general charitable intention, the doctrine of cy près could be at once applied were it necessary so to do. But is there any question at all of accumulation, seeing that there is the possibility that the purpose may exhaust the whole income ? In my judgment, the question of accumulations does not arise. Certainly the possibility of a surplus hereafter does not impair the validity of the gift now for charity. The appeal must be allowed. The order will be: Discharge the order of Tomlin, J., except as to costs. Declare that the will discloses a general charitable intention as asked in the notice of appeal. Liberty to the Attorney-General to apply for a scheme if and when so advised. Stay the action against all defendants except the Attorney-General. Costs of the appeal of all parties, as between solicitor and client out of the fund. Plaintiff to retain and pay such costs out of the residuary estate.

**SARGANT L.J.**—For the purpose of deciding the questions raised on this appeal the first and crucial point to be determined is whether the language of the testator's will, in relation to the disposition made of his residue after the death of his wife, indicates a general charitable intention coupled with specific directions as to the mode of carrying out that intention, or merely indicates a specific and limited charitable intention, the partial failure of which involves a partial failure of the gift. The indication of a general charitable intention may arise from general prefatory words, such, for instance, as those occurring in *Wallis* v. *Solicitor-General for New Zealand* (9), or in *Chamberlayne* v. *Brockett* (10). But, of course, it is not necessary that there should be any such prefatory or separate words, nor have they been present in most of the reported cases where a general charitable intention has been found. The intention may be shown from the nature of the dispositions themselves.

In my judgment, there are in the dispositions of this will several definite indications of general charitable intention which I will proceed to point out. In the first place, immediately after the death of the testator's wife and the payment of the legacies then given to relatives and friends, there is an abrupt termination of the duties of the testator's original trustees, and a peremptory direction to transfer the whole of the residuary estate to one of two alternative sets of trustees, who are expressly designated "charity trustees." The gift as regards the testator's estate is immediate and absolute. Great importance has been attached to such a disposition in the many analogous cases in which a share of a testator's estate has been given out and out as regards his estate, and then settled upon trusts for a daughter or child of his, which do not exhaust the entire beneficial interest in the share. In such cases, whether the original absolute gift has been to the daughter herself or to trustees for her, it is quite definitely settled that there is no resulting trust for the next of kin, or ultimate trust for the residuary legatees of the testator, but that the undisposed of beneficial interest passes to the daughter by virtue of the original gift. The principle is stated in *Lassence* v. *Tierney* (16), and has since been expressly re-stated in *Hancock* v. *Watson* (17). Among the numerous

cases to the same or a similar effect, *Moryoseph* v. *Moryoseph* (18), *Re Harrison* (19), and *Re Atkinson* (20) may be specially mentioned. The reasoning on which these cases is based is general: see per YOUNGER, J., in *Re Harrison* (19) and is, in my view, equally applicable to an original out and out gift to charity trustees, with a superadded direction to apply the subject-matter of the gift to charitable purposes which are not necessarily exhaustive of the whole interest in the fund.

Next is to be noted that the gift to the charity trustees is immediate and unconditional and that their duties are to begin at once and are such as will at once absorb some part of the fund, and, indeed, may in the view of the testator ultimately exhaust the whole fund. The case is quite different from that of *Re Wilson* (1), so much relied on by the appellant where the application of any part of the fund was dependent on the constitution of the whole scheme. If there should be any failure here it would be in the nature of a partial failure by matter subsequent, not as there, a total failure through failure of a condition precedent. Counsel for the respondents were not able to cite any case in which, a charity having actually been put into operation and passing afterwards, proved incapable of exhausting the whole charitable fund, it had then been held that there was a resulting trust for the donor, or in the case of a will for his next of kin. Further, there is an indication which is, perhaps, even more cogent than either of those already mentioned. I refer to the provisions in cl. 23 of the will for the investment and accumulation of so much of the fund as may not from time to time be required. Here the testator has himself recognised that the fund may be too large for immediate exhaustion, and has provided that in such a case, and without any limit of time, there should be an accumulation with a view to subsequent application for the charitable purposes in question. Reference was made to the restrictions on accumulation imposed by the Thellusson Acts. But it is elementary that these restrictions are quite immaterial for the purpose of placing a construction on the meaning of a will or other document. The document has first to be construed independently of these Acts, and they operate, if at all, only after that construction has been ascertained. Here it is the construction of the will, and that only, that is in question ; and for that purpose a direction for indefinite accumulation seems to me of the greatest weight, and does at least completely negative any suggestion that the gift to charity is not intended to be exhaustive, but leaves a possibility of a resulting trust.

It is now well settled, and, indeed, was admitted by counsel for the respondents, that the question of general charitable intent was one depending on the construction of the particular will, or other instrument ; and I have, therefore, devoted my main attention to the construction of this testator's will without, of course, disregarding any general principles to be deduced from the long bead-roll of cases on the subject. And having come to the conclusion that such an intention is shown by the will, I necessarily think that the appeal here should be allowed. But I should add that even if this conclusion is wrong, I entertain great doubt whether the judgment of the learned judge can stand. Even if no general charitable intention is shown here, still there is, in my judgment, an effective trust under which the fund, so far as not employed, has to be invested and accumulated for a period not ending till twenty-one years after the testator's death, that is till Aug. 5, 1937, and under which it would seem that after that date only the income not applied from time to time to the fund would result to the next of kin. Accordingly, it seems to me that even on that construction an immediate inquiry such as has been directed is premature.

**LAWRENCE, L.J.**—It is plain that the trusts declared by the testator concerning the loans fund are intended to continue for ever, and that the persons who may benefit under these trusts are limited in number only by the housing capacity of the parish of Foxton. It is not suggested that the trust so constituted is invalid or incapable of taking effect, but the next of kin assert that the ultimate residue of

the testator's estate is larger than is reasonably required for the purposes of the trust, and that the portion not so required ought to be paid over to them. TOMLIN, J., has so far acceded to the claims of the next of kin as to make an order declaring in substance that after setting aside a sum sufficient for giving effect, so far as practicable, to the testator's express directions relating to the loans fund the ultimate residue is undisposed of, and directing an inquiry what is the maximum sum practicable to be employed within a reasonable period of time in giving effect to the directions in the will concerning that fund.

It seems to me that the learned judge ought not to have made such an order. In my opinion, in a case such as this, where the trust is designed to meet the needs not only of the present, but of all future poor and deserving persons of a certain age inhabiting or residing in the parish of Foxton, it is not for the next of kin or the court to determine how much of the testator's estate ought to be devoted to the trust. This seems to me to be a matter which the testator is at liberty to decide for himself. There is nothing in law to prevent a testator, if so minded, from setting up a permanent charity, such as the one here, and from endowing it with a fund sufficiently large to afford relief not only to the present, but also to the future, objects of his bounty. Who can say that the fund provided by the testator in the present case is too large to meet all the claims which may in the future be made upon it ? What is the reasonable time within which (according to the inquiry directed) the court ought to find that the whole of the fund would not be required ? These are questions which, in my opinion, the court ought not to embark upon. Nobody can foresee what the population of the parish may be in time to come. It is even conceivable (though possibly not very probable) that the establishment of the loans fund (which is to be publicly advertised) may attract persons to the parish. In my opinion, the testator is the sole judge as to the amount he desires to devote to the object he had in view, and it is not the function of the court to inquire whether he has over-estimated the amount required to carry out his scheme, or whether it is likely or not that within a reasonable time so large an amount will be required for that purpose. In order to constitute a partial failure of a charitable trust such as this the next of kin would, in my opinion, have to prove that it was impossible that the whole sum could ever be required for the purposes of the trust—a fact which, in view of the nature and scope of the trust, is incapable of proof.

There remains, however, to be considered the effect of cl. 23 of the will which directs the charity trustees to invest any surplus money (beyond £500) forming part of or arising from the loans fund, and not required for loans. It was contended on behalf of the Attorney-General that this direction does not amount to a direction to accumulate the income of the loans fund within the meaning of s. 164 of the Law of Property Act, 1925 (which replaces the Thellusson Act), because under the express terms of the clause the investments might at any time be sold and applied for the purposes of the trust. In my opinion, this contention is not well founded. The purposes of the trust are limited to the making of loans which are to be repaid ; therefore, whenever any surplus income is invested there would be an automatic and permanent increase in the fund available for these loans. In my opinion, the destination of the surplus income after the period allowed by law for the accumulation of income depends primarily upon whether or not there is to be found in this will a general intention to devote the residue to charity. It is not disputed that if there be such a general charitable intention any surplus income after the expiration of the period allowed by law will be applicable cy près and will not pass to the next of kin. I agree with TOMLIN, J., that the point as to whether a general charitable intention can be gathered from the testator's will is a difficult one, and I confess to having found it far from easy to make up my mind upon it. On the whole, however, I have come to the conclusion that the better opinion is that the testator has sufficiently indicated his intention to dedicate the whole of the ultimate residue of his estate out and out to charitable purposes,

namely, the relief of the deserving poor of the parish of Foxton. In the first place, it is, in my opinion, not unimportant to bear in mind that the testator is dealing with the residue of the estate after having made provision for his wife, and given benefits to various relations, and others. It is this residue which the testator directs his original trustees to transfer bodily to either the parish council of Foxton or to the official trustees of charitable funds whom he designates as the charity trustees, and neither of whom (even if empowered to do so) could ordinarily be expected to entertain the administration of the trusts of any funds not permanently and completely dedicated to charitable purposes. These facts, coupled with the somewhat general words used by the testator in cl. 11 of the will in describing the main purpose of the ultimate trust, and coupled with directions contained in cl. 23 as to the investment and application of any surplus money not required for making loans, in my opinion, afford a strong indication that the whole of the charitable intention of the testator in favour of the deserving poor of the parish of Foxton would not be exhausted if it were found impracticable to apply some part of the capital or income of the ultimate residue in the precise manner laid down by him.

For these, and the other reasons given by the Master of the Rolls and SARGANT, L.J., I am of opinion that the testator has, in spite of the particularity with which he has laid down the method of application, shown an over-riding intention to devote the whole of his residue to charity, and that there is no resulting trust to his estate of any part of the capital or future income of such residue. I concur in the form of order proposed by the Master of the Rolls.

*Appeal allowed.*

Solicitors: *Treasury Solicitor; Mackrell, Maton, Godlee & Quincey*, for *Plummer & Pike*, Leicester.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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## Re LEIGH'S SETTLED ESTATES

[CHANCERY DIVISION (Tomlin, J.), March 22, 29, April 5, 1927]

[Reported [1927] 2 Ch. 13; 96 L.J.Ch. 423; 137 L.T. 378; 71 Sol. Jo. 369]

*Trust—Trustee—Trust for sale—"Immediate binding trust for sale"—Trustees for sale subject to jointure rentcharge—Approval by court—Powers of person exercising powers of tenant for life—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *s.* 3—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 2 (2), *s.* 29 (4)—*Law of Property (Amendment) Act*, 1926 (16 *& 17 Geo.* 5, *c.* 11), *s.* 7, *s.* 8, *schedule.*

Under a will, Mrs. T. became entitled as tenant in tail of settled land subject to a yearly rentcharge of £1,500 appointed by a deceased tenant for life to his widow under a power in the will. By an order of court in 1923, the marriage of Mrs. T., who was still a minor, was approved, and she was authorised to execute three deeds. By the first deed she executed a disentailing assurance. By the second, she conveyed the settled land to trustees on trust for sale, subject to the jointure, but with power to postpone, and to hold the proceeds of any sale and also the rents and profits until sale on the trusts and subject to the powers and provisions declared by the third deed, which was a deed of settlement. Under this settlement, the income of the trust fund created by the deed was to be applied in paying life annuities of £5,000 to Mrs. T., £1,000 to her husband and £3,500 to the jointress, and the remainder to Mrs. T.

during her life. By two orders made in 1924 and 1925, pursuant to the Settled Land Act, 1884, s. 7, Mrs. T. was given power to exercise all the powers of a tenant for life under the Settled Land Acts, 1884 to 1890. On the questions (i) whether, notwithstanding the amendments to the Settled Land Act, 1925, and the Law of Property Act, 1925, made by the Law of Property (Amendment) Act, 1926, Mrs. T. still had, under the Settled Land Act, 1925, s. 20 (1) (viii), the powers of a tenant for life in possession under that Act in relation to the settled estates ; (ii) whether, by reason of the trustees having been approved by the court when the three deeds were settled and approved, and by reason of the amendment made to the Law of Property Act, 1925, s. 2 (2), by the schedule to the Law of Property (Amendment) Act, 1926, the settled estates had ceased to be settled land within the Settled Land Act, 1925, and were subject to an immediate binding trust for sale under which the trustees were the proper persons to sell ; (iii) in the event of its being determined that the estates were subject to an immediate binding trust for sale, whether Mrs. T. could, under the Law of Property Act, 1925, s. 29 (4), and consequent on the two orders of 1924 and 1925, exercise the powers conferred on the trustees for sale by the Law of Property Act, 1925, in the names and on behalf of the trustees.

**Held:** (i) by virtue of the Law of Property (Amendment) Act, 1926, the land was no longer subject to a settlement within the Settled Land Act, 1925, s. 1, but was, by virtue of the Law of Property Act, 1925, s. 2 (2), as amended by the Act of 1926, subject to an immediate binding trust for sale ; (ii) the approval of the trustees contemplated by the Law of Property Act, 1925, s. 2 (2), as amended by the Law of Property (Amendment) Act, 1926, schedule, need not be an ad hoc approval for the purposes of sale, but included such an approval as was expressed in, or to be inferred from, the order of the court approving the settlement made on Mrs. T.'s marriage ; (iii) by virtue of the Law of Property Act, 1925, s. 29 (4), Mrs. T. was enabled to exercise the powers conferred by the orders made under the Settled Land Act, 1884, s. 7, but in the names and on behalf of the trustees.

**Notes.** Not followed : *Re Parker's Settled Estates*, *Parker* v. *Parker*, post, p. 546.

As to land settled by way of trust for sale, see 29 HALSBURY'S LAWS (2nd Edn.) 763 et seq. ; and for cases, see 40 DIGEST (Repl.) 792–794.

For Settled Land Act, 1925, s. 1, s. 3, see 23 HALSBURY'S STATUTES (2nd Edn.) 15, 23 ; for Law of Property Act, 1925, s. 2, s. 29, see 20 HALSBURY'S STATUTES (2nd Edn.) 438, 481, and for Law of Property (Amendment) Act, 1926, s. 7, s. 8, see ibid., 902.

Cases referred to :

(1) *Re Leigh's Settled Estates*, [1926] Ch. 852; 95 L.J.Ch. 511; 136 L.T. 395; 70 Sol. Jo. 758; 40 Digest (Repl.) 804, *2834*.

(2) *Re Lady Francis Cecil's Settled Estates*, [1926] W.N. 262; 161 L.T. Jo. 391; 40 Digest (Repl.) 814, *2934*.

**Adjourned Summons.**

By his will dated May 22, 1860, Capel Hanbury Leigh, a testator, who died on Sept. 28, 1861, devised his freehold estates in the counties of Monmouth, Glamorgan, and Brecon and elsewhere (subject to a prior limitation of a term of 1,000 years on trusts long since satisfied), to the use of his son, John Capel Hanbury Leigh, during his life with remainder to his son's first and every other son successively in tail general with remainder to his son's first and every other daughter successively in tail general with divers remainders over. The testator gave power to any tenant for life in possession to appoint to his widow a jointure rentcharge not exceeding £1,500 per annum, issuing out of, and charged on, the settled lands. John Capel Hanbury Leigh (afterwards John Capel Hanbury) survived the testator, and on Jan. 7, 1885, appointed to his wife, Mrs. Hanbury, for her life, and if

she survived him, a yearly rentcharge of £1,500 to be charged on all the settled lands. John Capel Hanbury had two children, namely, a son, who died on Aug. 9, 1908, at the age of fourteen years, and the applicant, Ruth Julia Margarette Tenison (hereafter called Mrs. Tenison), who was born on Feb. 16, 1903, and intermarried with Gerald Eric Farquhar Tenison (hereinafter called Mr. Tenison) on Dec. 18, 1923. By an order of the Chancery Division made on Dec. 3, 1923, the court had approved the marriage and authorised the execution by Mrs. Tenison (although a minor) of the three deeds next mentioned. On Dec. 17, 1923, Mrs. Tenison, being then still unmarried, executed a disentailing assurance, as the result of which she became entitled in fee simple to the settled lands, subject only to the yearly rentcharge of £1,500. Then by a conveyance of the same date she conveyed the settled lands unto and to the use of the trustees, who (by cl. 4) were to hold the same on trust for sale but with power to postpone sale, and so that, during Mrs. Tenison's life, any sale should be made only with her consent. In the same deed, Mrs. Hanbury covenanted with the trustees that if on or in connection with any sale under the trust for sale they should desire her to concur therein and to execute any deed for the purpose of releasing the property from her jointure rentcharge, she would do so at their cost, but only on the terms that her jointure rentcharge should attach and become charged on the proceeds of sale and the investments for the time being representing the same. By cl. 5 it was provided that the trustees should hold the net proceeds of any sale under the trust for sale and also the rents and profits until sale on the trusts and subject to the powers and provisions declared by a deed of settlement of even date. By this deed of settlement, it was declared that the trustees should stand possessed of the net money to arise from any sale made under the trust for sale contained in the conveyance of even date on trust for investment and to apply the income of the trust fund so created, first, in paying to Mrs. Tenison during her life, without power of anticipation, a net yearly sum of £5,000, secondly, in paying to Mr. Tenison a net yearly sum of £1,000, thirdly, in paying to Mrs. Hanbury a net yearly sum of £3,500, and fourthly, in paying the remainder of the income to Mrs. Tenison during her life without power of anticipation. After the death of Mrs. Tenison and subject to the annuities of Mr. Tenison and Mrs. Hanbury, the trustees were directed to hold the trust fund on trusts for the benefit of Mr. and Mrs. Tenison's issue. Pending the sale of the property comprised in the conveyance of even date, the net rents and profits were to be applied on the same trusts as were declared concerning the income of money arising from sales under the trust for sale. By an order of the Chancery Division made by TOMLIN, J., on April 15, 1924, in the matter of the compound settlement created by the testator's will, the disentailing deed, the conveyance and the settlement, it was ordered that Mrs. Tenison should be let into possession and receipt of the rents and profits of the settled lands, and trustees of the compound settlement were appointed. It was further ordered, pursuant to the Settled Land Act, 1884, s. 7, that the powers conferred on a tenant for life by s. 6 to s. 13 of the Settled Land Act, 1882, should be exercisable by Mrs. Tenison. By a further order of TOMLIN, J., on Jan. 20, 1925, it was ordered, pursuant to the same section, that the power of sale and other powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890, should also be exercisable by Mrs. Tenison.

In *Re Leigh's Settled Estates* (1), TOMLIN, J., decided, on June 2, 1926, that the settled land was subject to a compound settlement consisting of the will, the disentailing deed, the conveyance and the settlement, and that Mrs. Tenison had the powers of a tenant for life of the compound settlement conferred on her by the Settled Land Act, 1925, s. 20 (1) (viii), as the land was not "subject to an immediate binding trust for sale," by which was meant a trust for sale immediately exercisable so as to overreach all prior equitable charges. This summons was taken out by Mrs. Tenison asking:—(i) Whether notwithstanding the amendments to the Settled Land Act, 1925, and the Law of Property Act, 1925, made by the

A Law of Property (Amendment) Act, 1926, Mrs. Tenison still had under the Settled Land Act, 1925, s. 20 (1) (viii), the powers of a tenant for life in possession under that Act in relation to the settled estates ; (ii) whether by reason of the respondent trustees having been approved by the court when the three several deeds of Dec. 17, 1923, were settled and approved by the court and by reason of the amendment made to the law of Property Act, 1925, s. 2 (2), by the Law of Property (Amendment) B Act, 1926, the settled estates had ceased to be settled land within the meaning of the Settled Land Act, 1925, and were subject to an immediate binding trust for sale under which the trustees were the proper persons to sell ; (iii) in the event of its being determined that the estates were subject to an immediate binding trust for sale, whether Mrs. Tenison could, under the Law of Property Act, 1925, s. 29 (4), and consequent on the orders of April 15, 1924, and Jan. 20, 1925, exercise the C powers conferred on the trustees for sale by the above Act in the names and on behalf of the trustees.

*Bennett*, *K.C.*, and *H. T. Method* for Mrs. Tenison referred to *Re Leigh's Settled Estates* (1).

*Vaisey*, *K.C.*, and *Tillard* for the trustees referred to *Re Leigh's Settled* D *Estates* (1).

*Cur. adv. vult.*

April 5.—**TOMLIN, J.,** read the following judgment: The principal facts of this case will be found set out in *Re Leigh's Settled Estates* (1) and it is unnecessary for me to state them again. As the result of the decision in that case, the trustees on July 16, 1926, executed a vesting deed declaring that the legal estate in fee E simple was vested in the applicant, Mrs. Tenison, whom I had held to have the powers of a tenant for life under a compound settlement. The question which I have now to determine is as to the effect of the Law of Property (Amendment) Act, 1926, which received the Royal Assent on June 16, 1926, after my former decision, but which, by s. 8 (2), thereof provides that its provisions (with the exception of certain sections not material to this case) "shall be deemed to have F come into operation on the 1st day of Jan. 1926." Section 7 and s. 8 of the amending Act are the relevant sections and s. 7 enacts as follows :

> "The amendments specified in the second column of the Schedule to this Act, being amendments of a minor nature, shall be made in the enactments mentioned in the first column of that Schedule, and shall have effect without G prejudice to any title acquired by a purchaser, or any registration effected, before the passing of this Act."

Section 8 (1) is :

> "This Act may be cited as the Law of Property (Amendment) Act, 1926, and, so far as it amends any Act, shall be construed as one with that Act"

H and sub-s. (2) is :

> "The provisions of this Act except s. 4 and s. 5 shall be deemed to have come into operation on the 1st day of January, 1926."

By the Schedule to the Act, there are made, inter alia, certain amendments to s. 1 and s. 3 of the Settled Land Act, 1925, and certain amendments to s. 2 of the Law of Property Act, 1925. Section 1 of the Settled Land Act, 1925, determines I what constitutes a settlement. The amending Act adds a sub-section in these terms : "(7) This section does not apply to land held upon trust for sale." Section 2 of the Settled Land Act, 1925, remains unaltered and enacts as follows :

> "Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land and is in relation to the settlement referred to in this Act as the settled land."

Section 3 of the Settled Land Act, 1925, prescribes the duration of the settlement in the case of land which has been subject to a settlement. The amending

Act inserts after the word "land" the words "not held upon trust for sale." Section 2 (1) and (2) of the Law of Property Act, 1925, so far as they are material to this case, originally read as follows:

> "(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if "

—and then the second condition of affairs to which the "if" applies is as follows: if

> "the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of sub-s. (2) of this section or independently of that sub-section and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with."

Sub-section (2) was as follows:

> "Where the legal estate affected is not, when the equitable interest or power is created, subject to a trust for sale or a settlement, then if the estate owner, whether before or after the commencemnt of this Act, disposes of his estate to trustees upon trust for sale and at the date of a conveyance made after such commencement under the dispositions upon trust for sale, the trustees (whether original or substituted) are either—(a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed ; or (b) a trust corporation, such equitable interest or power shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale."

As amended by the amending Act, sub-s. (2) now reads thus:

> "Where the legal estate affected is subject to a trust for sale, then if at the date of a conveyance made after the commencement of this Act under the trust for sale or the powers conferred on the trustees for sale, the trustees (whether original or substituted) are either (a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed ; or (b) a trust corporation, any equitable interest or power having priority to the trust for sale shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land under sale."

Having regard to the alterations of the law, how can a title now be made to the land comprised in the relevant instruments ? I come to the following conclusions on the construction of the Acts: first, that "trust for sale" in the new sub-s. (7) of s. 1 of the Settled Land Act, 1925, and in s. 3 of the same Act, as now amended, must be read as meaning an immediate binding trust for sale ; secondly, that "trust for sale" in sub-s. (2) of s. 2 of the Law of Property Act, 1925, as amended, is not confined to an immediate binding trust for sale, as otherwise there would be no point in the sub-section ; regard must be had to the fact that definitions apply subject to the qualification, "unless the context otherwise requires"; thirdly, that the approval of trustees contemplated by the sub-section is not confined to an ad hoc approval for the purposes of sale, but includes such an approval as is expressed in, or is to be inferred from, the order of the court made on Dec. 3, 1925, approving the settlement made on Mrs. Tenison's marriage ; and fourthly, that where there is an approval or appointment of trustees by the court within the sub-section, the trust for sale is then capable of operating in relation to the whole

A subject-matter of the settlement, and (assuming that it is an immediate trust for sale) becomes an immediate binding trust for sale within the definition of that phrase in the Settled Land Act and the Law of Property Act.

Having regard to the view I have expressed above, I think that the amending Act has rendered this land no longer subject to a settlement within the meaning of s. 1 of the Settled Land Act, 1925, and as the amending Act is to be deemed to B have come into operation on Jan. 1, 1926, the vesting deed executed by the trustees must, I think, be regarded for the purposes of the future as having had no effect.

The question, however, still remains, what is the effect of s. 29 of the Law of Property Act, 1925, having regard to my orders made on April 15, 1924, and Jan. 20, 1925, giving Mrs. Tenison leave to execute the powers of a tenant for life including C the power of sale. Section 29 reads as follows:

> "(1) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an D annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period: and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence, that the delegation has not been revoked. (2) Any E power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power. (3) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee. F (4) Where, at the commencement of this Act, an order made under s. 7 of the Settled Land Act, 1884, is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such power in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section."

G The question, however, still remains: What is the effect of that section? I have already in part construed this section in *Re Lady Francis Cecil's Settled Estates* (2). I think the purpose of the section was to preserve as nearly as possible the position of a tenant for life who, when the Act came into force, was exercising powers by virtue of an order made under s. 7 of the Settled Land Act, 1884. I do not think that the force of that section has been in any way diminished by the amending Act H of 1926. Although the amending Act may have deprived Mrs. Tenison of her position as a tenant for life under the Settled Land Act, 1925, it has not, in my judgment, robbed her of the benefit of s. 29 of the Law of Property Act, 1925. There is, in my opinion, nothing in the contention that there are no powers which she can exercise, because the land is no longer subject to a settlement. The answer is that s. 29 enables her to sell, but only by exercising, so far as form is I concerned, the powers of the trustees under their trust for sale.

I shall make a declaration to the effect that, in the events which have happened, the estates are now subject to an immediate binding trust for sale, but that the applicant can, under s. 29 (4) of the Law of Property Act, 1925, in the names and on behalf of the trustees, sell the estates. The costs of all parties as between solicitor and client must come out of the estate.

Solicitors: *Foyer, White, Borrett & Black.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

A

# MATHIESON'S TRUSTEE *v.* BURRUP, MATHIESON & CO.

[CHANCERY DIVISION (Clauson, J.), January 14, 27, 1927]

[Reported [1927] 1 Ch. 562; 96 L.J.Ch. 148; 136 L.T. 796; [1927] B. & C.R. 47]

B

*Bankruptcy—Set-off—Claim to set off equitable against legal debt—Both debts existing at date of receiving order—Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

Where a defendant seeks to set off under s. 31 of the Bankruptcy Act, 1914, an equitable debt due to him from a bankrupt against a legal debt claimed by the trustee in bankruptcy, both debts existing at the date of the receiving order, he is entitled to do so, as bankruptcy administration is based on principles of equity and no distinction can be made between equitable and legal debts for the purpose of administration in bankruptcy.

C

**Notes.** As to the right of set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480–485, and for cases, see 4 DIGEST 389 et seq. For the Bankruptcy Act, 1914, s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 365.

D

Cases referred to:

(1) *Watson* v. *Mid Wales Rail. Co.* (1867), L.R. 2 C.P. 593; 36 L.J.C.P. 285; 17 L.T. 94; 15 W.R. 1107; 40 Digest (Repl.) 426, *193*.

(2) *Bennett* v. *White*, [1910] 2 K.B. 643; 79 L.J.K.B. 1133; 103 L.T. 52, C.A.; 40 Digest (Repl.) 427, *208*.

E

**Witness Action.**

Burrup, Mathieson and Sprague, Ltd., a company incorporated in 1905, of which G. J. Mathieson, the bankrupt, was a director, in pursuance of an agreement dated May 14, 1923, made between that company and a trustee for the defendant company, then intended to be formed for the sale of the business and assets of the old company to the defendant company (which was incorporated on June 10, 1923), by deed dated June 15, 1923, assigned to the defendant company the whole of its assets, which included all book debts and other debts due to the old company on Jan. 31, 1923, or to become due after that date; and in further pursuance of the agreement, the defendant company covenanted with the old company to pay and discharge all the debts and liabilities of the old company and to indemnify the old company in respect of any claims made in respect thereof. The agreement for sale provided, by cl. 10, that the agreement by the defendant company to pay and discharge all the debts and liabilities of the old company should not release any of the then directors of the old company from any liability they might be under to the old company in respect of all sums which the old company should have paid or should be called upon to pay, for government taxes under the Finance Acts, 1915 to 1922. On June 15, 1923, Mr. Mathieson, who had resigned his directorship of the old company, entered into an agreement with the defendant company of mutual service and employment for a period of five years at a salary of £500 a year, to be paid in equal monthly instalments in any event. On Aug. 5, 1925, a receiving order was made against Mr. Mathieson, and on Aug. 26 he was adjudicated bankrupt. No notice in writing of the assignment of June 15, 1923, was given to either the bankrupt or the plaintiff. At the date of the agreement of May 14, 1923, negotiations were on foot between the old company and the Inland Revenue Commissioners with regard to its liability for excess profits duty for the years 1915 to 1921. It had been ascertained that £3,000 was the amount of the balance due to the commissioners. Notice of assessment at that sum, and a demand to pay the same, had been made on the old company on Jan. 12, 1922. The liability arose from the disallowance by the commissioners of the sum of £8,791 remuneration credited to the bankrupt

F G H I

for the year ended June 30, 1920, in excess of the £2,000 allowed by statute. The whole of the £3,000 was paid by the defendant company to the commissioners between Feb. 26, 1924, and Dec. 31, 1925, of which £2,150 was paid before the date of the receiving order. The receipts for those payments were issued by the commissioners to the old company, to whom and its liquidator, and not to the defendant company, the commissioners looked for payment. On Jan. 27, 1926, the plaintiff, as the trustee in bankruptcy of Mr. Mathieson, issued a writ against the defendant company, claiming payment of a sum of £1,250 in respect of arrears of salary up to Dec. 15, 1925, under his service agreement with them. The defendant company pleaded a right to set off against the sum so claimed the sum of £2,150, being the amount of the excess profits duly paid by them before the date of the receiving order.

*Edward Clayton, K.C.*, and *Tindale Davis*, for the plaintiff, referred to WILLIAMS ON BANKRUPTCY, p. 180; *Watson* v. *Mid Wales Rail. Co.* (1); and *Bennett* v. *White* (2).

*F. K. Archer, K.C.*, and *A. Andrewes-Uthwatt* for the defendant company.

**CLAUSON, J.**—The excess profits duty in question was only paid off by instalments, but it was paid off by instalments, the final payment of which was made on Dec. 31, 1925. There had, however, by the date of the adjudication been paid off to the revenue sufficient payments to make the liability of Mr. Mathieson to recoup, assuming that liability to exist, a sum which exceeded the amount of the salary which he has claimed. Counsel for the defendant company suggested that, by reason of certain statutes to which he referred me, there was a direct liability by Mr. Mathieson to recoup the defendant company; and, of course, the case would be very much simplified if that were the position. It is not necessary for me to express any view upon that matter, and I abstain from expressing any view on it because, in the view I have taken of another point which arises, it is not necessary for me to deal with that matter. Accordingly, there is nothing that I have said in the course of the argument or what I say now, which is any authority on any such question as that which counsel raised. There is this position unquestionably, that, at the time that the defendant company took over the old company's assets and its liabilities, there was a liability, as between the director and the old company, for the director to make a recoupment in respect of excess profits duty to the old company. That liability of the directors to the old company was part of the property of the old company and, as such, it was transferred by way of assignment to the defendant company by the assignment which I have mentioned. It was so transferred by way of equitable assignment, for a right of that kind vested in the old company against a director will not be assigned at law except under the Judicature Act, 1873, and that would have involved certain notices in writing, which have not been given. Accordingly, the position is this, that the claim of the old company against a director in respect of this recoupment is a claim which was vested in equity, but not at law vested in the defendant company.

Counsel for the plaintiff, who has given me the greatest assistance in this case, has admitted—I think I may take it as an effective admission—that, assuming there had been an assignment of this liability perfected at law from the old company to the defendant company, the position at the moment the bankruptcy commenced would be this: a legal claim by the director against the defendant company for salary; a legal claim by the defendant company against the director to be recouped the sum in question, that claim arising by way of assignment from a similar claim. If that had been the state of facts, it would have been impossible to contend that s. 31 of the Bankruptcy Act, 1914, would not apply, and there would have been a set-off—a set-off, I may observe, under the Bankruptcy Act having nothing whatever to do with the legal set-off created by the statutes of set-off. It was pointed out, however, and pointed out very

truly, that that was not the position, because the assignment was an equitable assignment, and, accordingly, the claim of the company to set-off was that they sought to set-off against the defendant company. A

It is said—I do not doubt accurately—that, if I now decide that an equitable claim is not in the same position for purposes of set-off, under the mutual credits section, as if it were a legal claim, I shall be deciding a point which is not directly covered by a clear authority appearing in the books. My attention was drawn by counsel for the plaintiff to *Bennett* v. *White* (2), but I do not think it throws any light on the matter I have to consider. What was being considered was this. In a court of law, it was being considered whether the legal set-off provided by the statutes of set-off extended to set-off of a debt which had been assigned under the Judicature Act and, accordingly, had become a legal debt owing to the assignee, although it had not been originally owing to him. There was some discussion on the term "mutual." I confess that I found no assistance from that case. On principle, it appears to me that the mere fact that the debt is an equitable debt, and not a legal debt, has no bearing at all on the question whether it is available for the purpose of set-off under s. 31. The Bankruptcy Act, as I understand it, is an Act regulating the proceedings of a court which has always been a court of equity, proceeding on equitable principles, recognising equitable debts, subject, of course, always to such infirmities as sometimes happen, but drawing no distinction between equitable and legal rights for purposes of administering the estate of the bankrupt. I think at this time of day it would be very unfortunate if it were seriously suggested that a court of bankruptcy was in any way fettered by any such distinctions, except so far as any court of equity is fettered by the fact that certain disabilities may, in certain circumstances, attach to equitable rights as compared with corresponding legal rights. Accordingly, I decide that this set-off claimed in the defence is a good set-off and is operative to overtop the claim which has been made by the plaintiff in his action. B C D E

One more point I have to mention. There was a contention raised, on which I expressed my view in the course of the argument, and to make the matter as complete as I can I will express it once more. In the agreement under which the salary was claimed, it gives the right to salaries in these terms: "The company shall from"—such and such date to such and such dates—"pay to Mr. Mathieson in any event a salary at the rate of £500 per annum." What those words "in any event" mean, I am not quite clear. I am told that, if I could look at the surrounding facts, the matter would be clarified. I am not permitted to do that, and have to take the words as they stand. I am clear that those words do not have, and are not intended to have, the effect of excluding the defendant company from any right of set-off against the salary which may be given to them by any provisions of the law of the land. Accordingly, as far as this case is concerned, I regard those words "in any event" as wholly inoperative for any purpose with which I have to deal. F G H

Under those circumstances, the result of the action is that the claim by the plaintiff trustee for salary fails because it is overtopped by the defendant company's claim to set-off.

Solicitors: *Gush, Phillips, Waters & Williams; Wild, Collins & Crosse.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

# CROSSINGHAM *v.* PARK

[KING'S BENCH DIVISION (Acton and Talbot, JJ.), May 17, June 2, 1927]

[Reported [1928] 1 K.B. 330; 96 L.J.K.B. 1036; 137 L.T. 651; 43 T.L.R. 647]

*County Court—Moneylender—Application by borrower to re-open transaction—Total amount lent above £100—Proviso for repayment by monthly instalments—County Courts Act*, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 67—*Moneylenders Act*, 1900 (63 & 64 *Vict.*, *c.* 51), *s.* 1 (2).

In an application by a borrower to re-open a transaction with a moneylender which appears to be harsh and unconscionable under s. 1 (1) of the Moneylenders Act, 1900, a county court has jurisdiction if the whole amount of the "money lent," whether repayable by instalments or otherwise, without the addition of any claims arising under any agreement to pay interest or "expenses, inquiries, fines, bonus, premium, renewals, or any other charges" is within the jurisdiction of the county court, even though the moneylender has not taken any proceedings and though the time has not come for taking such proceedings.

**Notes.** The County Courts Act, 1888, was repealed by the County Courts Act, 1934, s. 193 (4) and Sched. V. Section 67 of the 1888 Act has been replaced by s. 52 of the 1934 Act. The limit of the county court jurisdiction is now £500.

As to relief of borrowers under the Moneylenders Acts, see 23 HALSBURY'S LAWS (2nd Edn.) 201–206; and for cases, see 35 DIGEST 212 et seq. For the Moneylenders Act, 1900, s. 1, see 16 HALSBURY'S STATUTES (2nd Edn.) 370.

Cases referred to:

(1) *Lazarus* v. *Smith*, [1908] 2 K.B. 266; 77 L.J.K.B. 791; 99 L.T. 77; 24 T.L.R. 592; 52 Sol. Jo. 481, C.A.; 35 Digest 218, *447*.

(2) *Samuel* v. *Newbold*, [1906] A.C. 461; 75 L.J.Ch. 705; 95 L.T. 209; 22 T.L.R. 703; 50 Sol. Jo. 650, H.L.; 35 Digest 212, *377*.

**Appeal** from Wandsworth County Court.

In February, 1924, the plaintiff, Mr. Crossingham, borrowed £250 from the defendant, Mr. Park, who was a registered moneylender and traded as the Temperance Loan Fund. The plaintiff gave as security a bill of sale on certain furniture and utensils. By January, 1927, the plaintiff had repaid in all a sum of £372 10s. in respect of principal and interest; but as the defendant still claimed that there was a balance owing to him, the plaintiff issued a summons in the Wandsworth County Court, under s. 1 (2) of the Moneylenders Act, 1900, which provides:

> "Any court in which proceedings might be taken for the recovery of money lent by a moneylender . . . may, at the instance of the borrower [reopen a transaction which appears to be harsh and unconscionable], and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower . . . notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived."

It was admitted before the county court judge that the amount claimed by the defendant to be owing to him from the plaintiff, under the terms of the original contract, was more than £100. It was, however, contended that, as the contract contained a proviso for the repayment of the loan by monthly instalments of £15, the defendant could have sued in the county court for any one instalment, and, therefore, the county court judge had jurisdiction to deal with the application before him and, further, that the defendant might have enforced his mortgage security under the bill of sale in the county court under the County Courts Act,

1888, s. 67. The county court judge held that, as the amount of the loan was more than £100, he had no jurisdiction to try the case and that the fact that the defendant might have proceeded under s. 67 of the Act of 1888, did not give the court jurisdiction to entertain the plaintiff's case under s. 1 (2) of the Act of 1900. The plaintiff appealed.

*S. P. Kerr* for the plaintiff.
*Charles Bray* for the defendant.

*Cur. adv. vult.*

June 2. **ACTON, J.,** read the following judgment of the court.—The question in this case is in what circumstances a borrower from a registered moneylender may have recourse to the county court in an application for relief under sub-s. (2) of s. 1 of the Moneylenders Act, 1900. To ascertain the meaning of this sub-section, it is, in our opinion, necessary to read it along with sub-s. (1) and to compare the two sub-sections with some care. Section 1 (1) begins with the words, "Where proceedings are taken in any court by a moneylender . . ." and sub-s. (2) with the words "Any court in which proceedings might be taken . . . by a moneylender. . . ." The first question is, what is the meaning of the words "might be taken" in this latter phrase? In our opinion, the true meaning of this phrase is "Any court in which (so far as amount is concerned) it would be competent for a moneylender to take proceedings, if he were minded so to do." The insertion of the parenthesised words is due to a consideration of the concluding words of the sub-section, viz., "notwithstanding that the time for the repayment of the loan, or any instalment thereof, may not have arrived," the effect of which is discussed later.

The next point to be observed is as follows: Sub-section (1) deals with "proceedings" of more than one kind, viz., (a) "for recovery of money lent," or (b) "for the enforcement of any agreement or security made or taken . . . in respect of money lent." Sub-section (2) deals with "proceedings" of one kind only, viz., "for the recovery of money lent," and there it stops. Now the claim of a registered moneylender is commonly on some negotiable instrument, such as a bill, note or IOU, but, whether it be so or not, it is always analysable into (a) a claim for "money lent," and (b) a claim or claims arising under an agreement or agreements to pay interest on or in respect of the amount of the loan, or other sums for "expenses, inquiries, fines, bonus, premium, renewals, or other charges," to employ the words of the Act of 1900. This analysis is familiar in the practice in the King's Bench Division under Ord. 14 since the decision in *Lazarus* v. *Smith* (1), the result of which is that, in a registered moneylender's action, if it appears that the whole or some part of the money "actually advanced" by the moneylender is still owing by the borrower, after crediting him with every payment made by him to the moneylender, irrespective of whether it purported to be in payment of principal or interest or charges, the plaintiff is entitled to judgment for that amount as "the principal sum admitted to be due" (per Lord Cozens-Hardy, M.R., [1908] 2 K.B. at p. 268), or as "a debt which is admitted, quite irrespective of any matters with which the Act has to deal" (per Kennedy, L.J., ibid at p. 269). The lord justice says:

> "The Moneylenders Act only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal."

In the light of this decision and what is therein involved, consideration now reverts to the meaning of s. 1 (2) of the Act of 1900. It can hardly be suggested that the difference in the wording of the two sub-sections to which attention has already been drawn—viz., that sub-s. (1) deals with proceedings for the recovery

of money lent and also with other claims of different kinds, whereas sub-s. (2) deals only with proceedings for the recovery of money lent and there stops—is without its significance. In our opinion, this gives the clue to the correct meaning of sub-s. (2). We think that the test whether a court is a court in which it would be competent for a "moneylender" (that is, for any particular moneylender) to take "proceedings for the recovery of *money lent*" is a test to be applied with reference to the strict meaning of the two italicised words. If the whole amount of the "money lent," whether repayable in instalments or otherwise without the addition of any claims arising under an agreement or agreements to pay interest or "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is within the jurisdiction of the county court, then in every such case, even though the moneylender has not taken any proceedings, and though the time has not come for taking proceedings, the borrower may make application under the Act in the county court, but not otherwise. This interpretation gives their ordinary and simple meaning to the words "money lent," and is applicable to every case. The fact is that a claim by a moneylender is often loosely regarded as a claim for "money lent" without more, whereas it is, practically always, not merely a claim for money lent, but such a claim in combination with claims of a different nature, although they are, of course, incidental to the transaction of borrowing the money lent.

It remains to be added that the concluding words of sub-s. (2) seem to be intended to show that the test is the amount of "money lent," and not the time at which any payment under the contract between lender and borrower becomes due and payable. It would otherwise seem very difficult to reconcile the words "Any court in which proceedings might be taken for the recovery of money lent" with the later words "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." This difficulty impressed itself on us in the course of the argument. It ceases, however, to be a difficulty if the earlier words are construed as relating solely to the amount of "money lent," irrespective of whether it is then wholly or in part due and payable, and we have not heard suggested, nor are we able to suggest, any more satisfactory reconciliation between these apparently inconsistent phrases occurring in the same sub-section. It is for these reasons that we have construed the words "Any court in which proceedings might be taken" as limited by the addition of the words "so far as amount is concerned."

We think that the learned county court judge was right in holding that this action was one under the Moneylenders Act, 1900, and not under s. 67 of the County Courts Act, 1888. The jurisdiction given by the Act of 1900 is a new jurisdiction of a special kind: see *Samuel* v. *Newbold* (2). In our opinion, the only test to be applied in an action such as this, to determine whether the county court has, or has not, jurisdiction to entertain an application by the borrower under s. 1 (2) of the Act of 1900, is that which is provided by the Act itself. We think, therefore, that counsel for the plaintiff's contention that he may have recourse to s. 67 of the County Courts Act and rely on some more or less dubious claim for redemption of the bill of sale granted by his client, as being a mortgage of personal chattels, is a contention which cannot prevail, even if there were no other grounds for rejecting it. Whether there are other grounds it, therefore, becomes unnecessary and inexpedient further to consider. His contention involves, however, the substitution of an inquiry whether the court is one in which the borrower might take proceedings for the inquiry whether it is one in which the lender might take proceedings, and it is the latter inquiry only which the Act indicates as relevant and essential. As the amount actually advanced in the present case was £250, this appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Piper, Smith & Piper; Webster, Butcher & Sons.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

A

# MACNAGHTEN *v.* DOUGLAS

[KING'S BENCH DIVISION (Acton and Talbot, JJ.), May 16, 1927]

[Reported [1927] 2 K.B. 292; 96 L.J.K.B. 738; 137 L.T. 518; 91 J.P. 143; 43 T.L.R. 525; 71 Sol. Jo. 409]

B

*Medical Practitioner—Unregistered person—Right to fees—Osteopath—Medical Act*, 1858 (21 & 22 *Vict.*, *c.* 90), *s.* 32.

By s. 32 of the Medical Act, 1858: "No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under the Act."

C

**Held:** section 32 did not preclude an osteopath, who was not a registered medical practitioner, from recovering at law fees for treatment as distinct from advice.

*Hall* v. *Trotter* (1) (1921), 38 T.L.R. 30, applied.

D

**Notes.** The Medical Act, 1858, s. 32, was repealed by the Medical Act, 1956, s. 57 (1) and Sched. V. Section 32 of the 1858 Act is replaced by s. 27 (1) of the 1956 Act.

As to recovery of charges by unregistered practitioners, see 22 HALSBURY'S LAWS (2nd Edn.) 316–317; and for cases, see 34 Digest 552. For the Medical Act, 1956, s. 27, see 36 HALSBURY'S STATUTES (2nd Edn.) 594.

E

Case referred to:

(1) *Hall* v. *Trotter* (1921), 38 T.L.R. 30, D.C.; 34 Digest 552, *105*.

**Appeal** from Bloomsbury County Court.

The plaintiff, who had a diploma from an American college of osteopathy, but was not registered as a medical practitioner in this country, sued the defendant to recover £30 9s. for osteopathic treatment for general debility and facial neuralgia rendered by him to the defendant's wife. The defendant, in his amended defence, relied on s. 32 of the Medical Act, 1858. During the cross-examination of the plaintiff the county court judge stopped the case and entered judgment for the defendant. The plaintiff appealed. The facts appear in the judgment of ACTON, J.

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*A. C. Jackson*, for the plaintiff, referred to *Hall* v. *Trotter* (1).

*A. A. Laporte Payne* for the defendant.

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**ACTON, J.**—This is an appeal from a decision of the learned deputy judge of the Bloomsbury County Court, by which he decided that the claim of the plaintiff in this action was barred by the operation of s. 32 of the Medical Act, 1858. The plaintiff is an osteopath, and it appears that he had taken his degree at Trinity College, Dublin, not in surgery or medicine, but in Arts. He gave evidence that he had studied osteology in America with a view of becoming an osteopath, that he had received a diploma from an American school or college of osteopathy, and that he had thereupon started in practice as an osteopath at 40, Weymouth Street, W. He said that his degree was taken in September, 1923, and he agreed that any qualification in the profession of osteopathy is not recognised in this country. The particulars of claim are expressed in these terms: "The plaintiff's claim is for £30 9s. for professional services rendered by the plaintiff as an osteopath to the defendant's wife from Mar. 10, 1926, to April 25, 1926." The plaintiff claims that, on Mar. 10, 1926, the defendant's wife came to him and said that she desired osteological treatment, that he examined her and came to a certain conclusion in regard to what she was suffering from and what was likely to prove remedial, and that he thereupon treated her according to the principles of osteopathy which he had studied. He treated the bones in the neck and other bones in the lumbar region, and he continued this treatment up to

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April 25, 1926. He said that the lady gave him a general description of her symptoms, that is to say, that she was not feeling well, and so forth, and particulars of her sensations in the morning, and on that he came to the conclusion that the treatment was likely to prove remedial. It would appear from what he said that he not only came to that conclusion, and put it into practice, but that he acquainted her with his conclusions, and advised that the kind of treatment which he was about to carry out was treatment which would be remedial. It appears that the case was originally set down for hearing on a day on which it was not reached, and up to that stage no defence had been filed, but when the case was before the learned deputy county court judge he allowed the defendant to set up the statutory defence under the Medical Act, 1858, s. 32. The question which we have to decide is whether, in these circumstances, the plaintiff's claim is, or is not, wholly barred by s. 32 of the 1858 Act.

The question is undoubtedly one of some importance, and at first sight one which might appear to present some little difficulty; but the very question raised in this case has already been raised and decided in this court in *Hall* v. *Trotter* (1). That was a case in which there was an appeal from a decision of HIS HONOUR JUDGE BRAY, at the Bloomsbury County Court, in which the plaintiff sued the defendant for £58 17s., the amount of her fees for osteopathic treatment given to the defendant, his wife and his daughter during the year 1920; and the female plaintiff in that case was in much the same position as the plaintiff in the present case, for she was a lady who had a diploma from an American college of osteopathy, but was not registered in England as a medical practitioner, though she was carrying on business as an osteopath and treating people for reward in that behalf. The question before the learned county court judge was the same question as that which is raised here. It is, perhaps, to be regretted that such a case only appears in THE TIMES LAW REPORTS, and that the facts are not more fully set out than they are in that report. They are, indeed, very scanty in what we are invited to regard as an important part of the case, namely, whether any diagnosis or advice was given by the plaintiff as distinguished from the actual manual or manipulative treatment, and, if so, how far that diagnosis and advice went. A feature of the case, of which it seems to me that sight ought not to be lost, is that the learned county court judge held, according to the report, that osteopathic treatment was not within the Act, and he gave judgment for the plaintiff. There was then an appeal to this court (HORRIDGE and SHEARMAN, JJ.), who dismissed the appeal, and it would appear from the report that, in substance, those learned judges listened to the same kind of argument to which we have listened. In the result, HORRIDGE, J., after referring to s. 32 of the Medical Act, 1858, and the judge's finding of fact—the cardinal finding of fact being, according to the report, that osteopathic treatment is not within the act—said:

> "In his view of the findings of the judge the plaintiff did not give any advice. She gave certain treatment to the bodies of these three persons. He declined to be led into definitions. He was satisfied that this case did not fall within the Act. The judgment must, therefore, be affirmed and the appeal dismissed."

SHEARMAN, J., agreed, and said that

> "they had only to consider what this woman did. She did not profess to advise anyone what was the matter, but after having got a diploma from a college in America, she applied her knowledge of anatomy to help her to determine the part of the body to which she should apply the treatment which she had been specifically called in to give. In applying the section the judge must bear in mind the recital in the Act."

It would appear that that is not improbably a slip on the part of the reporter for "preamble," for the reference must be to the preamble of the Act. SHEARMAN, J., continued:

"He thought that the judge here was right, but he was far from saying that anyone who chose to call himself an osteopath could charge for any service which he chose to render." A

Counsel for the plaintiff said that the attitude which he took up was that, in the present case, the whole claim for the £30 9s. was, as expressed in the particulars of claim, "for professional services rendered as an osteopath," and that there might be a question whether, if the charges were analysed, or capable of analysis, and if it were proved that any part of these charges was for advice, the plaintiff might not be in a position to recover them by reason of s. 32 of the Medical Act, 1858. What he complained of was that, in the circumstances of this case, the learned deputy county court judge stopped the case after the evidence to which I have referred had been given, and said that, by the operation of that section, the plaintiff could not recover anything at all, and that his claim was wholly barred. B C

Speaking for myself, in view of the decision in *Hall* v. *Trotter* (1), though it must be admitted that it would have been much more satisfactory if the report had been fuller and more detailed alike as to the facts and as to the judgment, it really is not open to this court to do otherwise than follow the decision of the learned judges who constituted the court on that occasion. In the result, in my view, this case ought to be sent back for a new trial on the ground that, apart from any question whether any charges for advice as distinguished from treatment or services may be recoverable, the learned judge was wrong in saying that no part of these charges could be recovered. D

**TALBOT, J.**—I am of the same opinion. I must say, had it not been for the decision in *Hall* v. *Trotter* (1), I should have thought there was a very strong argument in support of the judgment of the learned deputy county court judge. It is quite true that there are points on which the facts are distinguishable, and, in particular, the matter to which attention was called in the course of the argument, that it appears that the plaintiff gave certain advice to the defendant's wife. It is very difficult to imagine any case of this kind in which some advice would not be given. It seems undesirable, in view of that decision, to distinguish this case on a narrow ground, and, on the whole, I think we are doing what we ought to do if we follow *Hall* v. *Trotter* (1), and hold, in the circumstances of this case, that the learned judge was not right in declining to proceed further with the case and in deciding that the whole of the plaintiff's claim was barred by the Act. E F

I express no opinion whether it is possible in the interests of either party to split up the case into treatment and advice, and I content myself with saying that I agree that the case must go back. G

**ACTON, J.**—I should like to associate myself with the remark that my brother has expressed. I also desire to express no opinion on the question whether this case is or is not capable of any such analysis.

Solicitors: *Lucas & Bailey; Blewitt & Son.* H

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

# Re COLYER'S FARNINGHAM ESTATE

[Chancery Division (Tomlin, J.), March 14, 1927]

[Reported [1927] 1 Ch. 677; 96 L.J.Ch. 348; 137 L.T. 413; 71 Sol. Jo. 351]

*Settled Land—Two or more tenants for life—Conversion into joint tenancy—No vested indefeasible limitation not in undivided shares—Limitation in default of appointment—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 19 (2)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. Part IV, para.* 1 (3), *added by Law of Property (Amendment) Act*, 1926 (16 *& 17 Geo.* 5, *c.* 11), *s.* 7, *Schedule.*

The Law of Property Act, 1925, Sched. I, Part IV, para. 4, which was added by the Law of Property (Amendment) Act, 1926, Schedule, does not apply unless there is a vested indefeasible limitation not in undivided shares, and does not apply when there is a limitation in default of appointment, in which case the property is vested in the trustees of the settlement on the statutory trusts pursuant to Sched. I, Part IV, para. 1 (3), to the Act of 1925. In ascertaining whether para. 4 applies, regard must be had to the limitations of the settlement subsisting immediately before the commencement of the Act of 1925, but not to any dealing with, or devolution of, the interest of any person taking under the limitations of the settlement. The Settled Land Act, 1925, s. 19 (2), primâ facie does not apply where there are two persons interested as tenants for life in undivided shares.

**Notes.** As to the tenant for life under the Settled Land Act, 1925, see 29 Halsbury's Laws (2nd Edn.) 673 et seq.; and for cases, see 40 Digest (Repl.) 858–863. For the Settled Land Act, 1925, s. 19, see 23 Halsbury's Statutes (2nd Edn.) 55, and for the Law of Property Act, 1925, Sched. I, Part IV, as amended by the Law of Property (Amendment) Act, 1926, s. 7 and Schedule, see 20 Halsbury's Statutes (2nd Edn.) 859.

**Adjourned Summons** taken out by the present trustees of the will of the testator, asking whether, having regard to the limitations and provisions affecting the real estate contained in the will, and to the provisions concerning such estate contained in the will of Arthur Henry Colyer, and in the events which had happened, Mary Anne Lansdell and Julia Augusta Lucas were tenants for life under the said will within the meaning of the Settled Land Act, 1925, or persons having the powers of a tenant for life, and, therefore, entitled to require the execution of a principal vesting deed in their favour as joint tenants in respect of the settled estate.

By his will, dated July 28, 1879, Ernest Henry Colyer, after making certain specific and pecuniary bequests, gave all the residue of his real and personal estate to trustees on trust to pay the legacies and annuities therein mentioned, and, after disposing of his residuary personal estate, the testator (by cl. 12) directed that as to the residue of his real estate the clear income thereof should be paid or applied for the benefit of a class consisting of his wife (so long as she continued his widow) and his seven children and the survivors or survivor of them, and declared that so long as there should be more than one member of the said class the said income should be divided among them in equal shares. The testator then gave the last survivor of his wife and his daughters Caroline Rosabella Miller, Julia Augusta Lucas and Amy Emma Colyer power by deed or will to appoint his residuary real estate after the death of the surviving member of the above class to or in favour of any one or more of his sons or grandsons, and if no such sons or grandsons should be living then in favour of any one or more of his daughters or granddaughters, such appointment to be in such manner and form, and subject

in all respects to such conditions, limitations and provisions as such his wife or daughter should think fit. In default of, and subject to, any such appointment, the testator directed that his residuary real estate should, after the death of the survivor of the above class, go and remain as if he had died intestate. The testator died on June 22, 1887, and his will and a codicil which did not affect any of the material provisions of his will were duly proved. His residuary real estate consisted of houses and land in the parish of Farningham, in the county of Kent. Of the testator's seven children, his eldest son Francis James Colyer predeceased him and died a bachelor on April 25, 1885, his daughter Caroline Rosabella Miller died on Oct. 28, 1891, his daughter Laura Mildred Colyer died on Jan. 24, 1916, his son Arthur Henry Colyer died on Aug. 3, 1920, and his daughter Amy Emma Colyer died on Jan. 2, 1923. The testator's widow died on April 9, 1909. The result was that, on Jan. 1, 1926, the only survivors of the class, consisting of the testator's widow and seven children, were Mary Anne Lansdell and Julia Augusta Lucas ; that the power of appointment (which had not yet been exercised) was exercisable by Julia Augusta Lucas as the survivor of the four persons named in the will. The testator's heir-at-law, Arthur Henry Colyer, by his will dated May 17, 1920, after appointing executors, recited the devise in his favour as heir-at-law contained in the will of the testator, and gave and devised all real estate or proceeds of sale of real estate to which he might become entitled under the testator's will either in default of appointment or by virtue of any appointment to (in the events which happened) his three children in equal shares as tenants in common. Arthur Henry Colyer's executor had not yet assented to this devise, as the personal estate had proved insufficient to pay the debts of the testator.

*Lyttleton Chubb* for the trustees.
*C. P. Sanger* for the tenants for life.

**TOMLIN, J.,** stated the facts, and continued: In these circumstances, the question I have to determine is whether the power to sell the property is now vested in the trustees of the will or in the tenants for life.

Under the Settled Land Act, 1925, s. 19 (2):

"If in any case there are two or more persons of full age so entitled [that is, beneficially entitled under a settlement to possession of settled land for his life] as joint tenants, they together constitute the tenant for life for the purposes of this Act."

Under the Law of Property Act, 1925, Sched. I, Part IV, para 1, as amended by the Law of Property (Amendment) Act, 1926, s. 7 and Schedule:

"Where, immediately before the passing of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:— . . . (3) If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal mortgage, and free from any interests, powers and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares, in the trustees (if any) of the settlement as joint tenants upon the statutory trusts. . . ."

Then, by virtue of the Law of Property (Amendment) Act, 1926, Schedule, the following new paragraph is to be read in at the end of para. 3 of this Part of the schedule:

"4. Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and, after the cesser of all their interests in the income

of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act."

It is plain on the construction of the testator's will that there are two persons interested as tenants for life in undivided shares, and therefore, this case is not primâ facie within the Settled Land Act, 1925, s. 19 (2). The question is whether the trusts of the settlement immediately before the coming into force of the Law of Property Act, 1925, were such as to convert the tenancy in common for the tenants for life into a joint tenancy, and thereby constitute them the tenant for life for the purposes of the Settled Land Act, 1925. For the purpose of answering this question, it becomes necessary to examine the language of the new para. 4. It is clear that the condition is here fulfilled of there being "immediately before the commencement of this Act . . . two . . . tenants for life of full age entitled under the same settlement in undivided shares." The question is whether the next few words apply: "and, after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares)." I suspect that what is really meant by the words is: "and the entirety of the land is limited so as to devolve together (not in undivided shares) after the cesser of all their interests in the income of the settled land." In other words, I think it has to be determined whether at the commencement of the Act, and not whether after the cesser of the interests of the tenants for life, the entirety of the land was limited so as to devolve together.

The question that first arises is whether the limitations are to be ascertained in regard only to the actual limitations of the settlement or in regard to any number of subsidiary interests that may have arisen. The answer, I think, is that regard must be had only to the limitations of the settlement, irrespective of what the persons taking under these limitations have done with their shares. Therefore, I must look at the settlement to see what, immediately before the commencement of the Act, were the limitations to take effect on the cesser of the life interests; and in this way ascertain whether the entirety of the land was limited on such cesser so as to devolve together. In order to bring the case within the new para. 4, it must, I think be shown that the land is limited so as necessarily, if the limitation takes effect, to pass as an entirety. I do not think that this can be said of a limitation in default of appointment. The land may pass under the limitation in default of appointment, but it is a defeasible limitation and, by the exercise of the power of appointment, the land may (for all I know) be limited so as to devolve in undivided shares. Moreover, the power is a special power and, if it be exercised, the limitations so created have to be read into the settlement.

Therefore, I have come to the conclusion that when land is limited to a single person subject to a special form of appointment, it cannot be said that "the entirety of the land is limited so as to devolve together (not in undivided shares)." I think that those words are not satisfied unless the life interests are followed by a vested indefeasible limitation not in undivided shares, and that here that element is not present. I feel sympathy with tenants for life of considerable property who find themselves deprived of its management, but I can only have regard to the actual words of the Act and put the best construction I can on them. I will declare that the respondents have not the powers of a tenant for life and that the land has become vested in the trustees of the testator's will on the statutory trusts.

Solicitors: *Pettitt & Ramsay.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

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# NANCE *v.* NAYLOR

[COURT OF APPEAL (Scrutton, Atkin and Greer, L.JJ.), October 13, 1927]

[Reported [1928] 1 K.B. 263; 97 L.J.K.B. 39; 138 L.T. 165; 44 T.L.R. 11]

B

*Landlord and Tenant—Lease—Forfeiture—Arrears of rent—Judgment for possession and arrears of rent—Subsequent agreement by tenant to give up possession in consideration of landlord withholding writ of possession—Application by tenant for relief against forfeiture—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 46.

The rent of premises being in arrear, the landlord brought an action for ejectment and non-payment of rent and recovered judgment for possession, the rent due, and mesne profits. Subsequently, a document was signed by the tenant, the terms of which were that, if the landlord withheld the writ of possession, he (the tenant) would pay the amount of the debt and costs and give vacant possession of the premises on or before the next quarter day. The tenant applied for relief against forfeiture under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 46.

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**Held:** notwithstanding the agreement signed by the tenant, the court was not precluded from granting the relief sought.

**Notes.** Considered: *Gill* v. *Lewis*, [1956] 1 All E.R. 844.

As to relief from forfeiture for non-payment of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 681–683; and for cases, see 31 DIGEST (Repl.) 534–537. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 46, see 18 HALSBURY'S STATUTES (2nd Edn.) 483.

E

**Appeal** by the plaintiff from the decision of CLAUSON, J.

The plaintiff, Walter Norris Nance, was owner of a freehold shop, No. 69, Broad Street, Reading. He leased the shop to Thomas Naylor for a term of fourteen years from Sept. 29, 1917, at a rent of £200 per annum. In 1923, Thomas Naylor assigned the term to his son, Thomas Ewart Windsor Naylor, the defendant. After Midsummer, 1925, the plaintiff experienced difficulty in collecting his rent from the defendant. Early in August, 1926, the defendant sent to the plaintiff a cheque for the rent due at Midsummer, 1926, but this cheque was dishonoured. The plaintiff accordingly instructed his solicitors to take proceedings for recovery of the rent, but they succeeded in obtaining payment without doing so. Demand having been made for the rent due on Mar. 25, 1927, without result proceedings were threatened unless the amount due was paid on May 2. On that day, although the defendant sent a cheque which was dishonoured, the time for payment was extended until May 5. The defendant having failed to pay, a writ was issued claiming possession of the premises, one quarter's rent due Mar. 25, 1927, and mesne profits. On May 16 the plaintiff's solicitors notified the defendant that judgment had been entered for possession, and that execution would be issued unless the judgment was complied with by June 24. The defendant having made no reply, execution was issued on June 25. As the result of subsequent negotiations with the sheriff's officer the defendant agreed that if he could obtain time up to Sept. 29 he would then leave the premises, and he was told that he would have to give a written undertaking to pay out the fi. fa. and give possession. This proposal was accepted by the plaintiff subject to the tenant also undertaking certain specified repairs. On June 28 an agreement was drawn up by the sheriff's officer and the defendant signed it. The agreement was as follows:

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"In consideration of the plaintiff withholding the above writ of possession, I hereby undertake to pay out the amount of debt and costs under the fi. fa. not later than Friday next, July 1, 1927, to give vacant possession of the premises, No. 69, Broad Street, Reading, on or before Sept. 29 next, and also to give

independent security for the mesne profits from June 25, 1927. I further undertake to carry out the repairs which I am liable for, and of which I have received notice, under the terms of the lease."

The defendant remained in possession and in due course made the payments provided for by the agreement. The plaintiff having refused to waive his right to possession, the defendant, on July 28, issued a summons in the Reading District Registry asking for relief against forfeiture and cancellation of the agreement of June 28. The summons was dismissed by the district registrar on Aug. 2. The case came on appeal before CLAUSON, J., on Aug. 9, when the learned judge held that the existence of the agreement did not preclude him from granting relief against forfeiture and he granted relief under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 46. The plaintiff appealed.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 46, provides:

"In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery."

*J. B. Matthews*, K.C., and *A.F. Englebach* for the plaintiff landlord.
*C. J. Radcliffe*, for the defendant tenant.

**SCRUTTON, L.J.**—This is a question of some little difficulty, but, as both my colleagues are clear that the appeal should be dismissed, I do not dissent from their conclusion. The question arises in this way: The tenant gave a cheque for the rent due by him at Lady Day 1927, but the cheque was dishonoured, whereupon the landlord brought an action for ejectment for non-payment of the rent and other relief. In that action, judgment was signed on May 14 that the landlord should recover possession of the premises, £50 for one quarter's rent, and mesne profits. The landlord did not act on that judgment with undue haste; his solicitors wrote to the tenant stating that execution would be issued unless the terms of the judgment were complied with by June 24, and that, if the rent, costs and mesne profits were paid, the order for possession would not be enforced. The tenant did not pay the rent, costs and mesne profits by June 24, whereupon the landlord decided to execute the writ for possession and informed the tenant of this intention, the effect of which would be that the tenant would be ejected. Thereafter an agreement was entered into by the tenant on June 28 in the following terms:

"In consideration of the [landlord] withholding the above writ of possession, I hereby undertake to pay out the amount of debt and costs under the fi. fa. not later than Friday next, July 1, to give vacant possession of the premises, No. 69, Broad Street, Reading, on or before Sept. 29 next, and also to give independent security for the mesne profits from June 25, 1927 [a sum in respect of mesne profits we are told was paid, so there was no need for security being given]. I further undertake to carry out the repairs which I am liable for and of which I have received notice, under the terms of the lease."

That, I understand, was also done. But, before Sept. 29, the tenant applied under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, for relief against forfeiture, and the question we have to decide is whether CLAUSON, J., was wrong in granting relief against the forfeiture in spite of the terms of the agreement by which the tenant undertook to give vacant possession of the premises on or before Sept. 29.

The right to grant relief against forfeiture is to be exercised on the same conditions as could formerly have been exercised by the Court of Chancery, and there is no doubt that relief could have been given by that court after the tenant had been turned out of possession, and he could be reinstated. What we have to

consider is whether an agreement to give up possession on or before Sept. 29, by virtue of which the tenant escaped being ejected immediately, is so inconsistent with the right to grant relief against forfeiture that it must be taken that the right to relief is gone. I confess myself in some doubt on this point, because it seems to me to be possible to say that an agreement to go out by Sept. 29 is not consistent with the right to stay on after that date. But the right to grant relief is one which the courts have always jealously preserved in favour of tenants and, after some hesitation and consideration, I have come to the conclusion that I am not in a position to say that CLAUSON, J., was wrong in holding that he had still the power to grant relief from the forfeiture. We have been informed that CLAUSON, J., said that he would express no opinion on the point whether the agreement could be enforced. Probably, I ought not to express any opinion either, but it seems to me that, if relief is given, it can be done without prejudice to the landlord's right to sue for damages for breach of the agreement ; but I do not decide that.

In view of the conclusion arrived at by CLAUSON, J., and my brothers, I am unable to say that there was no power to grant relief. The appeal, therefore, will be dismissed.

**ATKIN, L.J.**—I agree. The right to relief against forfeiture is recognised by s. 210 of the Common Law Procedure Act, 1852, which begins by giving the landlord the power to recover the demised premises when a half-year's rent is in arrear, and there is a right of re-entry. The section then proceeds to say that if the lessee permits judgment to be recovered,

> "and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee . . . shall be barred and foreclosed from all relief or remedy in law or equity."

Section 211 provides that, if the lessee proceeds in equity, he is not to have an injunction or relief without payment of rent and costs. The provisions of s. 1 of the Common Law Procedure Act, 1860, have now been substantially reproduced in s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, which says that: [His Lordship read s. 46, and continued:] It is plain, therefore, that the equitable right thus recognised is a right to proceed for relief in Chancery within six months after judgment, even although the judgment has been fully executed and possession given under it.

In the present case the landlord obtained judgment for the recovery of possession, and the writ of execution was duly issued and handed to the sheriff's officer, but then an arrangement was made by virtue of which the tenant was given time on the terms set out in the agreement of June 28. I can quite understand that an agreement might be entered into on the terms that, if time were given, the tenant would surrender his right to relief against forfeiture, or that an agreement might be made on such terms that an agreement to surrender the right to relief must necessarily be implied. But it is a question of inference in each case whether such a term should be implied. For my part, I find great difficulty in a case where there is no evidence that the tenant knew anything about his right to relief against forfeiture, in implying such a term. That may not be conclusive, but it does not seem to me that an agreement to allow further time is inconsistent with the right to relief being still subsisting. If the writ of possession had been executed, there can be no doubt that the tenant's right to relief would still exist. I see no reason why he should not have the same right in this case. That seems to have been the view taken by CLAUSON, J., and I cannot say that he was wrong in granting relief.

**GREER, L.J.**—I agree. This appeal turns on the proper interpretation of the document of June 28, 1927. At that time, in law, the landlord was entitled to

have the writ of possession executed, and possession of the premises given to him. If the writ had been executed, that would not have precluded the tenant from applying for relief. I can see no reason why the parties should not agree that, for a period of three months, till Sept. 29, the writ would not be executed, and that the tenant would go out and give vacant possession on that date, which he was under an obligation to do at the date of the agreement. The agreement by him to give vacant possession on Sept. 29 does not, in my opinion, prevent him from exercising his right to ask for relief against forfeiture any more than if there had been, as there might have been, an agreement that he might remain in for two or three days after the writ of possession had been issued. In order to get rid of the right to relief, much plainer words would have been necessary. The fact of actually having gone out of possession has no bearing on the question whether the right to grant relief can be exercised or not. For these reasons, and for those given by ATKIN, L.J., I agree that the appeal fails.

*Appeal dismissed.*

Solicitors: *Paice & Cross*, for *Nance & Son*, Reading; *Dodd, Blaker & Handley*, Reading.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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## KONSKIER *v.* B. GOODMAN, LTD.

[COURT OF APPEAL (Scrutton, Sargant and Greer, L.JJ.), November 11, 1927]

[Reported [1928] 1 K.B. 421; 97 L.J.K.B. 263; 138 L.T. 481; 44 T.L.R. 91]

*Trespass—Adjoining building—Demolition of building—Debris deposited on adjoining owner's building by consent—Debris not removed—Subsequent new tenant of adjoining building—Damage caused by debris—Continuing trespass—Negligence.*

The defendants, a firm of house-breakers, were engaged in demolition work on a house, the owner of which had obtained permission from the owner and occupier of the adjoining house to pull down a chimney stack thereat. The defendants undertook to restore the chimney stack at any future period and to make good any damage caused to the adjoining premises by any of the works. The demolition work was completed by April, 1926, but the defendants had omitted to remove a quantity of debris which had been deposited on the roof of the adjoining premises. In July, 1926, the plaintiff became the tenant of those premises. In September, 1926, a heavy rain-storm washed the debris from the roof into the guttering and drain pipes so that it choked a gulley, flooded the basement, and damaged the plaintiff's goods. The plaintiff claimed damages for injury to his premises and goods by reason of the defendants' negligence.

**Held:** the defendants were not liable in an action of negligence since they owed no continuing duty to the plaintiff for acts committed before he became the occupier of the premises ; but they were liable on the grounds of trespass in allowing the debris to remain on the roof beyond a reasonable time after completion of their work, and this was continuing when the plaintiff became the occupier of the premises.

*Hudson* v. *Nicholson* (1) (1839), 5 M. & W. 437, applied.

**Notes.** As to the nature of trespass, see 33 HALSBURY'S LAWS (2nd Edn.) 3–6; and for cases, see 43 DIGEST 373–377.

As to the burden of proof of negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 667 et seq.; and for cases, see 36 DIGEST (Repl.) 12 et seq.

Cases referred to:

(1) *Hudson* v. *Nicholson* (1839), 5 M. & W. 437; 9 L.J.Ex. 71.

(2) *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C.P.D. 1; 37 L.T. 370; 42 J.P. 308; 26 W.R. 23; sub nom. *Dixon* v. *Reuter's Telegraph Co., Ltd.*, 47 L.J.Q.B. 1, C.A.; 36 Digest (Repl.) 13, *41*.

(3) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

(4) *Cavalier* v. *Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, H.L.; 42 Digest 968, *3*.

(5) *Langridge* v. *Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy* v. *Langridge* (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E.R. 1458; sub nom. *Levi* v. *Langridge*, 7 L.J.Ex. 387, Ex.Ch.; 39 Digest 458, *852*.

**Appeal** from a judgment of SALTER, J., in an action tried by him without a jury.

The plaintiff was the occupier of premises at Nos. 87 and 88, Houndsditch, where he carried on business as a ladies' blouse and robe manufacturer. In March, 1926, the owners of the adjoining premises obtained a licence from the plaintiff's father, the owner of No. 87, Houndsditch, to pull down the party wall, which consisted of a chimney stack. The licence was given on the terms of a document dated Mar. 4, 1926, signed by the adjoining owners and addressed to the plaintiff's father as follows:

> "In consideration of your giving us permission to pull down at our own expense the chimney stack at your premises, No. 87, Houndsditch, to within 3ft. of the existing roof of your building, No. 87, Houndsditch, we . . . hereby undertake at our own expense (a) to restore the said chimney stack to its present height at any future period, or when the adjoining property is rebuilt on receiving a written request from you to this effect, and (b) to make good any damage which may be caused to No. 87, Houndsditch, by all or any of the before-mentioned works."

Under that licence, the defendants proceeded with the work of pulling down the chimney stack, and, in the course of the demolition operations, they deposited debris in an inaccessible part of the roof of No. 87, and did not make good the damage by removing all the debris from that roof at the completion of the demolition operations. These operations were completed in March, 1926. In July, 1926, the plaintiff's father let No. 87 on lease to the plaintiff. On Sept. 1, 1926, a heavy storm of rain washed the debris which had been left on the roof of No. 87 by the defendants into the guttering, so that it choked the gulley and caused a flood in the basement of the plaintiff's premises, and damaged the plaintiff's goods. The plaintiff brought this action claiming £119 11s. 6d. damages for injury to his premises and to goods by the negligence of the defendants' servants in the pulling down of premises adjoining thereto and of part of the plaintiff's premises, and for damages for injury caused by mortar and debris from the house-breaking operations of the defendants and their servants. The defendants denied negligence and alleged contributory negligence against the plaintiff. They contended that they owed no duty to the plaintiff in respect of acts done before the plaintiff came into possession of the premises. SALTER, J., held that the defendants' act in leaving the debris on the roof of No. 87 was an act of continuing negligence and that, on that ground, the defendants were liable to the plaintiff for the damage caused to his goods and

A premises by the flooding of the basement; and directed that the amount of damages should be found by the official referee.

The defendants appealed.

*Malcolm Hilbery*, for the defendants, referred to *Dickson* v. *Reuter's Telegram Co.* (2), *Le Lievre* v. *Gould* (3), *Cavalier* v. *Pope* (4), and *Langridge* v. *Levy* (5).

B *Blanco White* for the plaintiff.

**SCRUTTON, L.J.,** stated the facts, and continued: The plaintiff brought this action claiming damages for injury to his premises and to his goods by the negligence of the defendants' servants in the pulling down of premises adjoining thereto and of part of the plaintiff's premises and for damages for injury caused by mortar and debris from the housebreaking operations of the defendants and their servants. C By para. 2 of the statement of claim, the plaintiff alleged that the defendants, in executing the said demolition, negligently and wrongfully caused and permitted debris to fall and remain on the roof of his premises, so that much debris fell and was washed down by rain into the gutters of the premises and completely choked the gulley in the basement thereof; and by para. 3, he alleged that, in consequence of the foregoing, on the morning of Sept. 1, 1926, when a heavy rainstorm occurred, D the basement of the premises was flooded with dirty water and great damage was done to his stock of gowns therein and he lost the use of the basement while it was being cleared out, whereby he suffered great loss amounting to £119 11s. 6d. It appears that counsel in his opening speech stated that the plaintiff's case was based on negligence, and the learned judge—SALTER, J.—deals with the question E of negligence in this way. He says in his judgment:

> "Was it negligent, assuming a duty, to leave this roof with a quantity of debris on it? I cannot entertain a moment's doubt about that. It cannot have been the exercise of proper care and skill to leave the roof in such a condition as that. In asking myself how the flood was caused, I have the evidence of Mr. Coles, which was very plain and feasible, and, on the other hand, I only F get the evidence of workmen who were on the roof, and people who say that they cannot imagine how this can have happened. Then I have assumed a duty, and I am not able to accept the contention of counsel for the defendants that there is no evidence here of a duty owing by the defendants to the plaintiff. When they did the work and finished it there was a duty upon them to all persons who were using or had property on the premises of No. 87. The G plaintiff was not at that time a person who had property, so far as I know, in that house. But this was an act of continuing negligence, and that negligence was continuing at a time when the plaintiff became lessee and brought property to that house."

Counsel for the defendants has argued that the case must be treated as one of H negligence or nothing; and that there was here no continuing negligence, because there was no continuing duty by the defendants to the plaintiff in respect of acts committed before the plaintiff became the occupier of the premises; that the duty owed by the defendants was owed to the person who was tenant of the house in June, 1926, and that there can be no continuing negligence without a continuing duty. That contention appears to be sound, but it does not dispose of another cause I of action, a cause of action arising on the undisputed facts of the case, for if there was a trespass by the defendants when the debris was allowed to remain on the roof of the plaintiff's premises, it was a continuing trespass. It was argued by counsel for the defendants that there could not be a trespass because the defendants had a right to put the debris where they did put it in the first instance, provided that the right to drop it there was a reasonable incident of the work on which they were engaged. But the right to drop it there was a limited right, and when the defendants had put the debris on the roof of the plaintiff's premises for a limited purpose, the failure to remove it at the completion of the demolition operations

or within a reasonable time thereafter was a trespass ; and it was a continuing trespass which entitled the new owner or occupier of the premises to sue in trespass. The point was discussed in *Hudson* v. *Nicholson* (1), where the plaintiff brought an action on the case, and the declaration stated that the plaintiff "was lawfully possessed of a certain close, . . . and the defendants . . . were . . . possessed of a certain building and premises near to and adjoining thereto. Yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and deprive him of the use, benefit, and enjoyment of the said close, and to annoy and incommode him in the use, possession, and enjoyment of the same—to wit, on, &c., and on divers others days and times afterwards and before the commencement of this suit, wrongfully and injuriously kept and continued, and caused to be kept and continued, for a long and unreasonable time, to wit, from thence hitherto, in and upon and over the said close of the plaintiff, divers, to wit, nine shores and nine timbers, before then, and before the plaintiff became possessed of the said close as aforesaid, by the defendants and others whose names to the plaintiff are unknown, wrongfully and injuriously put, placed, fixed, and erected in, upon, and over the said close of the said plaintiff; and the defendants so kept and continued the said shores and timbers in, upon, and over the said close, although they were, to wit, on the day and year first aforesaid, requested by the plaintiff to remove, take, and carry away the same from and off the said close. By means of which premises, and by reason also of the plaintiff being unable to remove and take away the said shores and timbers without causing the said building and premises of the defendants to tumble and fall, the plaintiff has been deprived of the use and enjoyment of the said close, and also thereby the plaintiff hath been and still is hindered and prevented from building and erecting a certain dwelling-house, buildings, and premises on the said close, which he intended to do and otherwise would have done, and thereby the plaintiff hath lost and been deprived of all the benefits, rents, profits, and advantages he would have derived and acquired from the said dwelling-house and premises, had the same been built and erected as aforesaid." The declaration contained no allegation of vi et armis, and was in point of form framed in case and not in trespass. The question arose whether the plaintiff, who at the time of the trespass was not in possession, could bring an action on the case, and LORD ABINGER, C.B., said in his judgment (5 M. & W. at p. 445) :

> "I still adhere to the opinion that this is properly the ground of an action of trespass, and not of case. It is not similar to those cases that have been cited, of trespass to a personal chattel, where trespass and case are concurrent remedies, and where a party may waive the trespass and go for the consequential damage."

The point having been raised after verdict, it was held that, notwithstanding the omission of the words vi et armis, which was of no importance after verdict, the declaration stated a continuing act of trespass by the defendants, and the Court of Exchequer discharged a rule for a new trial.

*Hudson* v. *Nicholson* (1) is an authority for the proposition that, if the present case had been argued in trespass, there would have been no answer to the claim and there has been no injustice done to the parties in this case in the way of being shut out from giving evidence which they might have given if the action had been treated as one of trespass. The court will endeavour to do justice without following technical rules too strictly. The judgment of SALTER, J., will stand on the ground of trespass and not on the ground of negligence, and the appeal will be dismissed, but without costs.

**SARGANT, L.J.**—I am of the same opinion. I am unable to agree with SALTER, J., with regard to the question of continuing negligence. The judgment of SALTER, J., confirms the statement that the case was argued in the court below

as raising a case of negligence and nothing else, and that the point was whether a duty was owed not only to the plaintiff's father, who was the owner and occupier of the premises when the work was being done, and after it was completed, but to the plaintiff also, who came into possession afterwards. If and in so far as the action was based on negligence, there was a good answer to the claim, because there was no contract between the defendants and the plaintiff, and the defendants were under no duty towards him. On the other hand, the licence given by the plaintiff's father for the demolition work to be done only justified the debris being allowed to remain on the roof of No. 87 during the progress of the demolition operations and for a reasonable time afterwards, and the act of the defendants in allowing the debris to remain on that roof after that time was a trespass. It was a continuing trespass which entitled the plaintiff to recover damages in respect of injury to his stock consequent thereon. I agree that the appeal should be dismissed, without costs.

**GREER, L.J.**—I agree. It is quite clear that, in order to recover damages for negligence against the defendants, the plaintiff must prove that the defendants were under a duty towards the plaintiff himself and had committed a breach of such duty, but here there was no duty on the part of the defendants towards the plaintiff, and, therefore, the claim in negligence fails. This case is not like *Langridge* v. *Levy* (5), where the cause of action was fraud. But it is equally clear that, if the case is fought in trespass, the plaintiff ought to succeed. The dropping of the debris on the roof of No. 87 would have been a trespass but for the licence, which was a limited one. The act of leaving the debris there, or the omission to remove it at the completion of the demolition operations, was a trespass. The appeal must be dismissed, but without costs.

*Appeal dismissed.*

Solicitors: *Harris, Chetham, & Cohen; Kenneth Brown, Baker, Baker.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

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## Re BRIDGETT AND HAYES' CONTRACT

[CHANCERY DIVISION (Romer, J.), October 27, 1927]

[Reported [1928] Ch. 163; 97 L.J.Ch. 33; 138 L.T. 106; 44 T.L.R. 222; 71 Sol. Jo. 910]

*Executor—Settled land—Death of tenant for life—Termination of settlement—Grant of probate to executor of tenant for life—Sale of settled land by executor—Capacity of executor to give a good title—Law of Property Act*, 1925 (15 *Geo. 5, c.* 20), *s.* 204 (1)—*Administration of Estates Act*, 1925 (15 *Geo. 5, c.* 23), *s.* 22 (1), *s.* 37 (1).

The executor of a deceased tenant for life, on whose death the settlement came to an end, agreed to sell the settled land. The purchaser objected to the executor's title on the ground that the trustees of the settlement were, by virtue of s. 22 (1) of the Administration of Estates Act, 1925, deemed to have been appointed the special executors of the tenant for life in regard to the settled land, and that they should, therefore, obtain a grant of probate limited to the settled land and then convey to him.

**Held:** section 22 (1) of the Administration of Estates Act, 1925, did not apply in the case of a settlement which came to an end on the death of the

tenant for life, and the legal estate in the land vested in the executor of the tenant for life to whom a general grant of probate had been made, and he could give a good title to the land. A

**Notes.** Distinguished: *In the Estate of Taylor*, [1929] P. 260.

As to grants of administration of settled land, see 16 HALSBURY'S LAWS (3rd Edn.) 251 et seq.; and for cases, see 23 DIGEST (Repl.) 316–317. For the Law of Property Act, 1925, s. 204, see 20 HALSBURY'S STATUTES (2nd Edn.) 829, and for the Administration of Estates Act, 1925, s. 22, s. 37, see 9 HALSBURY'S STATUTES (2nd Edn.) 728, 743. B

**Summons.**

By her will dated Mar. 18, 1875, Caroline Stoneley appointed three trustees, and devised her real estate and the residue of her personal estate to her trustees on trust to pay the rents and profits thereof to her niece, Emily Margaret Bridgett, for her separate use, and after her death, in the events that happened, on trusts for sale. Caroline Stoneley died on Mar. 19, 1875. In 1888 E. M. Bridgett married William Thornley. Two of the three trustees of the will of Caroline Stoneley died in 1891. On the coming into force of the Settled Land Act, 1925, on Jan. 1, 1926, E. M. Thornley was the tenant for life of the settled land and John Jackson was the sole surviving trustee of the will. E. M. Thornley died on Jan. 17, 1926, having by her will dated Feb. 6, 1922, appointed Thomas William Bridgett to be her sole executor. General probate of the will was granted to Thomas William Bridgett, who, by an agreement in writing dated Dec. 15, 1926, and made between himself, described as contracting as the personal representative of E. M. Thornley, as vendor, and G. W. Hayes, as purchaser, contracted to sell to G. W. Hayes certain leasehold premises forming part of the trust estate held under the will of Caroline Stoneley. By a deed of appointment dated Jan. 21, 1927, John Jackson, the surviving trustee of the will, appointed T. W. Bridgett and M. Bridgett to be new trustees in place of the two deceased trustees and of himself (who wished to retire from the trust), and the trust premises therefore vested in the two new trustees for all the estate and interest of John Jackson, the surviving trustee therein. G. W. Hayes, the purchaser, objected to the title of T. W. Bridgett, the vendor, on the ground that, on the death of the tenant for life, John Jackson, as the surviving trustee for the purposes of the Settled Land Act, 1925, of the will of Caroline Stoneley, was by virtue of s. 22 (1) of the Administration of Estates Act, 1925, to be deemed to have been appointed as her special executor in respect of the settled land, and that the legal estate in the land vested in him accordingly. The purchaser contended that to enable a good title to be shown, the grant of probate to the vendor should be revoked so far as it related to the settled land, and a special grant of probate limited to the settled land should be made to John Jackson, who, as special executor, should assent to the vesting of the property in the new trustees for sale or join with them in the conveyance to the purchaser. The vendor contended that, on the death of the tenant for life, John Jackson was not a trustee of the settlement created by the will of Caroline Stoneley, and was not entitled to a grant of probate in respect of the settled lands, but that the vendor, as the personal representative of the tenant for life, could give the purchaser a good title either (a) by assenting in writing to the vesting of the property in himself and M. Bridgett as the present trustees for sale and by a conveyance by such new trustees, or (b) by himself as personal representative assigning the term to the purchaser. C D E F G H I

The purchaser applied for a declaration that his objections to the title had not been sufficiently answered and that a good title to the property had not been shown.

*G. P. Slade* for the purchaser.
*Watmough* for the vendor.

A **ROMER, J.**—It is common ground that, up to the date of her death, Mrs. Emily Margaret Thornley, who was the tenant for life of the property now in question, had vested in her the legal estate in the property. It is common ground that that being so, on her death this legal estate passed to her personal representative by virtue of s. 1 (1) and (3) of the Administration of Estates Act, 1925. But then it is said that, if one looks at s. 22 (1) of that Act, one will find that in such B a case as this the lady must be deemed to have appointed as her special executor in regard to this land the person who up to the date of her death, or just before her death, was sole surviving trustee for the purposes of the Settled Land Act, 1925. Let me assume that that was so. On Jan. 17, 1926, she died, and on April 7, 1926, a general grant of probate of her will was made to Thomas William Bridgett, a person whom she had thereby appointed as executor. In my opinion, C as from that date at any rate, wherever the legal estate in this property may have been as between the date of her death and this act of probate, the legal estate in this land vested in Thomas William Bridgett and he can, while that act of probate remains unrevoked, properly convey the legal estate in this property to the purchaser. Section 204 (1) of the Law of Property Act, 1925, says this:

D "An order of the court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

With regard to s. 22 (1) of the Administration of Estates Act, 1925—if the E purchaser is right as to its application at all to this case—it provides that probate might have been granted to this sole surviving trustee. In point of fact the Court of Probate did not grant probate to him, but granted probate to Thomas William Bridgett. That being so, it appears that s. 204 of the Law of Property Act, 1925, applies to the case with regard to the taking of a conveyance from the legal personal representative. Further, the purchaser would be protected in the event of any subsequent revocation of that grant of probate by s. 37 (1) of the Administra- F tion of Estates Act, 1925. It can hardly be doubted that, in this case, if the purchaser does take a conveyance from the person to whom the grant of probate was granted he would be acting in perfect good faith.

The only difficulty I think as regards that point arises from the fact that, if one turns to the definition section of the Administration of Estates Act, 1925, which is s. 55, it is provided, by sub-s. (1) (xi), that: G

" 'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person. . . ."

At present the only executor of this deceased person is Thomas William Bridgett. Then it adds:

H ". . . and 'executor' includes a person deemed to be appointed executor as respects settled land."

In my opinion, the later part of that section only refers to the case where, in the circumstances, it is proper that the word "executor" should be so read as to include a person deemed to be appointed executor as respects settled land, and that the effect of the definition is not to vest in the person who is deemed to I be appointed special executor for the legal estate in settled land where the Court of Probate has granted general administration to somebody else.

The point still remains whether s. 22 (1) applies to the present case, it being conceded on both sides that, on the death of this lady, the settlement came to an end. Let me read the words of s. 22 (1):

"A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof,

and probate may be granted to such trustees specially limited to the settled land." A

Then follow these words:

"In this sub-section 'settled land' means land vested in the testator which was settled previously to his death and not by his will."

B

Section 22 is the first of three sections which come under the general heading "Special provisions as to settled land," and in s. 23 and s. 24 "settled land" is referred to, and in both cases referred to as meaning land which after the death of the testator continues to be settled land. The words in s. 22 (1), " 'settled land' means land vested in the testator which was settled previously to his death and not by his will" refer, therefore, in terms only to this particular sub-section. C I cannot help thinking that these words were merely designed for the purpose of making it clear that s. 22 (1) did not apply to a case where the land was settled by the will of a testator. However, I have to deal with the words as I find them, and, that being so, I must read the earlier part of the sub-section as follows:

"A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to land vested in the testator which was settled previously to his death, the persons, if any, who are at his death the trustees of the settlement thereof." D

So far, down to the words "previously to his death," the section applies to the present case because here land was vested in the testatrix previously to her death. Then the sub-section says she shall be deemed to have appointed as her special E executors the persons, if any, who are, at her death, the trustees of the settlement. Now, before anyone can come to the Court of Probate and get probate specially limited to the settled land granted to him, he must be at liberty to say to the court that he is to be deemed to have been appointed special executor of this land because, at the death of the testator, he was trustee of the settlement thereof. If he says that he can only say it truly in relation to the settlement then existing, F and if the settlement comes to an end the moment the testatrix dies, then nobody can go and say "I am the person to whom probate specially limited can be granted." It is to be observed the sub-section does not say the persons who immediately before the death of the testatrix were the trustees of the settlement thereof, but the persons who at her death are the trustees of the settlement.

For these reasons I think this sub-section does not apply in a case like the G present where, on the death of the testatrix in question, the settlement previously existing up to the date of the death comes to an end.

Solicitors: *Hedley Norris & Co.*, for *Cumberbirch & Potts*, Macclesfield; *Downer & Johnson.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

# BROWN & CO., LTD. v. HARRISON. HOURANI v. HARRISON

[Court of Appeal (Bankes, Atkin and Lawrence, L.JJ.), May 31, 1927]

[Reported 96 L.J.K.B. 1025; 137 L.T. 549; 43 T.L.R. 633; 17 Asp. M.L.C. 294; 32 Com. Cas. 305]

*Shipping—Carriage by sea—Loss of goods by theft—"Management of ship"—Carriage of Goods by Sea Act*, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Schedule, Art. IV, r.* 2 (*a*), (*q*).

The plaintiffs consigned goods under bills of lading in the defendants' ships from Liverpool to ports in Mexico. Each bill of lading contained an exception clause and also a clause providing that it should have effect subject to the provisions of the rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924. On arrival at the ports of destination the goods had been broken open and pilfered by labourers employed by the stevedore. On a claim by the plaintiffs for damages for non-delivery of the goods.

**Held:** the defendants were liable to the plaintiffs for the loss of the goods since (i) the loss of the goods did not result from an act of the servants of the carrier "in the management of the ship," within Art. IV, r. 2 (a), of the Schedule to the Act of 1924, but had relation to the goods alone; (ii) the word "or" in Art IV, r. 2 (q), must be read conjunctively and not disjunctively, and the defendants had failed to discharge the onus of showing that neither their actual fault or privity nor the fault or neglect of their servants or agents had contributed to the loss of the goods.

**Notes.** This case should be compared with *Heyn* v. *Ocean Steamship Co., Ltd.*, post, p. 657.

Considered: *Foreman and Ellams* v. *Federal Steam Navigation Co.*, [1928] 2 K.B. 424; *Gosse Millerd* v. *Canadian Government Merchant Marine, The Canadian Highlander*, [1928] All E.R. Rep. 97; *The Athelvictor*, [1946] P. 42. Referred to: *Green* v. *Premier Glynrhonwy Slate Co.* (1927), 20 B.W.C.C. 563.

As to carriage under the Carriage of Goods by Sea Act, 1924, see 30 Halsbury's Laws (2nd Edn.) 606 et seq.; and for cases see 41 Digest 369 et seq. For the Carriage of Goods by Sea Act, 1924, Schedule, Art. IV, see 23 Halsbury's Statutes (2nd Edn.) 889.

Cases referred to:

(1) *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Association* (1889), 23 Q.B.D. 342; 58 L.J.Q.B. 462; 61 L.T. 312; 38 W.R. 87; 5 T.L.R. 700; 6 Asp. M.L.C. 422, C.A.; 29 Digest 439, *3398*.

(2) *The Ferro*, [1893] P. 38; 62 L.J.P. 48; 68 L.T. 418; 7 Asp. M.L.C. 309; 1 R. 562; 41 Digest 432, *2714*.

(3) *Good* v. *London Steamship Owners' Association* (1871), L.R. 6 C.P. 563; 20 W.R. 33; 29 Digest 439, *3396*.

(4) *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887), 19 Q.B.D. 242; 56 L.J.Q.B. 428; 57 L.T. 550; 35 W.R. 793; 3 T.L.R. 636; 6 Asp. M.L.C. 184, C.A.; 29 Digest, 439, *3397*.

(5) *The Glenochil*, [1896] P. 10; 65 L.J.P. 1; 73 L.T. 416; 3 Asp. M.L.C. 218; 41 Digest 426, *2683*.

(6) *Rowson* v. *Atlantic Transport Co.*, [1903] 1 K.B. 114; 72 L.J.K.B. 87; 87 L.T. 717; 52 W.R. 85; 19 T.L.R. 67; 9 Asp. M.L.C. 347; 8 Com. Cas. 74; affirmed [1903] 2 K.B. 666; 72 L.J.K.B. 811; 89 L.T. 204; 52 W.R. 85; 19 T.L.R. 668; 47 Sol. Jo. 738; 9 Asp. M.L.C. 458; 9 Com. Cas. 33, C.A.; 41 Digest 432, *2712*.

(7) *The Rodney*, [1900] P. 112; 69 L.J.P. 29; 82 L.T. 27; 48 W.R. 527; 16 T.L.R. 183; 9 Asp. M.L.C. 39, D.C.; 41 Digest 431, *2711*.

(8) *The Silvia* (1898), 171 U.S. 462.

(9) *Knott* v. *Botany Mills* (1900), 179 U.S. 69.

(10) *Machu* v. *London and South Western Rail. Co.* (1848), 2 Exch. 415; 5 Ry. & Can. Cas. 302; 17 L.J.Ex. 271; 11 L.T.O.S. 226; 12 J.P. 744; 12 Jur. 501; 154 E.R. 554; 8 Digest (Repl.) 56, *365*.

**Appeal** from an order of MacKinnon, J.

Under a bill of lading dated Jan. 15, 1925, the plaintiffs, Messrs. R. F. Brown & Co., Ltd., consigned a case of cotton piece goods in the defendants' ship *Spectator* from Liverpool to Tampico, Mexico. On arrival, the case was found to be empty, and the evidence showed that it had been broken open and its contents stolen at Vera Cruz (the previous port of call) by the Mexican labourers employed by the stevedore to discharge the ship. Under a bill of lading dated Mar. 25, 1925, the plaintiffs, Messrs. Hourani, consigned some cases of silk and cotton piece goods in the defendants' ship Dramatist from Liverpool to Vera Cruz. One of the cases was found to be broken open and part of its contents stolen at Vera Cruz —again by the Mexican stevedore's labourers. Both bills of lading contained a clause excepting risks from "Loss, damage . . . caused by or arising from . . . robbers and thieves of whatever kind, whether on land or afloat or in the service of the carriers or not." Each bill of lading also contained a clause providing that it should have effect subject to the provisions of the rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924. The plaintiffs claimed damages for non-delivery of the goods. MacKinnon, J., held that the defendants did not excuse themselves for the failure to deliver the goods either under Art. IV, r. 2 (a) or r. 2 (q) of the Schedule to the Carriage of Goods by Sea Act, 1924, and that the word "and" in r. 2 (q) of Art. IV must be substituted for the word "or." The defendants appealed.

*Clement Davies*, *K.C.*, and *William Procter* for the defendants, the shipowners.
*A. T. Miller*, *K.C.*, and *Sir Robert Aske* for plaintiffs, the bill of lading holders.

**BANKES, L.J.**—These are two appeals from a judgment of MacKinnon, J., which undoubtedly raise a matter of great importance to the shipping community under existing conditions. The matter arises in this way. The dispute is between bill of lading holders and shipowners. The bill of lading holders are complaining of the loss of certain goods during a voyage. The fact, as proved before the learned judge, was that, in the case of both vessels, goods had been consigned by the bill of lading holder from this country to ports in Mexico, and at one port the cargo, or portions of the cargo, had been stolen by the men employed by the stevedore in the discharge of the goods, and the shipowners contended that, under the terms of the bills of lading, they were exempt from liability. The bills of lading incorporated the articles contained in the Schedule to the Carriage of Goods by Sea Act, 1924, and the question which the learned judge had to decide was whether or not the theft of these goods by the servants of the stevedore employed by the ship in the discharge of the cargo came within the exceptions contained in Art. IV of the Schedule to the Carriage of Goods by Sea Act, 1924 so as to exonerate the shipowners from liability.

Counsel for the shipowners, who has brought to our attention every point which could be raised, has relied on three points. He has said, first of all, that the loss of these goods occurred in the course of or in the management of the ship. His second point was that, on the true construction of r. 2 (q) of Art. IV, inasmuch as the loss of these goods occurred without the actual fault or privity of the carrier, he came within the exception contained in r. 2 (q). His third point was that, even assuming that he was wrong on the first two points, in this particular case, the theft having been by the servants of the stevedore employed by the shipowner to carry out the discharge, the servants acting in that capacity were not his agents within the meaning of the article. Every one of those points is, of course, of extreme importance nowadays, because shipowners are bound by the terms of these articles and cannot contract themselves out of the obligations imposed on them by the statute.

The two material articles which we have to consider are, first of all, Art. III, r. 2, which imposes a statutory obligation on the shipowner in reference to the carriage of the goods—and when I say "the carriage of the goods" I include, what r. 2 includes, not only the carriage, but the loading, handling, stowing, carrying, keeping, caring for, and discharge of the goods carried. In construing these articles which form part of the statute, I think one must begin by realising that here the legislature have imposed this distinct statutory obligation in reference to the goods which the carrier undertakes to carry. The statute then proceeds to set up what, under former practice, would have been the exceptions agreed on between the parties, and those are the exceptions cutting down the statutory obligation which is imposed by r. 2 of Art. III. The first of these, which is in Art. IV, r. 2 (a), is the one in reference to which the main and most important point raised in this argument arises. The material words are these:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship";

and the first question raised which the learned judge had to decide, and which we have to decide, is, what is included in those words "management of the ship?" Can it be said that the act of these stevedores' servants in raiding the cargo and stealing these goods, within the meaning of this rule is an act which occurred in the management of the ship? MACKINNON, J., has said that it cannot, and I agree with him, whether the question is considered on the language of the statute by itself, or in reference to the decisions to which we have been referred and of which there are a number, not only decisions of this court, but one decision in particular in the Supreme Court of the United States. Speaking first of all in reference to the language of the statute itself, I think that, as an ordinary rule of construction of this language, when you find in the first place the legislature imposing this particular statutory duty on the shipowner in reference, among other things, to the discharge of the goods carried, and then when it comes to enumerate the exceptions it has no exception dealing specifically with the goods, but it has an exception dealing with the ship and the management of the ship as it may affect the goods; in order to bring any particular matter within the exception it must be something which can be said to be in the management of the ship. Therefore, I should say, apart altogether from authority, that, if all the shipowners can prove is an act which has relation to the goods, and the goods alone, and has no relation to the ship itself, it is an act which is a well-recognised act in relation to a ship, it is true, but it is a separate and an independent act and independent of the ship itself, which is the taking of the goods out of the ship and discharging them from the ship.

So far as the authorities are concerned, I should like to begin with the test which BOWEN, L.J., I notice, laid down in *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Association* (1). There the question was whether the act in question could be said to come within the expression "improper navigation," and BOWEN, L.J., addresses himself to the point in this way: He says (23 Q.B.D. at p. 342):

> "The question is whether the damage in this case was caused by 'improper navigation,' and depends on the meaning of that expression. I should have thought it clear that 'damage caused by improper navigation' was equivalent to damage caused by navigation of an improper kind, and consequently that damage, caused by something which was not navigation at all, was not caused by improper navigation."

I should like to apply those words to the point that we have to decide, and to apply them to "management of the ship" instead of "navigation of the ship"; and I ask myself: Can it properly be said that this particular damage here was

caused by mismanagement of the ship? My answer is, No, because it was not management of the ship at all. Is there any support for that view, that this particular act of these men cannot be said to come within the term "management of the ship"? I think the more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression "management of the ship," as used in Art IV of the Schedule to the Carriage of Goods by Sea Act, or in the American Harter Act, 1893.

There are three cases to which I should like to refer. There is first of all *The Ferro* (2). That was decided in the year 1892. Before that case was decided there had been a number of cases before the courts in which the exception had been confined to matters arising in the navigation of the vessel, and cases in which the exceptions had not included the word "management." A number of decisions had been given in reference to matters which, on the one hand, were said to come within the expression "in the navigation of the vessel," and, on the other, were said not to. Some were clear cases: for instance, *Good* v. *London Steamship Owners' Association* (3), where damage was done by the leaving open of a seacock, and there WILLES, J., held that that was clearly improper navigation, because it was something improperly done with the ship, or part of the ship, in the course of the voyage. Then in *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (4), a further difficulty arose, because there the damage was done owing to leaving a port open, and the damage was done before the vessel commenced her voyage. The court got over the difficulty, holding that it was improper navigation because it was not an act which, if the vessel had proceeded on her voyage, would have been an act of improper navigation by leaving the port open. But difficulties such as those that were raised in *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (4) are got over when the section includes not only "improper navigation" but "improper management of the ship," and I think the first of the cases in which there was a discussion as to the meaning of the word "management" is *The Ferro* (2). There the point was whether improper stowage constituted mismanagement of a ship. There had been previously a dictum by CHARLES, J., in the *Canada Shipping Co. Case* (1), in which he had said that, in that particular case, and confining his language to the facts of that case, he thought the improper stowage in that case was an act of mismanagement of the ship; and when the facts are looked into, it is quite plain that, when he used that language, he was referring to the state of the holds, and the state of the holds as having been improperly and insufficiently cleaned and prepared before the cargo was put on board; and attention is called to that in some of the later cases. But in *The Ferro* (2), both the President (SIR FRANCIS JEUNE) and GORELL BARNES, J., state their view very clearly that such an act of damage, done merely in the stowing of the cargo, and apart altogether from anything done in reference to the ship, is not mismanagement of the ship. GORELL BARNES, J., in emphatic language, says ([1893] P. at p. 46):

> "It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo,"

and it seems to me on principle it is quite impossible to draw a distinction between mere stowage and mere discharge, and that, if the facts in that case had been in reference to the discharge of cargo instead of the stowage of cargo, GORELL BARNES, J.'s language would have been just as emphatic. In *The Glenochil* (5) again one finds, as it seems to me, equally emphatic language, which I think points quite clearly to the line which is to be drawn between acts which can properly be said to be acts done in the course of the management or mismanagement of a vessel, and the acts done which cannot come within that expression; and in this case the President said this ([1896] P. at p. 16):

A "This court had before it the same sort of question in the case of *The Ferro* (2), and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want
B of care of vessel indirectly affecting the cargo."

It seems to me that, in that short sentence, the President very happily draws the distinction between cases which do and do not fall within the protection of an exception which contains the words "management of the ship." GORELL BARNES, J., in the same case, says ([1896] P. at p. 18):

C "Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. I do not think it is now necessary to decide whether it is or is not; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument two principal points
D seem to have been taken. It is said that the word 'management,' having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that
E where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel'."

F The last case to which I should like to refer is *Rowson* v. *Atlantic Transport Co.* (6), where KENNEDY, J., in giving his judgment, concludes his judgment in these terms ([1903] 1 K.B. at p. 114):

"This seems to be in accordance with the language of GORELL BARNES, J., in *The Rodney* (7), where he says ([1900] P. at p. 117): 'I think that the words
G "faults or errors in the management of the vessel" include improper handling of the ship as a ship, which affects the safety of the cargo.' "

—bringing out again, as it seems to me, the line of distinction that has been referred to by the President in the case to which I have already referred. When one comes to what VAUGHAN WILLIAMS, L.J., said in the Court of Appeal in the
H same case, the way he expresses it is this ([1903] 2 K.B. at p. 676):

"Though it is not necessary for me to construe ss. 1 and 2, yet I do construe them to this extent: it is the contrast between the dealing with the stowage of the cargo, and the dealing with the vessel itself, that leads me to say, when I come to s. 3, that 'management of the vessel' means management of the vessel qua ship—not qua navigation, but qua ship."

I It is in that case that STIRLING, L.J., goes into the authorities at very considerable length, and he draws from them the same principle and the same distinction that I have been trying to draw between a dealing or damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself.

So much for the English authorities, the whole bearing of which I think is conclusive against the argument which counsel for the shipowners has pressed on

us. Reference has been made to a decision in the Supreme Court of the United States in which HOLMES, J., delivered the opinion of the court, and I think it is satisfactory to find that the law as interpreted in this country in reference originally to exceptions in bills of lading, and then in reference to the Harter Act, and now in reference to our own Carriage of Goods by Sea Act, so exactly corresponds with the view of the law as expressed by HOLMES, J., in reference to the Harter Act in this American decision. The facts of that case were interesting from this point of view, and the facts brought the case very nearly to the line of distinction between the one class of case and the other, because the question there arose in reference to the shifting of the cargo, and it was said that the shifting of the cargo was done for the purpose of securing the safety of the ship. On the other hand, it was said: No, it may incidentally have had an effect in reference to the trimming of the vessel, but the act which caused the damage was primarily an act of discharge of cargo and, therefore, it cannot be said to be an act done in the management of the ship, although it might have been said to be an act in reference to the management of the ship if it could have been established that the dealing with the cargo was a dealing for the purpose of trimming the vessel or securing the greater safety of the vessel. HOLMES, J., deals with that matter and says that, in the Supreme Court, they must proceed on the finding of the court below that the dealing with the cargo was a dealing with the cargo in the course of the discharge, and that the matter must be regarded from that point of view. I will read a passage from his judgment, which seems to me to put the case very clearly and very admirably, if I may say so. HOLMES, J., says (196 U.S. at p. 596):

> "The petitioner contends that any dealing with the ship or cargo which affects the fitness of the ship to carry her cargo is 'management of the vessel,' within the meaning of s. 3 [of course, he is referring to the Harter Act]. To support this contention the case of *The Glenochil* (5) is cited."

Then he goes into the facts of that case, and refers to *The Silvia* (8):

> "We see no reason to criticise this decision and, therefore, lay on one side at once the fact that the vessel had come to the end of her voyage and was in dock. We assume further that the captain retained authority over his ship, so that it was in his power and perhaps his duty to intervene in any case that needed his control. On these assumptions the argument is that cargo has also a function as ballast, that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel within the Act. The thing done is the same and the name of the object cannot affect the result. Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of this section, adopted by the court in *The Glenochil* (5), and sanctioned by this court in *Knott* v. *Botany Mills* (9), to faults primarily connected with the navigation or the management of the vessel and not with the cargo. In the case supposed, the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true the question which section is to govern,

must be determined by the primary nature and objects of the acts which cause the loss."

I think, therefore, both on the construction of the statute taken by itself and applying the ordinary meaning to the word "management," it cannot be said that the acts of these stevedore's men in pillaging the cargo in the way they did, can come within such an expression as acts done in the management of the ship. Apart from that, I think both by English law and decisions of these courts, and by the decision of the Court of the United States of America, the authority is practically unanimous against the view contended for by counsel for the shipowners, and in support of the view taken by the learned judge. I think, therefore, whatever the consequences may be, it does seem to me clear that particular acts of this class, acts done in the course of the discharge and in the course of the discharge merely, cannot be held to come within the exception which is applied to acts which may affect the cargo but which are acts done in the course of the management of the ship.

The next point taken was this. It was said that, even assuming that they were wrong on that point, yet they were entitled to the benefit of the exception contained in r. 2 (q) of Art. IV. Rule 2 (q) is in these terms; it is the last exception:

> "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Now the structure of this exception is, first, to indicate what the exception is, and next, to establish what is the necessary proof which brings the person seeking the benefit of the exception within it, and it lays the onus of proof on the person claiming the benefit of the exception. So far as the burden of proof is concerned, it is plain that the obligation is laid on the person seeking the benefit of the exception to establish not only that the loss has been without his actual fault or privity, but also that it has been without the fault or neglect of his agents or servants; and that, one would think, is reasonable and natural, because to contend that the statute has conferred an exception from liability on a carrier who deliberately incites a man to steal the goods and then claims exemption from his act because his servants or agents had been guilty of no fault or neglect, is to impose an obligation on the court which it would be extremely loth to accept unless it was absolutely compelled to do so. Counsel for the shipowners says that the court must put that construction on the statute because of the opening words which define the exception and which, as he says, draw a distinction between the act of the carrier and the act of his servant, and that it is sufficient to bring himself within the exception if he proves either that the loss was without his actual fault or privity or that it was without the fault or neglect of his agents or servants. He lays the whole stress of his argument on the fact that r. 2 (q) is drafted in this form,

> "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants,"

and he says that the word "or" is there read disjunctively, and that you cannot read it otherwise, except by assuming that the draftsman has made a mistake or that it is competent for the court to alter "or" into "and." But with great respect, it is doing no injustice either to the draftsman or the language, to use the word "or" conjunctively and not disjunctively. There is abundant authority for doing that. It seems to me that it is quite imperative on the court to do it in this case, first, because it is only by doing it that you can bring the two branches of r. 2 (q) into agreement, and, secondly, that unless you do it, you adopt a

construction of the exception which it seems to me inconceivable that the legislature should ever have contemplated for a moment. I think, therefore, that that point fails.

The last point is that the servants of the stevedore in this particular case being employed by the stevedore, and the stevedore himself being employed as an independent contractor by the shipowner to carry out the discharge, the servants of the stevedore are not agents of the carrier within the meaning of r. 2 (q). I think counsel for the shipowners has answered that point himself, because he points out in a case which he referred to for another purpose, *Machu* v. *London and South-Western Rail. Co.* (10), that, in a very similar case, the court held that, for the purpose of construing an Act of Parliament in somewhat similar terms to this statute, the servants of the independent contractor would be the agents of the railway company for the purpose of the construction of the statute; and so here, it seems to me impossible to put any reasonable construction on this statute except by regarding the servants of the persons who are employed by the shipowner in order to fulfil his statutory obligation to discharge the vessel as being his agents for that purpose. On all points, therefore, I think that the judgment of the learned judge was right and that the appeal must be dismissed.

**ATKIN, L.J.**—I agree. This case does raise an important point on the construction of the rules which are scheduled to the Carriage of Goods by Sea Act, 1924, and the particular paragraph is in the nature of a statutory exception,

> "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Those are words which were found, and no doubt are still found, in old bills of lading and charterparty exceptions, and they are words that are found in legislation which preceded this Act and on which this Act was founded, and especially, it is to be noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods by sea. I think it is very important in commercial interests that there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these courts seem to correspond with the decisions given by the courts of the highest authority in the United States.

I do not propose to add anything at any length to what has been said by my Lord, with whose judgment I entirely agree, but I think, perhaps, one might point out this, that, in this statute, it is plain that a very clear distinction is drawn between dealings with goods and dealings with ships, and that "ship" is defined in the Act. "Ship" is defined as being "any vessel used for the carriage of goods by sea," and it is quite plain that what is meant by "ship," when the word is used, is the actual vessel, the res, the actual thing itself. One will find phrases in Art. IV that "Neither the carrier nor the ship shall be liable for loss," and in r. 2: "Neither the carrier nor the ship shall be responsible for loss." That means, the ship as a res shall not be responsible for loss ; and while it is quite true that, in general language, in another context, "management of the ship" might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship, and when they talk of the word "ship" they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Gorell Barnes, J., in *The Rodney* (7) ([1900] P. at p. 117):

> "Faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo"

and that construction merely follows, I think, and was intended by the learned judge to follow, his decision in *The Glenochil* (5), and the decision of Sir Francis

A JEUNE, P., and GORELL BARNES, J., and both *The Glenochil* (5) and *The Rodney* (7) are supported in terms by STIRLING, L.J., in *Rowson* v. *Atlantic Transport Co.* (6), to which my Lord has referred. I think that those statements of the meaning of the word "management" must be taken, so far as this court is concerned, as being authoritative. I do not quite agree with what is said by the learned judge as to the impossibility of defining the words "management of the
B ship" in this context. I agree that a definition which is made before a full and complete observation of the different phenomena to which you are to apply the definition is unsatisfactory, but it may very well be that the time has not yet come to attempt a complete definition of the word. On the other hand, it is impossible for a reasoning and logical tribunal to try and construe the word without forming for itself some idea of what it means, and we may say how far the definition goes
C so far as the observed facts are at the present moment, but clearly the partial definition given by LORD GORELL in the words that I have cited amount to something which binds the court, and which affords a guide to construction. Therefore, you are dealing with the question of management of the ship and not management of the business of the ship.

D The only other thing that I want to deal with is this. In the case which was cited of *Rowson* (6), the members of the Court of Appeal, without deciding the matter, I think all of them, suggested some doubt whether or not a defect in the management of the apparatus in the ship could be said to be a defect in the management of the ship if that apparatus applied solely to the cargo or was introduced into the ship for the mere purpose of protecting the cargo. I wish to guard
E myself at the present moment against being supposed to accept that definition or that view of the construction. It was not necessary for the Court of Appeal in that case to lay down an actual decision on the matter, and it is unnecessary for us to do so. I merely wish to point out this, that at the present day, a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the
F navigation of the ship but have everything to do with the safety of the cargo. Amongst other things, one would mention in particular the refrigerating machinery which was the subject of discussion in *Rowson's Case* (6), and other matters dealing with ventilation, fans, pumps, the pumps of an oil tanker and matters of that kind, and winches and derricks, and so forth, which have nothing to do with the navigation of the ship, but still which are part of the structure of the ship, and
G without which the ship would clearly not be seaworthy, either if they were not fitted at all or if they were not in a proper condition when the ship started sailing. For my part, at the present moment, I have a difficulty in seeing, if there was a defect in the management of those appliances in the ship which are an essential part of the ship, that that would not be a defect in the management of the ship. This case clearly is not, and could not be, brought within the definition mentioned
H by LORD GORELL. It appears to me that here we are not dealing with anything which is, or can be said to be, part of the ship as a ship. The stevedores brought in were employed by the ship for the purpose of discharging the cargo, and that which was done was not a defect in the ship, or a defect in the management of the ship, as defined, but merely a default of a person dealing with a particular case of cargo, and, in my view, it is clearly not within the meaning of the words "man-
I agement of the ship" as defined by the authorities.

The other question is the question of the construction of the words in r. 2 (q) of Art. IV. I do not propose to say more about that than to say that I think, on the whole, that the point that has been taken in that matter is the worst point that has ever been taken in the Court of Appeal in my time. It is a most hopeless proposition—not that it has not been very well argued by counsel for the shipowners. Again, I disagree with the learned judge in his view that the word "or" can never have a conjunctive sense ; I think it quite commonly and grammatically can have a conjunctive sense. It is generally disjunctive, but it may be plain from the

collation of the words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity, it is quite within the ordinary principles of construction adopted by the court to give the word a conjunctive use. Here, it is quite plain that the word leads to an absurdity, because the contention put forward by the shipowners in this matter amounts to this, as my Lord said, that, if a shipowner himself breaks open a case and steals the contents of it, he is exempted from liability under r. 2 (q) if none of his servants stole the part of the case or broke it open. That seems to me to be a plain absurdity. In addition to that, there is a repugnancy because it is plainly repugnant to the second part of r. 2 (q). Therefore I say no more about that.

The other question is the question whether or not the servants of the master stevedore at Vera Cruz can be said to be, within the meaning of r. 2 (q), the agents or servants of the ship. Counsel for the shipowners did not dispute that the master stevedore himself was to be considered an agent of the ship, and I think he was quite right in so holding. There was a statutory obligation on the ship to discharge, and they performed that duty by entering into a contract with the master stevedore, who, for that purpose, was their agent in performing their statutory duty. To my mind, that in itself would be sufficient to support the matter, because it is plain that the master stevedore, according to our law, would be responsible for the tortious acts of his servants done in the scope of their employment. But, quite apart from that, I think that the servants of the stevedore for this purpose are also the agents of the ship, and I think that is made plain by the reasoning of the court in the case that my Lord referred to of *Machu* v. *London and South-Western Rail. Co.* (10), where they had to deal with words which were narrower in their meaning, where they had to deal with the word "servants," and where the court held that the servants of the sub-contractor of the carrier were, within the meaning of the Carriers Act, servants of the carrier. I think that that is sound and applies to this case.

For these reasons it appears to me that the shipowners have not discharged themselves from their liability, and that the judgment of the learned judge was quite right, and that this appeal should be dismissed with costs.

**LAWRENCE, L.J.**—I entirely agree with the judgments which have been delivered.

*Appeal dismissed.*

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool; *Thain, Davidson & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

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# DE FREVILLE *v.* DILL

[King's Bench Division (McCardie, J.), July 1, 1927]

[Reported 96 L.J.K.B. 1056; 138 L.T. 83; 43 T.L.R. 702]

B *Person of Unsound Mind—Certification—Negligent certification—Duty of medical practitioner to patient—Liability to action for breach.*

When a medical practitioner certifies to the soundness of a person's mind, he owes a duty to such person to take reasonable care, even though he has been called in by third parties and there is no contract between himself and the patient. If he certifies that such person is of unsound mind, his certificate is C the cause of the detention of such person under a justice's order, and an action for damages will lie in the form of an action on the case for negligence in certification without just cause causing damage through detention in a mental hospital.

**Notes.** The Lunacy Act, 1890, s. 16, was amended by the Mental Treatment D Act, 1930, s. 20, which has been repealed in part by the National Health Service Act, 1946, s. 50 and Sched. IX, Part II. Section 16 of the 1890 Act has been further amended by s. 50 of, and Sched. IX, Part I to, the Act of 1946. A new s. 330 of the Lunacy Act, 1890, was substituted by the Mental Treatment Act, 1930, s. 16 (1). As to summary reception orders, see 21 Halsbury's Laws (2nd Edn.) 418–424; and for cases see 33 Digest 265–268. For the Lunacy Act, 1890, s. 16, E s. 330, see 17 Halsbury's Statutes (2nd Edn.) 1068, 1155.

Cases referred to:

(1) *Harnett* v. *Fisher*, [1926] W.N. 142; 96 L.J.K.B. 55; 42 T.L.R. 486; affirmed [1927] 1 K.B. 402; 96 L.J.K.B. 55; 135 L.T. 724; 42 T.L.R. 745; 70 Sol. Jo. 917, C.A.; affirmed [1927] A.C. 573; 96 L.J.K.B. 856; 137 L.T. 602; 91 J.P. 175; 43 T.L.R. 567; 71 Sol. Jo. 470; 25 L.G.R. F 454, H.L.; Digest Supp.

(2) *Hall* v. *Semple* (1862), 3 F. & F. 337, N.P.; 33 Digest 266, *1852*.

(3) *Everett* v. *Griffiths*, [1920] 3 K.B. 163; 89 L.J.K.B. 929; 123 L.T. 280; 84 J.P. 161; 36 T.L.R. 491; 64 Sol. Jo. 445; 18 L.G.R. 293, C.A.; affirmed [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 85 J.P. 149; 37 T.L.R. 481; 65 Sol. Jo. 395; 19 L.G.R. 283, H.L.; 33 Digest 267, *1862*.

G (4) *Thompson* v. *Schmidt* (1891), 56 J.P. 212; 8 T.L.R. 120, C.A.; 33 Digest 267, *1863*.

(5) *Harnett* v. *Bond*, [1925] A.C. 669; 94 L.J.K.B. 569; 133 L.T. 482; 89 J.P. 182; 41 T.L.R. 509; 69 Sol. Jo. 575, H.L.; 33 Digest 268, *1869*.

(6) *Skelton* v. *London and North-Western Rail. Co.* (1867), L.R. 2 C.P. 631; 36 L.J.C.P. 249; 16 L.T. 563; 15 W.R. 925; 36 Digest (Repl.) 28, *121*. H

(7) *Austin* v. *Dowling* (1870), L.R. 5 C.P. 534; 39 L.J.C.P. 260; 22 L.T. 721; 18 W.R. 1003; 33 Digest 467, *12*.

(8) *Hodson* v. *Pare*, [1899] 1 Q.B. 455; 68 L.J.Q.B. 309; 80 L.T. 13; 47 W.R. 241; 15 T.L.R. 171; 43 Sol. Jo. 223, C.A.; 33 Digest 268, *1867*.

(9) *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. I 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(10) *Morris* v. *Atkins and Brooker* (1902), 18 T.L.R. 628, C.A.; 33 Digest 268, *1865*.

(11) *R.* v. *Whitfield* (1885), 15 Q.B.D. 122; 54 L.J.M.C. 113; 53 L.T. 96; 49 J.P. 820; sub nom. *R.* v. *Thorne, etc., Lewes Justices*, 1 T.L.R. 437, C.A.

**Further consideration** of an action tried by McCardie, J., with a jury.

The facts are set out in the judgment of McCardie, J.

*Cremlyn* and *Comyn Maitland* for the plaintiff.
*Singleton, K.C.*, and *W. H. Gattie* for the defendant.

*Cur. adv. vult.*

July 1.—**McCARDIE, J.,** read the following judgment: The plaintiff is the wife of Mr. Geoffrey de Freville. The defendant is a medical man practising in the county of Gloucester. On June 9, 1926, the defendant certified in writing that the plaintiff was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. The plaintiff alleged (in substance) that the defendant was negligent in giving his certificate, and she further alleged that, as a result of his negligence, she was taken, although sane, to the Gloucester County Hospital on the night of June 9 and was detained at that institution for two days before she was discharged. Hence her claim for damages.

In the earlier stages of the trial there was a suggestion by the plaintiff of bad faith against the defendant. I am glad to say that, before the conclusion of the trial, the plaintiff's counsel fully and frankly admitted the absolute honesty and integrity of the defendant in all respects. At the conclusion of the evidence it was agreed by counsel that one issue only (apart from damages) should be considered by, and left to, the jury, namely: Did the defendant act with reasonable care ? To that question the jury answered "No," and they assessed the damages at the sum of £50. Points of law had arisen during the hearing, and, therefore, after the verdict had been given, I adjourned the case to a future day so that the arguments of counsel might be presented in the light of the decision of the House of Lords in *Harnett* v. *Fisher* (1).

With the prolonged family history and countless details of this unhappy case I need not deal. It is, however, necessary to state a few of the main facts in order that the points of law may be appreciated. The plaintiff married in 1917 the son of a Gloucestershire vicar. The marriage at first was a happy one. Grounds of difference, however, arose later. It was alleged by the defence that, before 1926, the plaintiff had shown signs of serious mental and nervous disorder. This was denied by the plaintiff and her witnesses. The defendant acted as the medical attendant to the vicar (the Rev. Frederick de Freville) and his wife, who was an invalid. It is well to state that the defendant was wholly unconcerned with, and dissociated from, the family differences and asperities which were revealed in court. In May, 1926, the vicar's wife (without the knowledge of the plaintiff) telephoned to the defendant to come to the vicarage to see the plaintiff. He went, and at the vicarage he had an interview with the plaintiff, although she resented his presence. He formed a view regarding her state later. He prescribed some simple sedative medicine for her which was sent to the vicarage. On May 15, 1926, the defendant had a prolonged interview with the plaintiff's husband, who gave him certain information about the plaintiff's health and condition. On June 8 the defendant visited the vicarage again and had a further long interview with the husband, who gave him further information. At this time the plaintiff was not staying at the vicarage.

On June 9, the plaintiff returned to the vicarage and, shortly before six o'clock, the defendant received more than one urgent telephone message (from some member of the family other than the plaintiff) to go to the vicarage. In response to the message, the defendant went as asked, and he spent about five hours with the plaintiff. The evidence is conflicting about the condition of the plaintiff and about many other matters and incidents. The defendant honestly formed the view that the state of the plaintiff was serious. Therefore, shortly before nine o'clock he telephoned to the relieving officer to come to the vicarage. That official came soon after ten o'clock, and he and the defendant had a conversation. A policeman, I may mention, had been at the vicarage since seven o'clock that evening. The relieving officer brought with him a form of certificate appropriate to s. 16 of the Lunacy Act, 1890. The defendant filled it up and signed it. The

certificate states that the defendant had personally examined the plaintiff, and that he had come to the conclusion that she was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. It then proceeds to state: (a) the grounds observed by the defendant himself, and (b) the facts communicated to him by others. It added that the plaintiff appeared to the defendant to be in a fit condition of bodily health to be removed to a mental hospital. Such was the certificate. After it had been signed, the plaintiff was led by the relieving officer and the police constable to a waiting motor-car. The plaintiff and the relieving officer entered the car with a female servant whose presence was, for obvious reasons, deemed desirable. The car then drove with its three passengers to the house of a justice of the peace, who was a judicial authority within the Lunacy Act, 1890. The justice of the peace saw the plaintiff, but apparently did not ask her any questions. Shortly afterwards he (the magistrate) signed the following order:

> "Order for reception of a pauper lunatic. I, Joseph William Aldridge, having called to my assistance Alfred Vincent Dill, of The Bourne, Brimscombe, a duly qualified medical practitioner, being satisfied that Muriel de Freville, of The Vicarage, Oakridge, in the county of Gloucester, married woman, is in such circumstances as to require relief for her proper care and maintenance, and that the said Muriel de Freville is a person of unsound mind and a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said Muriel de Freville as a patient into your hospital. Subjoined is a statement of particulars respecting the said Muriel de Freville.—(Signed) J. W. Aldridge, a Justice of the Peace for the county of Gloucester. —Dated June 9, 1926.—To the Medical Superintendent of the Mental Hospital for the county and city of Gloucester."

Appended to the order of the justice of the peace was a statement of particulars containing various details about the plaintiff I need not set them out. That statement is signed by the relieving officer. After the magistrate had signed the order the motor-car, with the plaintiff, the relieving officer and the female servant, drove to the Gloucester Mental Hospital. They reached it about midnight, and the plaintiff was received by the matron and two nurses. The next day the plaintiff was examined by the medical superintendent of the hospital, and also by another medical member of the staff. These gentlemen took the view that no ground existed for the detention of the plaintiff, and they decided that she ought at once to be taken from the hospital. On the evening of June 11, the plaintiff's father arrived at the hospital and took the plaintiff away.

Such are the facts so far as I need state for the present purpose. I have given them in brief outline only. A large body of evidence was given by and on behalf of the plaintiff. An equally large body of evidence was given by and on behalf of the defendant. It is not my function now to examine that evidence or to weigh the verdict of the jury. I held that there was evidence for the jury of a want of reasonable care by the defendant, and the jury have found against him. They are the tribunal on questions of fact. It is right to add that counsel for the plaintiff and defendant conducted the case and addressed the jury with clearness, force and moderation. It is also right to add that, in my view, the verdict of the jury must be taken to indicate their opinion that the plaintiff was not in such a state of mental or nervous disorder on June 9, 1926, as to require her detention at a mental hospital. There is one other thing I should say ere I deal with the points of law raised before me. It is, I think, clear on the evidence that the defendant was never employed by the plaintiff. She never contracted with him. She never consented that he should be her medical adviser. She had never invited him to attend or to treat her. The defendant, in examining the plaintiff and forming his opinion on June 9, 1926, was acting on behalf of her husband, or her father-in-law (the vicar), and not on behalf of the plaintiff herself.

I now take the points of law. The first contention on behalf of the defendant was that he owed no duty of care to the plaintiff. This point has been raised and often discussed in well-known litigation during the past seven years, and almost all the relevant decisions and dicta have been, from time to time, cited. Many exhaustive judgments have been given which touch, either directly or indirectly, on the point. To review these judgments in detail would make my present judgment one of undesirable length. I shall, therefore, deal with the matter somewhat broadly and without citing in undue detail from the various reports. The question is one of great importance, for it stands on the threshold of such actions as the present. It is singular, therefore, that it has not received express and clear decision from the final appellate tribunal. I feel myself that it would have been desirable long ago to pronounce the exact causes of action (if any) in such cases as the present.

In the action now before me, the statement of claim asks damages: (a) for negligent certification, (b) for false imprisonment and (c) for assault. The case, however, at the trial before me was confined to head (a), and by agreement of counsel the only question left to the jury was, as I have said, whether the defendant had been guilty of a want of reasonable care. In *Hall* v. *Semple* (2) it is worth noting, the two counts were (a) for assault, and (b) for that the defendant, without reasonable and probable cause and with intent to cause the plaintiff to be imprisoned and put under bodily restraint, did sign a certain certificate. CROMPTON, J. (who tried the case), seems to have felt the difficulty of formulation, but told the jury (3 F. & F. at p. 354) that the true ground of complaint was "the negligence of the defendant and the want of due care in the discharge of the duty thrown upon him." The jury seems to have found (a) that the defendant acted negligently, (b) that he acted without probable cause, and (c) that the plaintiff had been sane, in point of fact, at the time the defendant gave his certificate. They awarded damages, and the plaintiff got his judgment, apparently, as CROMPTON, J., said, "on the ground of culpable negligence and want of reasonable care or probable cause." *Hall* v. *Semple* (2) is, in my view, somewhat ambiguous and unsatisfactory, but it appears to decide (a) that a doctor when certifying is bound, though not employed by the alleged lunatic, to use reasonable care, and (b) that the basis of a plaintiff's claim for wrongful certification is a particular form of action on the case. It seems clear from the facts in *Hall* v. *Semple* (2) that the doctor who there certified was not under any contract with the plaintiff.

In *Everett* v. *Griffiths* (3), the statement of claim apparently formulated two grounds of claim against the doctor concerned, namely (i) false imprisonment, and (ii) negligence causing imprisonment, and the latter issue alone was left to the jury: see per ATKIN, L.J. ([1920] 3 K.B. at p. 200). SCRUTTON, L.J., refers to a claim for "negligent arrest and imprisonment" ([1920] 3 K.B. at p. 197). LORD HALDANE said ([1921] 1 A.C. at p. 640):

> "It is therefore an action for damages for false imprisonment, based on alleged breach of duty. The real legal question is not whether the appellant was actually of unsound mind when he was so certified, but whether the respondents committed a breach of any obligation to be careful in so certifying."

See, too, [1921] 1 A.C. at p. 658.

On the question of the cause of action, I need only refer to one more case—namely, *Harnett* v. *Fisher* (1). Two questions were there left to the jury—namely (i) Was Mr. Harnett of unsound mind on Nov. 10, 1912, when he was certified by Dr. Fisher, and (ii) Did Dr. Fisher act with reasonable care in certifying him? So far as I can see, there was no challenge on appeal to the sufficiency or propriety of those two questions. I infer from the many dicta in the opinions delivered in the House of Lords and also from the decision itself that such an action as the present is to be regarded as an action on the case for negligence in certification causing damage through detention in a mental hospital without just cause. I do not pause to analyse the curious and somewhat anomalous feature of

this comparatively recent form of action on the case. I am not free to write on a tabula rasa. I am beset by, and subject to, decisions and dicta.

If the cause of action be of the nature which I have indicated, and if, as I hold, there was no contract at all between the defendant and the plaintiff in the present case, did the defendant owe to the plaintiff the duty of care with respect to certification, and to the matters that preceded and surrounded it ? It is plain that a surgeon who operates negligently on the body of a patient is liable in damages, although there be no contract between the patient and himself. So, too, of a physician who administers medicine to the body of a patient. But here the defendant performed no operation at all, nor did he, on June 9, administer any medicine to the plaintiff. He only expressed in a certificate—the substance of which I have given—his honest view that the plaintiff was a "person of unsound mind, and a proper person to be taken charge of and detained under care and treatment." See on this point per Lord Esher in *Thompson* v. *Schmidt* (4) (56 J.P. at p. 213). Did, then, the defendant here owe the duty of care to the plaintiff with respect to certification ? If the answer be "Yes," then the singular result seems to follow that he would, apparently, have been liable to the plaintiff for not certifying if the plaintiff had been, in fact, of unsound mind and a proper subject, therefore, for detention in a mental hospital. Suppose that, in the latter case, the plaintiff, through the absence of certification and restraint, had inflicted injury on herself ? Could she have sued the defendant for damages ? "If not, it is curious"—as Scrutton, L.J., has pointed out—"that when he—the doctor—has undertaken to examine he is liable for carelessness which certifies, but not for carelessness which does not certify." See *Everett* v. *Griffiths* (3) ([1920] 3 K.B. at p. 196). It may also be pointed out that, if a doctor be liable in such a case as that now before me, it might follow that a petitioner who frames and signs a petition under s. 4 of the Lunacy Act, 1890, may also be liable for negligence in supplying the particulars required by the statutory form. See per Lord Atkinson in *Harnett* v. *Fisher* (1) ([1927] A.C. at p. 594). But, as I have said before, I am not, I fear, in spite of the statements made to me by counsel on both sides on the point, free to express an independent opinion of my own.

How, then, do the authorities stand ? I take the House of Lords decisions first. In *Everett* v. *Griffiths* (3), the opinions were uncertain and somewhat opposite. Viscount Haldane said ([1921] A.C. at p. 657):

> "I only wish to say that while I think it probable that if the matter were argued out Anklesaria [the doctor there concerned] would be found to have been under a duty to the appellant to exercise care, the precise nature of this duty would require consideration before it could be exactly defined."

Viscount Finlay said (ibid., at p. 669):

> "For the purpose of this case your Lordships assume without deciding that the defendant Anklesaria owed to the plaintiff the duty of ordinary care."

Viscount Cave said (ibid., at p. 679):

> "Upon the conclusion of the argument of the appellant your Lordships were of the opinion that, assuming that this defendant might in law be sued for want of reasonable care in examining and certifying the plaintiff, there was no evidence of such want of care to go to the jury."

His Lordship added that he did not wish to cast any doubt on the correctness of the opinion of Crompton, J., in *Hall* v. *Semple* (2) (3 F. & F. at p. 354),

> "that a medical man who negligently signs a certificate of insanity upon which an order for detention is founded may be made liable in damages for any injury so caused,"

though, as the noble Lord added, "I express no final opinion on that point." Lord Atkinson said ([1921] A.C. at p. 681):

"Even assuming the duties alleged and relied upon existed, which I am far from admitting, there is not, in my view, sufficient evidence to show that either of the respondents neglected to perform fully the duty he was alleged to owe to the plaintiff."

LORD MOULTON said (ibid., at p. 697):

"I propose to assume in the plaintiff's favour that such negligence and want of care and skill would give to the plaintiff a good cause of action against such defendant, though I do not decide the point."

Thus it will be seen that the House of Lords expressed no definite opinion on the point of law now before me. In *Harnett* v. *Bond* (5), the question of duty to take reasonable care in certification did not call for consideration. In *Harnett* v. *Fisher* (1), when in the House of Lords, the point ultimately turned on the Statute of Limitations. Incidentally, however, the question of the duty of reasonable care was mentioned. VISCOUNT SUMNER said ([1927] A.C. at p. 580):

"The respondent has not for present purposes disputed that a cause of action would arise at common law as for breach of duty towards the appellant (Harnett) if the respondent was actually wanting in reasonable care in his examination and in forming his conclusion as to the appellant's state of mind. I need therefore express no opinion on this question."

LORD ATKINSON said (ibid., at p. 592):

"It may well be that a medical man who treats a patient, or purports to express an opinion on that patient's bodily or mental state of health, is bound to do the work he has undertaken with reasonable care and skill . . . Negligence is a breach of duty, but the question is to whom this duty to use reasonable skill and care is owed. This action is founded on the assumption that it was owed to the appellant."

LORD CARSON and LORD WRENBURY agreed with VISCOUNT SUMNER. LORD BLANESBURGH, however, appears to have taken the view that the correctness of the ruling of CROMPTON, J., in *Hall* v. *Semple* (2) was no longer challenged. As to *Harnett* v. *Fisher* (1) I may say, as I said of *Everett* v. *Griffiths* (3), that it contains no definite opinion on the question of the duty of reasonable care in certification.

I now turn to the views expressed in the Court of Appeal. Those views are to be found in *Everett* v. *Griffiths* (3). I can summarise them in a sentence or two. BANKES, L.J., held definitely that the defendant in such a case as the present owed a duty of reasonable care. ATKIN, L.J., expressed a clear opinion to the like effect. SCRUTTON, L.J., however, took a wholly opposite view, and ruled that, in a case such as that before me no duty of care existed. I deem myself free to say that the reasoning, the authorities, and the illustrations given by SCRUTTON, L.J., carry a stronger appeal to my own mind. His view, however, was the dissenting and not the majority view. Practically all the relevant decisions were cited before the Court of Appeal in *Everett* v. *Griffiths* (3), and the interesting authorities quoted to me in the present case by counsel for plaintiff, including the dictum of WILLES, J., in *Skelton* v. *London and North-Western Rail. Co.* (6), do not carry the matter further. In *Harnett* v. *Fisher* (1), the very point before me was argued before and expressly decided by my colleague, HORRIDGE, J. He definitely ruled that a doctor in such a case as the present owes the duty of reasonable care. In the Court of Appeal and in the House of Lords the case turned on other points. Whatever my own view, therefore, might have been, I feel that I must bow to the weight of opinion. I must follow the rulings of BANKES and ATKIN, L.JJ. in *Everett* v. *Griffiths* (3), of CROMPTON, J., in *Hall* v. *Semple* (2), and of HORRIDGE, J., in *Harnett* v. *Fisher* (1). I can find nothing in the House of Lords opinions which are definitely adverse to those rulings. On the contrary, some of the opinions seem

inferentially to favour them. I ought not perhaps to omit mention of the fact that s. 330 of the Lunacy Act, 1890, seems to be based on the assumption that the ruling of Crompton, J., in *Hall* v. *Semple* (2) was correct. The material words of s. 330 are that a person

> "shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care."

I must, therefore, hold in the present case that the defendant owed to the plaintiff the duty of reasonable care. The House of Lords alone can give, I feel, an opposite decision. I would like to add an observation. During the past seven years a number of medical men, who acted in perfect good faith, have been exposed to the most prolonged, harassing and costly litigation on the allegation that they acted without reasonable care in a matter which is the most difficult, delicate and indefinite in the whole range of medical practice. It may well be, as was stated at the trial before me, that, as a result of past litigation, many doctors have refused and will refuse to take any part whatever in the work of certification because of the perils and anxieties of litigation which may follow. I am not, however, concerned with the consequences, I have only to deal with the points of law before me. Perhaps some further protective legislation is needed in view of recent cases.

I now turn to the second contention of the defendant—namely, that the defendant's certification was not the cause of the plaintiff's detention. Here I must set out the section of the Lunacy Act, 1890, under which the plaintiff was received at the Gloucester County Hospital. It is s. 16:

> "The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought under this Act shall call in a medical practitioner, and shall examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case that the alleged lunatic is a lunatic and a proper person to be detained, and, in the secondly-mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order, and the relieving officer, overseer, or constable who brought the lunatic before the justice, or in the case of a lunatic wandering at large, any constable who may by the justice be required so to do, shall forthwith convey the lunatic to such institution."

Such is the section, and I will assume for the purpose of the present point that the sequence of steps indicated in the section was duly followed. Now, was the certificate of the defendant the cause of the plaintiff's detention on such assumption ? If I had been freed from authority, I should have thought, myself, that the effective cause of that detention was the order of the justice, and not the certificate of the doctor. The decision lay with the justice and not with the doctor. The justice could decide as he pleased, whatever the certificate stated. He was possessed of judicial authority and judicial discretion, and his adjudication was decisive pro tempore on the matter before him. The doctor's certificate, though an essential requirement, was a mere opinion. It possessed of itself no operative force.

I could wish that, in the recent decisions on the Lunacy Acts, consideration had been given to the words of Willes, J., in *Austin* v. *Dowling* (7). He there pointed out, in a non-lunacy case, the significance of "the opinion and judgment" of a judicial officer. Those words, when taken in conjunction with the decision of the Court of Appeal in *Hodson* v. *Pare* (8), are well worthy of close attention. It cannot be pointed out too emphatically that, in *Hall* v. *Semple* (2) there was no

order whatever by any judicial person. The order for admission to the asylum was there signed by the wife alone. Considerations such as those I have indicated were doubtless present to the mind of LORD READING, C.J., when he gave his ruling in *Everett* v. *Griffiths* (3).

I confess that, on the point now before me, the judgment of SCRUTTON, L.J., in *Everett* v. *Griffiths* (3) strikes me as weighty in reasoning. The case, like this, turned on s. 16. But am I free to express an independent view ? I fear not. The position stands as follows. In *Everett* v. *Griffiths* (3), BANKES, L.J., expressed no view on the point before me. SCRUTTON, L.J., ruled that the doctor's certificate was not the cause of the plaintiff's detention. ATKIN, L.J., however, ruled that it was, in fact and law, the cause of that detention. When *Everett* v. *Griffiths* (3) went to the House of Lords, the House did not, in the majority of opinions, deal expressly with the point, for they held that there was no evidence of a want of reasonable care. VISCOUNT HALDANE does not deal with it. VISCOUNT CAVE inclined, I think, to favour the view of ATKIN, L.J. LORD ATKINSON expressed no clear view. LORD MOULTON expressed no actual opinion. VISCOUNT FINLAY, however, expressly concurred with the view stated in the Court of Appeal by ATKIN, L.J. The balance of opinion so far, therefore, favours the view that, in the present case, the doctor's certificate must be taken to be the cause of the plaintiff's detention in the Gloucester County Asylum. This balance is substantially increased by reason of the recent decision of HORRIDGE, J., in *Harnett* v. *Fisher* (1). The facts there, so far as they concern the present point, cannot be distinguished from those in the case before me. My learned colleague held expressly that the negligent giving of the doctor's certificate was the direct cause of the magistrate's order in the consequent detention of the plaintiff. The decision in *Harnett* v. *Fisher* (1), when before the Court of Appeal, rested on the Statute of Limitations only. In the House of Lords, the ultimate decision also turned on the Statute of Limitations. On the point now before me, however, I see that VISCOUNT SUMNER said ([1927] A.C. at p. 584) :

> "Any principle on which this cause of action could be sustained would be equally applicable if the defendant had signed nothing but had given his opinion to the magistrate orally. The rest is either a separate cause of action under the Lunacy Act, 1890, for which no damage could be recovered, since the detention order was the order of the justice and not of the doctor, or is a mere item in the damages claimed for the negligence."

The judgment of VISCOUNT SUMNER was, as I have earlier said, concurred in by LORD WRENBURY and LORD CARSON. See, too, the somewhat similar observations of LORD ATKINSON (ibid. at p. 594), where he says :

> "This reveals the true nature and function of the medical certificates. They are pieces of evidence, just as the statements of the petitioners are pieces of evidence, and are supplied to the judicial authority to help it to decide on the matter of the petition."

From LORD BLANESBURGH'S opinion (ibid. at p. 600), I infer, however, that he was in accord with the view expressed by VISCOUNT FINLAY in *Everett* v. *Griffiths* (3).

In this state of opinion, I feel that I ought to follow the clearly expressed rulings of ATKIN, L.J., of VISCOUNT FINLAY, and of HORRIDGE, J., supported, as I think they are, by the view of LORD BLANESBURGH just cited. I find no decision opposite to those rulings save in the judgment, forcible though it was, of SCRUTTON, L.J., in *Everett* v. *Griffiths* (3). I must, therefore, hold in the present case, simply on the balance of authority, that the certificate of the defendant was the cause of the plaintiff's detention in the Gloucester Mental Hospital.

I hope that it is permissible for me to express the view that, if possible, the House of Lords will ere long give a clear and final decision both on the question of the duty of care and also on the question of the certificate as a " cause " of deten-

A tion. Each is a matter of grave importance, both from a legal and from a practical point of view. It is regrettable that so great a difference of opinion should exist, and that a trial judge should be beset with difficulty and doubt. I desire also to express the hope that, when the question of the certificate as a cause of detention is finally considered, *Harnett* v. *Bond* (5) will receive a full measure of attention. I doubt if the importance of that case with respect to "causation" and the nature B of a novus actus interveniens has been fully realised. It was not even cited in *Harnett* v. *Fisher* (1). The weighty observations in *Harnett* v. *Bond* (5) should be contrasted with the well-known passage in the judgment of Lord Sumner in *Latham* v. *R. Johnson & Nephew, Ltd.* (9).

I must now deal quite briefly with the third (and most ingenious) point raised by counsel for the defendant in his able argument. Concisely put it is this: After C referring to the provisions of s. 13, s. 14 and s. 15 of the Lunacy Act, 1890 (as to summary reception orders), counsel for the defendant points out that the steps required by s. 16 are (i) that the justice shall call in a medical man; (ii) that the justice shall himself examine the lunatic and make such inquiries as he thinks fit; (iii) that, if he is satisfied that the alleged lunatic is a lunatic and proper to be detained, the justice should obtain a medical certificate; and then (iv) make D an order for detention if he thinks it right to do so. That is the sequence of steps required by s. 16. Counsel for defendant then points out that, in the case now before me, this sequence was not followed. In the present case, the justice had not called in the defendant, but, on the contrary, it was the defendant who may be said to have called in the justice. The section, moreover, assumes that the certificate shall be signed after and not before the justice has called in the medical man. E Here it was signed before the justice had taken any actual part in the matter. This being so, counsel for defendant contends, in substance, that the provisions of s. 16 were not complied with as they should have been, and he further contends, in substance, that the defendant was entitled to assume (a) that his certificate was a mere and unessential preliminary, and (b) that the justice would, when the matter F was brought before him, call in another and an independent doctor for the purpose of certification under s. 16. This third point was never raised at all by counsel for defendant while the case was before the jury. It was first submitted by him during the argument before me several weeks after the jury had given their verdict. On the whole, I do not think it is open to the defence to raise it now. If it had been put to me when the jury were in the box, I should most probably have left G to them other questions besides that of reasonable care. Both counsel, as I have said, had agreed that the only issue to be considered by the jury was the question of reasonable care in certification, together, of course, with the matter of damages should they find for the plaintiff. But even if the point be open to the defence there is a further objection. It is this. On the evidence of the defendant himself, who gave his evidence with the utmost frankness, it is clear that he did not H contemplate in fact that any other doctor would be called in by the magistrate. He expressly stated on the evening of June 9, in reply to a question by the relieving officer, that no second doctor was necessary. It is plain that the defendant assumed that the magistrate, if he made any order at all, would act on his (the defendant's) certificate and on no other certificate. I, therefore, see nothing in the facts here which takes this case outside those opinions and rulings on which I have felt I bound to rely in giving my decision on the second point in this case. It may well be, indeed, that the special facts here tell more strongly against the defendant than would have been the case if the sequence of steps required by s. 16 had been strictly followed. I need not examine the decisions in *Morris* v. *Atkins* (10) and *R.* v. *Whitfield* (11) cited by counsel for the defence. They do not, I think, affect my decision. It is right to point out that s. 330 of the Lunacy Act, 1890, provides, in substance, that persons carrying out the statute and signing orders or medical certificates shall not, if they act in good faith and with reasonable care, be liable

to civil or criminal proceedings whether on the ground of want of jurisdiction or any other ground. I must rule against the defendant on the third point also.

The result is that judgment must be entered for the plaintiff for the £50 damages awarded her by the jury.

*Judgment for the plaintiff.*

Solicitors: *H. Coulson; Le Brasseur & Oakley.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

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## Re KING. PUBLIC TRUSTEE *v.* ALDRIDGE

[Chancery Division (Romer, J.), October 14, 17, 1927]

[Reported [1928] Ch. 330; 97 L.J.Ch. 172; 138 L.T. 641]

*Settlement—Class—Member of fluctuating class—Contingent right to fund and accumulated income—Destination of accumulations during minority—Conveyancing Act*, 1881 (44 *& 45 Vict. c.* 41), *s.* 43 (2)—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

By a settlement dated Sept. 18, 1916, the settlor directed that the Public Trustee should stand possessed of certain property on trust for sale. After the settlor's decease, the income was to be paid to the tenants for life mentioned in the settlement, and, after the death of any tenant for life, the share of that tenant for life was to be held in trust for the grandchildren of the settlor who were then alive or might thereafter be born, and, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry under it, in equal shares per capita. One of the tenants for life died during the lifetime of the settlor. No grandchild of the settlor, at the settlor's death, had attained the age of twenty-one years, or, being female, had married; one of the grandchildren of the settlor was born after the dates when two of the grandchildren had attained the age of twenty-one years; and a grandchild of the settlor, who survived the settlor, had died under the age of twenty-one years. On the question as to the application of the accumulations of income of the share of the tenant for life who had died during the settlor's lifetime,

**Held:** (i) each member of the class on attaining the age of twenty-one years was entitled to receive such part of the accumulated income as he would be entitled to receive as if the class were then closed, but, in the event of the class being subsequently added to by the birth of a child, the share would be reduced; (ii) in the event of the class being added to by the birth of a child, the apportionment of the income among those members of the class who had not attained the age of twenty-one years was to be made provisionally, but, on attaining the age of twenty-one years, each member would be paid all accumulations provisionally assigned to him since that income so provisionally assigned was to be regarded as income of the property to which he ultimately became entitled; (iii) the share of the grandchild who had died under the age of twenty-one years which had been provisionally assigned to him must be treated as not having been properly assigned, and that portion which had accrued while he was a member of the class and had not been applied to his maintenance and education must be re-assigned among the other members of the class.

**Notes.** As to maintenance of infants under settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 773–776; and for cases, see 40 DIGEST (Repl.) 617–619. For the Conveyancing Act, 1881, s. 43, see 20 HALSBURY'S STATUTES (2nd Edn.) 416, and for the Trustee Act, 1925, s. 31, see 26 HALSBURY'S STATUTES (2nd Edn.) 94.

Cases referred to:

(1) *Re Holford*, *Holford* v. *Holford*, [1894] 3 Ch. 30; 63 L.J.Ch. 637; 70 L.T. 777; 42 W.R. 563; 10 T.L.R. 496; 38 Sol. Jo. 512; 7 R. 304, C.A.; 23 Digest (Repl.) 469, *5411*.

(2) *Re Jeffery*, *Arnold* v. *Burt*, [1895] 2 Ch. 577; 64 L.J.Ch. 830; 73 L.T. 332; 44 W.R. 61; 13 R. 857; 23 Digest (Repl.) 469, *5412*.

(3) *Re Jeffery*, *Burt* v. *Arnold*, [1891] 1 Ch. 671; 60 L.J.Ch. 470; 64 L.T. 622; 39 W.R. 234; 23 Digest (Repl.) 469, *5409*.

**Adjourned Summons.**

By a voluntary settlement dated Sept. 18, 1916, Sarah King, the settlor, directed that the Public Trustee should stand possessed of all the real and personal estate therein mentioned on trust for sale, and should hold the proceeds of such sale on trust for the settlor during her life. After declaring separate trusts of seven equal shares of the settled fund after the death of the settlor in favour of her four sons and three daughters and the husbands of two of the daughters during their respective lives, the settlor proceeded to direct as follows (cl. 12):

"After the death of the settlor and subject as to the parts thereof for the time being affected thereby to the aforesaid trusts in favour of the settlor's said four sons and three daughters and the said husbands of two of the said daughters the Public Trustee shall stand possessed of the settled fund of the income thereof in trust for such of the settlor's grandchildren being children of her said four sons and three daughters as are now living or shall be born at any time hereafter during the lifetime or after the death of the longest liver of the settlor's said four sons and three daughters and being male attain the age of twenty-one years or being female attain that age or marry under that age if more than one equally and as a single class per capita and not per stirpes."

By cl. 13, it was provided as follows:

"So long as the class of grandchildren of the settlor capable of taking under the aforesaid trust shall be liable to increase by the birth of a grandchild the Public Trustee shall pay the income of the share of the settled fund to which any grandchild, who is for the time being living and has attained a vested interest or to which the personal representatives of any grandchild who is for the time being dead, having attained a vested interest is or are for the time being presumptively entitled in possession having regard to the number of grandchildren for the time being living and for the time being dead having attained vested interests to the grandchild in question (as the case may be) and shall pay or apply or deal with the income of the share of the settled fund to which any grandchild who is for the time being living and has not attained a vested interest is for the time being contingently and presumptively entitled as aforesaid in the same manner as it is by s. 43 of the Conveyancing Act, 1881, directed that trustees shall pay or apply or deal with income to which that section relates."

Arthur King, one of the four sons of the settlor, died on April 12, 1919, in the lifetime of the settlor, without ever having had any issue. The settlor died on May 23, 1923. Since the death of the settlor the Public Trustee had accumulated the surplus income of the one-seventh share of the settled fund which was directed to be paid to Arthur King during his life. At the death of the settlor, no grandchild of the settlor had attained the age of twenty-one years, or, being female, had married. The defendant, Peggy Audry Lilian King, a grandchild of the settlor,

was born after the dates when two of such grandchildren, namely, the defendant, John William Robert Aldridge, and Florrie Isabella King, had attained the age of twenty-one years. Cyril Albert King, a grandchild of the settlor, died on June 15, 1926, under the age of twenty-one years.

This summons was taken out by the Public Trustee for the determination of the following questions: (i) whether the accumulations during the minority of the defendant, J. W. R. Aldridge, of the share of income of the settled fund to which he was then contingently and presumptively entitled, (a) became payable to him on his attaining the age of twenty-one years, or (b) ought to be retained by the plaintiff, as sole trustee of the settlement, as capital of the settled fund and held on trust in equal shares per capita for all the grandchildren of the settlor who had attained or should thereafter attain vested interests in the settled fund; (ii) whether the accumulations during the minority of Cyril Albert King, deceased, of income of the share of the settled fund to which he was therein contingently and presumptively entitled on the date of his death, (a) became payable, as to an aliquot part thereof, according to the number of the grandchildren of the settlor living at the date of his death, to each such grandchild who had then already attained a vested interest in the settled fund; or (b) became payable, as an aliquot part thereof, according to the number of the grandchildren of the settlor living at the date when any such grandchild attained a vested interest in the settled fund, to each such grandchild who had then already attained such a vested interest; or (c) ought to be retained by the plaintiff as such trustee as aforesaid as capital of the settled fund and held on trust in equal shares per capita for all the grandchildren of the settlor who had attained or should thereafter attain vested interests in the settled fund.

*H. H. King* for the plaintiff.

*C. A. J. Bonner*, for the defendant J. W. R. Aldridge referred to *Re Holford*, *Holford* v. *Holford* (1), and *Re Jeffery*, *Arnold* v. *Burt* (2).

*Robert Peel* for the defendant Peggy Audry Lilian King.

**ROMER, J.**—This is a somewhat curious question which has arisen under a voluntary settlement made by Mrs. Sarah King on Sept. 18, 1916. By that settlement, she vested certain property in the Public Trustee on trust for sale and investment of proceeds and directed the Public Trustee to pay the income to the settlor—who is now dead—during her life, and after her death to pay the income of an equal seventh share to each of her seven children therein mentioned for life, and in the case of two of her daughters to pay part of the income after the death of such daughter to that daughter's husband during his life. Subject to these trusts, the Public Trustee was to stand possessed of the settled fund and the income thereof in trust for such of the settlor's grandchildren, being children of her said seven children as were then living or should be born at any time thereafter during the lifetime or after the death of the longest liver of the seven children, and being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares per capita and not per stirpes. One of the life tenants has died in the settlor's lifetime, the other six are still living, and the trustee wishes to know how he is to deal with the income arising from the one-seventh share of the child who is dead. It would follow from what I have said that we have an ordinary case of a gift to a class capable of increase or, rather, to such members of a class which is capable of increase as shall attain the age of twenty-one years, the gift being one that carries the intermediate income.

It has long since been laid down by the Court of Appeal, differing from a view which NORTH, J., had expressed in *Re Jeffery*, *Burt* v. *Arnold* (3) that, in a case of that sort, each member of the class as he attains twenty-one is entitled to receive such part of the income as he would be entitled to receive if the class were then closed, that is to say, supposing at the time the eldest of the class attains

the age of twenty-one there are only six members of that class in existence, as from the time he attains twenty-one he is entitled to receive one-sixth of the income notwithstanding that the class is capable of increase. Should the class increase later by the birth of a seventh member, as from that time the member of the class who has attained twenty-one would only receive one-seventh of the income assuming that the other members of the class are still in existence. That is very well settled as regards the income of members of the class who have attained the age of twenty-one years. Now what about the members of the class who have not attained, for the time being, the age of twenty-one years? I think it is equally well settled that the same thing is done provisionally, that is to say, if there are six members of the class, of whom one only has attained twenty-one, one-sixth of the income ought to be provisionally allocated to each of the other five members. If and when another member comes into existence so that there are seven members of the class, there will thenceforth be allocated to each of the six minors a seventh share of the income.

What is to happen to the income so provisionally assigned to an infant member of a class? In general, that, I think, would be governed by s. 31 of the Trustee Act, 1925, replacing s. 43 of the Conveyancing Act, 1881, and under that section the trustees would, in my opinion, be justified in treating the income so provisionally assigned to the infant member of the class as the income produced by property to which that infant was contingently entitled, and would be justified in applying that income for the maintenance, education and benefit of the infant. So far as not so applied, the balance of the income would have to be accumulated under sub-s. (2) of the section. Now as a matter of fact that is exactly what is expressly provided for by cl. 13 of the settlement. That clause is as follows: [His Lordship read cl. 13, and continued:] So far there does not seem much difficulty about the matter. But what are the trustees to do with the accumulations of the income provisionally allotted to the members of the class who have not attained twenty-one, that is, that part of the income which has not been applied in maintenance and education of the infant? Let me again take the case of there being six members of the class in existence, five of whom are infants. The trustees provisionally allocate to each of the five infants a sixth part of the income. So far as that sixth part of the income is not applied in maintaining the particular infant for whose benefit it has been provisionally apportioned, it will have to be accumulated. But supposing by the time the infant attains the age of twenty-one years the class has increased to seven, what is to be done with the accumulations made at a time when the class only consisted of six members? In other words, what is the property from which those accumulations arose, for, according to the Act, the accumulations only go to the infant on attaining twenty-one if he becomes entitled to that property. In my opinion, the property from which the accumulated income arose is the share to which the infant becomes ultimately entitled, even though that share may be considerably smaller than a sixth by reason of other members of the class coming into existence. For it appears to me that, in each year in which there are only six members of the class, the income of the ultimate share of each member of that class, whatever it may be, is one-sixth of the income of the trust fund, in other words that, during the time that there are only six members of the class, the ultimate share of each member is earning income and the ultimate shares of persons who are not at that time members of the class are not earning income. The result of that will be that, as each member of the class attains twenty-one, he will be entitled to be paid all accumulations of income provisionally assigned to him in the way that I have mentioned before, because that income so provisionally assigned to him is to be regarded as the income of the property to which he ultimately becomes entitled.

What is to be done supposing, as has happened in this case, one of the members of the class to whom a share has been provisionally assigned dies under the age of twenty-one years? It seems to me that, logically, the trustee ought to treat

the share so provisionally assigned, so far as, of course, it is not applied in maintenance of the child, as not having been properly assigned, and then to reassign the income accruing while that infant was a member of the class amongst the others who were at that time members of the class. While there are six members, for instance, the income will be divided into six parts: those who are adults will receive their sixth; for those who are minors there will be provisionally allotted a sixth. When another member of the class comes into existence, the income will be divided and provisionally allotted into sevenths. Supposing before another member of the class comes into existence one of the seven dies an infant; then it appears to me that the trustee must go back and, if that infant was one of those originally entitled to one-sixth, he must, during the period that he was dividing and provisionally assigning the income in sixths, divide and provisionally assign it in fifths and as from the time that the seventh grandchild was born, instead of dividing and provisionally assigning it in sevenths he must divide and provisionally assign it into sixths. This is a mere matter of book-keeping and should not be difficult to apply in practice.

Solicitors: *Wilkinson, Bowen & Co.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

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## Re MYHILL. HULL *v.* MYHILL

[Chancery Division (Astbury, J.), December 15, 1927]

[Reported [1928] 1 Ch. 100; 97 L.J.Ch. 81; 138 L.T. 486; 72 Sol. Jo. 86]

*Settled Land—Trust for sale—Land held in undivided shares vested in possession—Three shares held for life and one absolutely—Single trustee—Capacity to sell with newly-appointed trustee—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. I, Part IV, para.* 1 (1).

On Dec. 31, 1925, immediately before the coming into operation of the Law of Property Act, 1925, freehold land was vested in a single trustee on trust for four persons in undivided shares. Three of the shares were settled on tenants for life and the fourth was held absolutely.

**Held:** although there was only one trustee holding the land in trust for persons entitled in undivided shares, some holding for life and some absolutely, the case fell within the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (1), and, therefore, the trustee held the land on the statutory trusts, and, on the appointment of a new or additional trustee to act with him, could sell and make a good title and give a valid receipt to a purchaser.

**Notes.** Considered: *Re Robins, Holland* v. *Gillam*, [1928] All E.R. Rep. 360. Referred to: *Re Dawson's Settled Estates*, [1928] All E.R. Rep. 472.

As to the vesting of land held in undivided shares on Dec. 31, 1925, see 27 Halsbury's Laws (2nd Edn.) 629 et seq.; and for cases, see 40 Digest (Repl.) 858–863. For the Law of Property Act, 1925, Sched. I, Part IV, see 20 Halsbury's Statutes (2nd Edn.) 859.

**Adjourned Summons.**

John Myhill, by his will dated July 17, 1868, gave all the residue of his estate to his wife, Jane Myhill, and Cæsar Crellis on trust to permit his wife to have the use and enjoyment thereof during her life or so long as she should remain his widow,

and after her death or remarriage he gave the same unto and among all his children who should be living at the death of his wife or her remarriage, in equal shares and proportions and the issue of such of them as should be dead—such issue dividing equally between them the share to which their deceased parent if surviving would have been entitled—for their own use and benefit during the term of their natural lives, and after their respective deaths to his, her or their children—dividing equally between them his, her or their parent's share only—to and for his, her or their own use and benefit absolutely. The testator died on Jan. 20, 1872, having had four children only, John Edward Myhill, Jane Johnson, Mary Ann Bush, and Florence Louisa Hull, all of whom survived the widow Jane Myhill, who died on Dec. 18, 1896, without having remarried, and having survived the said Cæsar Crellis. On Feb. 12, 1898, letters of administration to the estate of Jane Myhill were granted to her son, John Edward Myhill, who thereby became the legal personal representative of the testator. John Edward Myhill, Jane Johnson and Florence Louisa Hull were still living. John Edward Myhill and Jane Johnson had issue, but Florence Louisa Hull had no children. Mary Ann Bush was married and died on Sept. 28, 1925, having had three children, one of whom died in infancy, and the other two, Arthur Herbert Bush and Hilda McAlister were still living. By a deed dated Feb. 24, 1898, John Edward Myhill, as legal representative of Jane Myhill, purported to appoint himself and James Planta Hull, husband of Florence Louisa Hull, trustees of the will in place of Jane Myhill and Cæsar Crellis and also trustees of the will for the purposes of the Settled Land Acts, 1882 to 1890. The appointment by John Edward Myhill of himself and James Planta Hull to be such trustees was invalid, and John Edward Myhill as legal personal representative of Jane Myhill remained sole trustee of the will. The residuary estate of the testator comprised ten freehold houses at Bromley in Kent. The rents and profits of the residuary estate were paid to Jane Myhill during her life, and after her death in equal shares to the four children until the death of Mary Ann Bush. After her death the income of her fourth share was retained by the trustee pending the decision of the court as to the validity of the devise to the issue of Mary Ann Bush. It was desired now to sell the houses, but a question arose in whom the legal estate was now vested under the Law of Property Act, 1925, the houses being held on trust in undivided shares when that Act came into force.

James Planta Hull, on the assumption that he was validly appointed a trustee, issued this summons to decide (i) whether the ultimate limitation to the issue of the children of the testator was valid or not; and (ii) whether, under the Law of Property Act, 1925, Sched. I, Part IV, the legal estate in the houses was vested (a) in John Edward Myhill as the trustee of the will, (b) trustees for the purposes of the Settled Land Act, 1925, of the settlement created by the will when appointed, or (c) in the Public Trustee, in each case on the statutory trusts. The defendants were John Edward Myhill and Arthur Herbert Bush, one of the children of Mary Ann Bush. Astbury, J., decided that the limitation to the grandchildren was valid. That point does not require report, but the other question was adjourned and now came on for argument.

*Mendel* for the plaintiff.
*Stafford Crossman*, for J. E. Myhill.
*Eardley-Wilmot* for Arthur Herbert Bush.

The Law of Property Act, 1925, as amended by the Law of Property (Amendment Act, 1926, provides:

"27 (2) Notwithstanding anything to the contrary in an instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation, but this sub-section does not affect the right of

a sole personal representative as such to give valid receipts for, or direct the application of, proceeds for sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee."

Sched. I, Part IV:

"1. Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provision shall have effect:

"(1) If the entirety of the land is vested in trustees or personal representatives (whether subject or not to incumbrances affecting the entirety or an undivided share) . . . in trust for persons entitled in undivided shares, then . . . (c) . . . the land shall be held by such trustees or personal representatives upon the statutory trusts. . . .

"(3) If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal mortgage, and free from any interests, powers and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares, in the trustees (if any) of the settlement as joint tenants upon the statutory trusts. . . ."

**ASTBURY, J.,** stated the facts, and continued: The present question is how and where the legal estate in the residuary real estate under the testator's will is now vested. Before Jan. 1, 1926, the real estate was held in trust in undivided shares in possession, as to three undivided fourth shares for persons for life, and as to the other fourth part for the grandchildren absolutely. It is clear that Sched. I, Part IV, para. 1, to the Law of Property Act, 1925, applies, but the question is which of the sub-paras. (1), (3) or (4) applies.

Sub-paragraph (1) provides that, if the entirety of the land was vested in "trustees or personal representatives" in trust for persons entitled in undivided shares, then the land should be held by "such trustees or personal representatives" on the statutory trusts. The question has been raised whether that sub-paragraph applies to a single trustee or personal representative. I should have thought that there was no question that s. 1 (1) (b) of the Interpretation Act, 1889, which provides that the plural includes the singular unless a contrary intention appears, applies, as no contrary intention is expressed in the will. But it is suggested that s. 27 (2) of the Law of Property Act, 1925, which, as amended by the Law of Property (Amendment) Act, 1926, provides that proceeds of sale "shall not be paid to or applied by the direction of fewer than two persons as trustees for sale," shows a sufficient contrary intention. In my opinion, that contention is not sound. Section 27 in no way prevents the legal estate vesting in a single trustee or personal representative or affects the operation of Sched. I, Part IV.

Then it was suggested that sub-para. (1) is confined to the case of persons entitled absolutely in undivided shares. In my opinion, that is not the true construction of the sub-paragraph, and this is borne out by sub-para. (2), which provides that, if the entirety of the land (not being settled land) is vested "absolutely and beneficially" in not more than four persons of full age "entitled thereto in undivided shares," it shall vest in them as joint tenants on the statutory trusts. This shows that the expression "entitled in undivided shares" is used in the general sense of having a present interest therein, and does not mean "absolutely entitled." In my judgment, sub-para. (1) means in trust for persons entitled qua such an interest. Here the personal representative of the surviving trustee held the land in trust for persons whose interest was in undivided shares,

three of those persons being tenants for life, and the grandchildren being absolutely entitled to the other share. In my judgment, the case falls reasonably clearly within sub-para. (1), and John Edward Myhill holds the land in trust for persons entitled for undivided shares, some holding for life and some absolutely.

It was then submitted that, if sub-para. (1) applies to limited interests as in the present case, it would also apply to a case where the entirety of the land, though vested in trustees, is settled land, and would clash with sub-para. (3). [HIS LORDSHIP read sub-para (3), and continued:] There may be cases where it is difficult to decide whether they fall within sub-para. (1) or sub-para. (3). But the question does not arise here. The entirety of this land is not settled land at all. Three-fourths of it are in settlement, the other fourth is not settled at all. Sub-para. (3) does not apply; and, as the case falls within sub-para. (1), sub-para. (4) does not apply.

The land in question is now held by John Edward Myhill on the statutory trusts, and, on the appointment of a new or additional trustee to act with him, he, and such new or additional trustee, can sell and make a good title, and give a valid receipt to a purchaser.

Solicitors: *Horsley & Weightman; Maude & Tunnicliffe.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

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## Re ALEFOUNDER'S WILL TRUSTS. ADNAMS *v.* ALEFOUNDER

[CHANCERY DIVISION (Astbury, J.), January 13, 14, 1927]

[Reported [1927] 1 Ch. 360; 96 L.J.Ch. 264; 137 L.T. 16; 71 Sol. Jo. 123]

*Settled Land—Equitable tenant in tail—Entail barred—Disposition of legal fee—Need of vesting instrument—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 13, *s.* 112 (2).

On Dec. 16, 1925, the defendant became entitled to settled estates as legal tenant in tail in possession without any overriding trusts or incumbrances. On Jan. 1, 1926, on the coming into force of the new property legislation, he automatically became estate owner in legal fee simple and equitable tenant in tail. On the question whether, if he barred the equitable estate tail, he could make a valid disposition of the legal estate as absolute legal owner in fee simple, or whether he must obtain a vesting deed pursuant to the Settled Land Act, 1925, s. 13,

**Held:** if the defendant disentailed his equitable interest and became entitled to the legal and equitable fee simple free from settlement or trust, he could dispose of the property as absolute owner in fee simple without previously obtaining a vesting deed in pursuance of s. 13 of the Settled Land Act, 1925, that section, having regard to s. 112 (2) of the Act, applying only to dispositions under that Act.

**Notes.** As to the execution of vesting instruments, see 29 HALSBURY'S LAWS (2nd Edn.) 543; and for cases, see 40 DIGEST (Repl.) 850–851. For the Settled Land Act, 1925, s. 13 and s. 112, see 23 HALSBURY'S STATUTES (2nd Edn.) 43, 240.

**Adjourned Summons** issued by the trustees for the purposes of the Settled Land Act, 1925, under the will of R. S. Alefounder for the determination of certain points arising under the will. The first question was whether the defendant, R. E. S. Alefounder, was entitled to the unsold part of the real estate absolutely,

or as tenant in tail in possession. ASTBURY, J., decided that, on the true construction of the will, the defendant was entitled to the real estate as tenant in tail in possession without any overriding trusts or incumbrances. The testator died on Dec. 16, 1864, and on Dec. 16, 1925, the defendant became entitled as legal tenant in tail in possession, and could then have barred the entail, and become absolutely entitled in fee simple. On Jan. 1, 1926, when the new property legislation came into force, he automatically became estate owner in legal fee simple and equitable tenant in tail. The second question arose whether, if he barred his equitable estate tail, he could make a valid disposition of the legal estate as absolute legal owner in fee simple, or whether he must obtain a vesting deed pursuant to s. 13 of the Settled Land Act, 1925.

*Humphrey King* for the Settled Land Act trustees.
*C. J. Parton*, for the defendant.
*Buckmaster* for other parties.

**ASTBURY, J.**, stated the facts, and continued: The question is whether the defendant, on barring his equitable estate tail, can make a valid title without first having a vesting deed executed. This interesting question is considerably complicated by the simplifications introduced by the new property legislation. I have already decided that, at the end of 1925, he was an adult legal tenant in tail in possession, with remainders over, but without any overriding trusts or incumbrances. On Jan. 1, 1926, by virtue of the Law of Property Act, 1925, his legal estate tail became an equitable estate tail, which, having regard to s. 133, he could bar without enrolment. But, until this was done, the land remained settled under the Settled Land Act, 1925, s. 1 (1) (i), (ii) (a).

Under s. 20 (1) (i) and s. 117 (1) (xxviii) of the Settled Land Act, 1925, which latter clause is incorporated in s. 205 (1) (xxvi) of the Law of Property Act, 1925, he is deemed to be a tenant for life, with the consequent power of requiring a principal vesting deed under Sched. II, para. 1 (2) of the Settled Land Act, 1925. The estates have, therefore, vested in him automatically as estate owner under Sched. I, Part II, paras. 3, 5 and 6 (c) of the Law of Property Act, 1925. He, therefore, holds the absolute legal fee simple in trust for himself as equitable tenant in tail with remainders over, but without any overriding trusts or incumbrances, and not unnaturally wishes to know whether, if he bars his equitable estate tail and so puts an end to the settlement, he can make a valid disposition of the property without first obtaining a vesting deed, which, as a tenant in tail, he is entitled to require.

The difficulty, if any, is caused by s. 13 of the Settled Land Act, 1925, which, as amended by the Law of Property (Amendment) Act, 1926, is in these terms:

> "Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof inter vivos by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge . . ."

It has, however, been rightly contended that, on its true construction, this section cannot have been intended to prevent a valid disposition in such a case as the present, namely, where the person in question is estate owner in law, and on barring his equitable estate tail will also become owner in unencumbered fee

simple in possession. In my opinion, this contention is right for two reasons. First, because if the defendant executes a disentailing assurance the land will cease to be settled land, and the settlement will come to an end. Secondly, the purported disposition referred to s. 13 means, and means only, a disposition under the Settled Land Act itself: see s. 112 (2). Under s. 5 of the Law of Property Act, 1925, every vesting deed must contain statements and particulars which are there set out. It is difficult to understand how a vesting deed complying with these requirements could be executed after the cesser of the settlement.

For these reasons, I am of opinion that, if a tenant in tail disentails his equitable interest and becomes entitled to the legal and equitable fee simple free from settlement or trust, he can dispose of the property without any regard to s. 13, and without previously obtaining a vesting deed.

Solicitors: *Albert M. Oppenheimer*, for *Steward, Rouse, Vulliamy & Son*, Ipswich; *Merton, Jones & Lewsey*.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law*.]

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## Re PAYNE. TAYLOR *v.* PAYNE

[CHANCERY DIVISION (Astbury, J.), February 25, March 1, 1927]

[Reported [1927] 2 Ch. 1; 96 L.J.Ch. 291; 137 L.T. 117]

*Trust—Rule in Lassence* v. *Tierney—No absolute gift—Direction to appropriate share of residue to be held on trusts declared—Intestacy.*

A testator by his will devised real and personal estate to his trustees upon trust for sale and conversion and for investment of the proceeds thereof, which he called his "residuary fund." By cl. 10 he directed his trustees to stand possessed of his residuary fund upon trust to divide the same into five equal shares and to appropriate one of such shares to each of his sons then living, whether such son should survive him or not, and directed that the share so to be appropriated to each of his sons respectively should not vest in such son or his representatives, but should be retained by his trustees, and held upon the trusts thereinafter declared concerning the same respectively. He directed that after the death of any son his share should be appropriated unto such child or children of the son as should be living at the testator's death, or born afterwards, or have died in the testator's lifetime leaving issue surviving the testator, in equal shares, and empowered each of the sons who should survive the testator by deed or will to alter in any manner he might think fit the way in which the share of such son should be appropriated to his children. All five sons of the testator survived him, and one, F., died on Oct. 20, 1926, without leaving issue, having by his will devised and bequeathed all his real and personal estate to his wife, whom he appointed his sole executrix.

**Held:** there was no absolute gift to F. of his appropriated share, but a direction to appropriate the share so that it should be held upon the trusts declared, and, therefore, the rule in *Lassence* v. *Tierney* (1) (1849), 1 Mac. & G. 551 did not apply, and, in the events that had happened, F.'s share of the residuary trust fund was undisposed of and passed as on an intestacy.

**Notes.** For an instance of a case where the decision was to the contrary effect—that the rule in *Lassence* v. *Tierney* applied—see *Re Marshall*, [1928] All E.R. Rep. 694.

Distinguished: *Re Marshall, Graham* v. *Marshall*, [1928] All E.R. Rep. 694. Considered: *Re Gatti's Voluntary Settlement Trusts, De Ville* v. *Gatti*, [1936] 2 All E.R. 1489.

As to the rule in *Lassence* v. *Tierney* see 34 HALSBURY'S LAWS (2nd Edn.) 214, and for cases see 43 DIGEST 643, et seq.

Cases referred to:

(1) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom, *Lassence* v. *Tierney*, *Lassence* v. *Lescher*, 14 Jur. 182, H.L.; 43 Digest 643, *790*.

(2) *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36; 1 New Rep. 48; 32 L.J.Ch. 46; 9 Jur. N.S. 17; 11 W.R. 137; 71 E.R. 16; 37 Digest 122, *545*.

(3) *Re Harrison, Hunter* v. *Bush*, [1918] 2 Ch. 59; 87 L.J.Ch. 433; 118 L.T. 756; 62 Sol. Jo. 568; 43 Digest 644, *795*.

(4) *Moryoseph* v. *Moryoseph*, [1920] 2 Ch. 33; 89 L.J.Ch. 376; 123 L.T. 569; 64 Sol. Jo. 497; 43 Digest 644, *796*.

(5) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, *792*.

**Adjourned Summons.**

By his will, dated June 27, 1916, J. T. Payne, after appointing executors and trustees, devised and bequeathed all his real and personal estate not otherwise disposed of unto and to the use of his trustees upon trust for sale and conversion as therein mentioned, and directed that his trustees should make certain payments and invest the residue, thereinafter called his "residuary fund." By cl. 10 he directed as follows:

> "My trustees shall stand possessed of my residuary fund in trust to divide the same and the investments thereof into five equal shares, and to appropriate one of such shares to each of my sons now living, whether such son shall survive me or not, and so that any reference hereinafter contained to the shares of my respective sons in my residuary fund shall be deemed to apply and have reference to the shares hereinbefore directed to me appropriated to them respectively, whether they shall respectively survive me or not, provided always and I direct that the share so directed to be appropriated to each of my said sons respectively shall not vest absolutely in them or their representatives, but shall be retained by my trustees and held upon the trusts hereinafter declared concerning the same respectively."

The testator directed that his trustees should hold the share of each of his sons in his residuary fund upon certain trusts during the son's life and should stand possessed of the share of each of his sons from and after his death, or from and after the death of the testator as to any son predeceasing him, upon trust to appropriate such share unto such child or children of the son to whom such share should have been originally appropriated as should be living at the testator's death, or born afterwards, or should have died in the testator's lifetime leaving issue surviving the testator, in equal shares. The testator then empowered each of his sons who might survive him at any time by deed revocable or irrevocable or by will or codicil to alter in any manner or to any extent he might think fit the shares in which the share of such son in the residuary fund should after his death be appropriated to his children, if more than one. The testator died on Mar. 2, 1917. All his five sons survived him. One of his sons, F. S. Payne, died on Oct. 20, 1926, without leaving issue. By his will F. S. Payne gave all his real and personal estate to his wife, E. M. Payne, and appointed her sole executrix. Questions arose as to the person or persons for whom, and the trusts upon which, the share of the testator's residuary fund directed to be appropriated to F. S. Payne ought to be held, and the trustees of the will of J. T. Payne issued this summons asking whether the share of the residuary fund appropriated or directed to be

appropriated to F. S. Payne passed on his death to his legal personal representative, or whether it was undisposed of by the will and was distributable as on an intestacy, or whether it accrued to the other shares appropriated or directed to be appropriated under the provisions of the will, or who otherwise was entitled to such share. The defendants were the other sons of the testator and the widow of F. S. Payne.

*Underhay* for the trustees.

*Galbraith, K.C.*, and *J. V. Nesbitt*, for married sons of the testator, referred to *Rucker* v. *Scholefield* (2).

*Percy C. Lamb*, for an unmarried son of the testator.

*Bennett, K.C.*, and *A. Guest Mathews*, for the executrix of F. S. Payne, referred to HAWKINS ON WILLS (3rd Edn.) p. 318, the rule in *Lassence* v. *Tierney* (1), *Re Harrison*, *Hunter* v. *Bush* (3), *Moryoseph* v. *Moryoseph* (4), *Hancock* v. *Watson* (5).

**ASTBURY, J.**—This is a summons to determine whether, on the true construction of the will of J. T. Payne, a share of residue directed to be appropriated to one of his sons who died without issue passed to the son's personal representative or is undisposed of. The question involves the application of the rule in *Lassence* v. *Tierney* (1), and raises a point which does not seem to have been raised in any of the authorities.

By cl. 10 of his will the testator directed his trustees to stand possessed of the share appropriated to each son on trusts declared in the will. The question is, whether, on the true construction of cl. 10, there is an absolute gift in the first instance of the appropriated share to each son. Whether an original gift is absolute or qualified is often a difficulty which arises in applying or excluding the rule in *Lassence* v. *Tierney* (1). The rule is clearly laid down by LORD DAVEY in *Hancock* v. *Watson* (5), where he says:

> "The appellant's second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that, if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute gift which fail, either from lapse or invalidity or other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as LORD COTTENHAM pointed out in *Lassence* v. *Tierney* (1), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words 'I give,' and speaks of the share subsequently as 'allotted' to her. Mr. Levett contended that there are words in the will that confine her interest in the allotted portions to her life. But that is not what the testator has said: he has directed that during her life she shall have only the income of her share for her separate use, without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the trusts declared of it, and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only."

The difficulty here is to determine whether the appropriation should be regarded as an absolute gift in the first instance with engrafted qualifications, or whether

it is part of a series of directions to be read as a whole, as PAGE-WOOD, V.-C., read the gift and limitations in *Rucker* v. *Scholefield* (2), where a power was given to a husband and wife to appoint among their children, with a proviso that no child taking under any appointment should be entitled to any part of the unappointed fund without bringing his or her appointed share into hotchpot, unless the appointment contained an express direction to the contrary. The husband and wife exercised the power by deed poll. The words there were

> "to appropriate one-fifth part, and to pay and apply the interest, dividends, and annual proceeds of each one-fifth part unto each of their five daughters, and upon trust after the death of each daughter to pay, apply, and dispose of her share amongst her children or their issue as she should by deed or will appoint, and in default of any such appointment then equally between the children and issue of such daughter, and, if one of the daughters should die without leaving issue, then her share should be in trust for such of her sisters as should be living at her death, and the issue of such of them as should be then dead, but, in case all her daughters died without issue, then in trust to pay and divide the trust fund equally between such of the sons of the appointors as should be living and the issue of such of them as should be dead."

PAGE-WOOD, V.-C., said:

> "In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to show that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled ; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So, if you find a clear gift followed by words which affect to divest it, and the limitations over are inoperative, then the court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words in the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law."

The question is to which of these two classes the instrument under consideration belongs. The trusts declared by the deed of appointment are, first, "to appropriate one-fifth of the principal to and for the benefit of" each of the daughters, exclusively of the other children, and, if these words stood alone, they would suffice to vest the absolute interest in the five daughters ; but the clause runs on thus:

> "and to pay and apply the interest, dividends and annual proceeds of each such one-fifth part or share unto or permit the same to be received by each and every of the said several children for her own sole and separate use, and upon trust from and after the decease of each such daughter to pay, apply and dispose of the said fifth part or share of such daughter so dying unto and amongst the children of such daughter."

Then follow the limitations, which are clearly bad.

There the learned Vice-Chancellor held that the daughters took a life interest only. Now the question is, within which class does the present case fall ? *Rucker* v. *Scholefield* (2) was a case where the earlier part of the gift, if standing alone, would have given an absolute interest, but it was held to be cut down by the series of trusts which followed it. From what was said in *Rucker* v. *Scholefield* (2), coupled with LORD COTTENHAM'S statement in *Lassence* v. *Tierney* (1) and LORD DAVEY'S statement in *Hancock* v. *Watson* (5), it appears to me that the court has first to construe whether there was an absolute gift to each son, or whether there

was a direction to appropriate a share to enable it to be held on the trusts declared. I think that the latter is the true view here. It is difficult to say that the testator intended an absolute gift of these shares by a clause which says: "The shares are not to vest absolutely in the sons or their representatives." Whether they survived the testator or not, a share was to be appropriated for the benefit of the sons of the testator or their issue. Then there is a direct provision that the shares are not to vest in the sons or their representatives, but are to be held upon a series of trusts which do not exhaust the events. That fact cannot in the circumstances have the effect of preventing the appropriated shares being of a non-vesting character. For these reasons I am of opinion that there was not in the first instance an absolute gift of the appropriated shares; the rule in *Hancock* v. *Watson* (5) and *Lassence* v. *Tierney* (1) does not apply, and there will be a declaration that, upon the true construction of the will, and in the events which have happened, the share of the residuary trust fund directed to be appropriated to F. S. Payne was undisposed of by the will.

Solicitors: *Dennes, Lamb & Drysdale; James Turner & Son.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

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## Re R. AND H. HALL, LTD. AND W. H. PIM (JUNIOR) & CO.'S ARBITRATION

[Court of Appeal (Lord Hewart, C.J., Bankes and Scrutton, L.JJ.), January 21, 1927]

[Reported 137 L.T. 585; 32 Com. Cas. 144]

*Contract—Breach—Damages—Measure—Sale of goods—Loss of profit on re-sale—Material date—Date of main contract—Relevance of knowledge acquired by seller after that date.*

By a contract in the Form No. 12 of the Corn Trade Association, dated Nov. 3, 1925, sellers sold to buyers 7,000 tons of Australian wheat of the quality and description and at the price stated in the contract for December or January shipment. The buyers, without waiting to receive the cargo, re-sold it to buyers on the same terms except as to price. There were further sub-sales in a chain of contracts. In January, 1926, the sellers nominated the steamship I. as containing a cargo which they appropriated to the contract of Nov. 3, 1925, but, on arrival of the ship in England on Mar. 22, 1926, the sellers failed to tender the documents to the purchasers and so were in breach of the contract. Between the date of the contract and the date of the breach the sellers became aware, as the result of correspondence between them and the buyers, of the re-sale which had been effected by the buyers. The sellers admitted the breach of contract, the only question being the measure of damages.

**Held:** the material date, when considering the question of damages, was the date of the contract, and the fact that the sellers became aware of the re-sale after that date could not be taken into consideration; on the construction of the contract, there were no materials on which the court could find that when it was made the parties contemplated that the cargo would be re-sold before delivery; and, therefore, the damages payable could not include the

profit which the buyers had failed to gain on the re-sale, but must be limited to the difference between the contract price and the market price at the date of the breach.

**Notes.** This case went to the House of Lords (see [1928] All E.R. Rep. 763) where the decision of the Court of Appeal was reversed on the ground that, on construction of the contract, it was clear that when it was made the parties contemplated re-sale. The decision of the Court of Appeal with regard to the materiality of the date of the contract when considering the measure of damages for its breach was not questioned.

As to damages for breach of a contract for the sale of goods where the buyer has re-sold before delivery see 29 HALSBURY'S LAWS (2nd Edn.) 195–197, and for cases see 39 DIGEST 476 et seq., 668 et seq.

Cases referred to:

(1) *Hydraulic Engineering Co., Ltd.* v. *McHaffie* (1878) 4 Q.B.D. 670; 27 W.R. 221, C.A.; 39 Digest 554, *1616.*

(2) *Grébert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 39 Digest 669, *2569.*

(3) *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, *2570.*

(4) *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 4 T.L.R. 95, C.A.; 39 Digest 476, *995.*

(5) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99.*

(6) *Salford Corpn.* v. *Lever*, [1891] 1 Q.B.D. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 1 Digest 483, *1626.*

**Appeal** from an order of ROWLATT, J., on a Special Case stated by arbitrators.

On Nov. 3, 1925, the buyers, R. and H. Hall, Ltd., bought from the sellers, W. H. Pim (Junior) & Co., Ltd., on c.i.f. terms 7,000 tons of Australian wheat at 51s. 9d. per quarter. Before receiving the documents the buyers re-sold the wheat at 56s. 9d. per quarter, and further subsales followed at increased prices. In January, 1926, the sellers bought a cargo of wheat in the steamship *Indianic*, and notified the buyers that they appropriated that cargo to the contract of Nov. 3, 1925. The steamship *Indianic* arrived in England on Mar. 22, 1926, but the sellers did not tender the documents to the buyers. The buyers claimed damages for breach of contract, and the claim was referred to arbitration. The sellers admitted the breach, but they contended that the only damages recoverable by the buyers was the difference between the contract price and the market price on the date of the ship's arrival in this country. The buyers, however, claimed the difference between the contract price and the price at which they re-sold, together with a declaration that they were also entitled to recover all sums which might become payable by them in consequence of their failure to deliver to their sub-buyers.

By condition 13, endorsed on the back of the contract:

"Notice of appropriation, with ship's name, date of bill or bills of lading, and approximate quantity loaded shall be given by the shipper of the grain tendered . . . within ten days from date of bill of lading, and by each seller within the ten days or in due course if received by him after that time. . . . Provisional invoice . . . shall be sent by shipper's house or representative in Europe to his buyer within seven days after arrival of documents . . . and by other sellers to their buyers respectively in due course after receipt. . . ."

The arbitrators found, inter alia:

"It was not suggested on behalf of [the buyers] that they had at the time of the transaction of the 3rd Nov., 1925, expressly notified [the sellers] of any

A intention on their part to re-sell the cargo, and in the circumstances the arbitrators are unable to find that it was in the contemplation of the parties, or ought to have been in the contemplation of [the sellers] at that time, that the cargo would be re-sold or was likely to be re-sold before delivery ; in fact, the chances of its being re-sold as a cargo and of its being taken delivery of by [the buyers] were about equal."

B The arbitrators awarded, subject to the opinion of the court on a Special Case, that the purchasers could only recover as damages the difference between the contract price and the market price when the ship arrived in England.

On appeal, Rowlatt, J., held that, as the contract, by the terms of condition 1, provided for the case of re-sale it must be inferred as a matter of law that it was within the contemplation of the parties at the time when the contract was made C that the buyers would re-sell the wheat and the purchasers were, therefore, entitled to both the damages and the declaration claimed. The sellers appealed.

*Rayner Goddard*, *K.C.* and *D. B. Somervell* for the sellers.
*A. T. Miller*, *K.C.* and *C. W. Lilley* for the buyers.

D **LORD HEWART, C.J.,** stated the facts and continued: What was the appropriate measure of damages ? It is quite true that, if one looks, not at the date of the contract, that is Nov. 3, 1925, but at a much later period, namely, the last week of January, 1926, and, in particular, a period beginning Jan. 25 and ending Jan. 29, there were subsidiary agreements for the re-sale of the wheat resulting in a commercial chain or string ; but all those matters were subsequent to the E making of the contract, and, as the learned judge has said in the last paragraph of his judgment, a question was suggested before him, whether the time at which should be asked the question: What was in the contemplation of the parties ?, was not the time of the appropriation under the contract and not that of the making of the contract. Rowlatt, J., held that it was true that the seller did then—that is, at the date of appropriation—

F "take upon himself a new obligation, namely, to deliver a specific cargo, but this is only working out the original contract, and events occurring or notice received since cannot, in my opinion, add to the responsibilities involved."

In my opinion, with great respect, the learned judge was right in holding that view, and in dealing with the question what is the true measure of damages one has to look at the date of the making of the contract. With regard to that matter, G the principles have been laid down for a long time in quite unmistakable terms. Counsel for the sellers has reviewed a series of cases beginning with *Hydraulic Engineering Co., Ltd.* v. *McHaffie* (1), passing on to *Grebert-Borgnis* v. *Nugent* (2) and *Rodocanachi* v. *Milburn* (3), but the series of cases is concluded by the well-known case of *Hammond & Co.* v. *Bussey* (4). In giving judgment in the last-named case, Lord Esher, M.R., reviewed and explained the underlying principle H —that in *Hadley* v. *Baxendale* (5).

In *Hammond & Co.* v. *Bussey* (4) Lord Esher, M.R., said (20 Q.B.D. at p. 88):

"We have not got to determine how that rule would apply to other breaches of other contracts under other circumstances than those we have now to consider. The rule is laid down thus: 'Where two parties have made a contract I which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract'—it is to be observed in passing that the rule is not contemplating a breach of contract to pay damages, but the damages which are recoverable in respect of a breach—'should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself.' "

Lord Esher paused there to add for himself:

"That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case

if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: 'Or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' "

LORD ESHER continued:

"It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not 'such damages as were in fact in the contemplation of the parties at the time they made the contract'; which would have raised a question of fact for the jury, but 'such as may reasonably be supposed to have been in the contemplation of the parties' not as the inevitable, but as 'the probable result of the breach.' The next sentence of the judgment is, I think to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself. It proceeds:

> 'Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances so known and communicated.'

I do not think that there is anything in those words to show that the second branch of the rule must be confined to the case of a sub-contract already actually made at the time of the making of the contract, and would not apply to the case of a sub-contract not yet actually made, but which will probably be made."

There is the word "probably," and on the next preceding page there is the word "likely," and the parties may be supposed reasonably to have contemplated damages following from what it is probable or likely will happen, but not from what it is improbable or unlikely will happen. With regard to the question: What is the province of the jury and what is the province of the judge in determining the matter, LORD ESHER, M.R., says (ibid. at p. 89):

"It is impossible for us to lay down a rule as to what would be reasonably to be supposed to have been in the contemplation of the parties in the cases of other contracts made with regard to other subject-matters under other circumstances. We can only apply the rule laid down as above stated to the circumstances of the case before us. We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of contract under the circumstances. I do not think that the question is one for a jury, though I think that possibly, under certain circumstances, with regard to some subject-matters, it would be competent to a judge to ask particular questions of a jury in order to assist him in coming to a conclusion on such a question."

That particular aspect of the matter was further dwelt upon by FRY, L.J., in his judgment, where he said (ibid. at p. 100):

"There are, I think, four questions which have to be answered in order to see whether these costs [in the particular case] come within it [the rule]. First, what are the damages which actually resulted from the breach of contract? It seems to me that the loss actually sustained by reason of such breach was that of the damages recovered by the sub-vendees in their action against the plaintiffs and the costs of that action. Secondly, was the contract made under any special circumstances and, if so, what were such circumstances? It appears that it was made by the plaintiffs with the intention of

re-selling the coal to steamships visiting Dover in the course of their usual business. Thirdly, what at the time of making the contract was the common knowledge of both parties? The purposes for which the plaintiffs bought the coal were as well known to the defendant as to the plaintiffs themselves."

There, there are three questions of fact—actual loss, special circumstances, and common knowledge, and having said so much, Fry, L.J., went on:

"Having thus ascertained the special circumstances under which the contract was made, and the knowledge of the parties with regard to them, we come to the last question, viz., What may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?"

To apply that method to the present case, as soon as the facts falling under these various heads, or at any rate, some of them, have been ascertained, and the question is approached: What may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of contract?, one is faced at once with a finding in the Special Case, which, indeed, seems to have been phrased with direct reference to certain passages in the judgment in *Hammond & Co.* v. *Bussey* (4):

"The arbitrators are unable to find that it was in the contemplation of the parties, or ought to have been in the contemplation of [the sellers] at that time, that the cargo would be re-sold or was likely to be re-sold before delivery; in fact, the chances of its being re-sold as a cargo and of its being taken delivery of by [the buyers] were about equal."

In other words, as I understand the meaning of that finding of fact, not only do the arbitrators say that upon the materials before them they could not find that a re-sale was within the contemplation of the parties, and, therefore, possibly damages for breach of subsequent contracts within the scope of the measure of damage, but they actually state as a fact that the chances of this cargo's being re-sold or if its not being re-sold were equal, and, therefore, that it was idle to speak of a likelihood or of a probability of a re-sale.

The question, therefore, arises whether there were any materials before the learned judge upon which he could hold, as he has clearly held, that the buyers were entitled to recover the extended damages for which they asked. Counsel for the buyers has argued that the very form of the contract itself shows, or must be taken to show, that re-sale was within the contemplation of these contracting parties, and that they must be taken to have knowledge at any rate of the likelihood of such re-sale, because they made this contract upon Form No. 12 of the Corn Trade Association. In my opinion, that argument does not suffice. The form, it is true, is convenient for contracts of either kind, those in which re-sale is contemplated, and those in which it is not, and I do not think it would be right to infer from the mere use of that ambiguous form that re-sale was contemplated as likely when the arbitrators have found as a fact that it never was likely, nor was contemplated as likely. In these circumstances, it seems to me there were no materials on which Rowlatt, J., could properly hold as he has done. It may be that there are certain circumstances and certain reticences in this case which, to say the least of it, do not prejudice the mind of the spectator in favour of the sellers. That is quite a different matter from the question whether upon the materials contained in the Case this extended measure of damages can fairly be held to apply. I have come to the conclusion that it cannot and, therefore, that the judgment of Rowlatt, J., ought to be reversed.

**BANKES, L.J.**—The dispute is between buyers and sellers of a cargo of Australian wheat. The contract, which is dated Nov. 3, 1925, is a contract for

the sale of a cargo of December or January shipment; and the contract is on the form of the London Corn Trade Association, Australian Wheat Contract No. 12. There is no dispute that the sellers committed a breach of contract, and it was obviously a deliberate breach. What their object was, or what purpose they thought they could serve by that breach, I am not sure. It is suggested that there had been some failure in the corn trade, and the failure affected a firm who were in the chain of purchasers and sellers of this particular cargo, but it seems to me immaterial to consider what their object was or whether they succeeded. They admit a deliberate breach, and are prepared to pay the proper amount of damages —that is to say, a sum in damages measured according to the accepted measure of damages applicable to such a case. They say that those damages ought to be confined to the difference between the value and the contract price as between them and their immediate purchasers. The purchasers say, on the contrary: "No; this is a contract under which we are entitled to recover not only those damages, but in addition damages in respect of any damage which we may incur by reason of our being parties in this chain—any damages or costs which we may have to pay to persons who bought or sold subsequently to us as parties in this chain." That dispute was submitted to arbitration. At the arbitration the right question was obviously put before the arbitrators, as appears from this carefully drawn Special Case, and the question was: What was the proper measure of damages to be applied in the facts of the case?, the material question being: What was within the contemplation of the parties at the date of the contract? Valuable evidence upon a question such as that may consist of conversations between the parties; it may consist of parol evidence and different accounts of the circumstances existing at the time, and it may consist partly or wholly of documents. In this case on the materials before them the arbitrators came to the conclusion as a matter of fact that there was no material conversation between the parties at the time the contract was made, and that they were not entitled to assume affirmatively against the sellers, that they did know of or contemplated re-sales. All they knew was that the sellers as often as not used grain for their own purposes. In the circumstances, the arbitrators came to the conclusion as a matter of fact that it was not within the contemplation of the parties that the cargo should be re-sold, or any portion of it. ROWLATT, J., came to the conclusion, I think rightly, that the material date to concentrate upon was the date of the contract, and that the question he had to answer was whether, upon the materials before him, he could say affirmatively, that at the date of the contract the parties had in contemplation a probable re-sale of this cargo or of some portion of it. Apparently, before the arbitrators, the argument was that the date of the contract was not necessarily the material date in this case because the date of appropriation should be the material date; ROWLATT, J., decided against that, and I think quite rightly.

Before us, counsel for the sellers argued that by the subsequent negotiations and agreement between the parties the material date is no longer to be taken as the contract date, but it is a later date when, by correspondence, the sellers and buyers agreed that a certain course should be taken in reference to this chain which had been formed. I am quite unable to follow that argument, and I think counsel for the sellers admits that, if he is right in his contention, it would apply even though at the date of the contract it had been expressly stated that this cargo was purchased for use by the purchasers and not for re-sale. I think the learned judge was right in fixing his attention upon the date of the contract as being the material date. He said that in the present case it seemed to him that the contract itself imposed the contemplation, though not the forecast in fact, of a re-sale. He, therefore, in terms confined himself to a decision founded as a pure matter of law upon the construction of the document. I am not able to accept that view of this contract. As it seems to me, looking at the materials as a whole—all the facts that were known to the arbitrators and found by them, and every inference that can be drawn as a matter of law from the document

itself—there is not sufficient to justify this court in coming to the conclusion that these parties contemplated re-sale at the date of the contract—that is to say, that they both took the risk, whatever it might be, of this cargo's being re-sold, and the damages, therefore, being possibly very much heavier than they would be if the contract were one confined to the original seller and original buyer.

For these reasons, I think that this appeal must be allowed with the usual consequences, and the judgment set aside, and that the answer to the question submitted by the arbitrators is that the damages are the limited damages contended for by the sellers.

**SCRUTTON, L.J.,** stated the facts and continued: The sellers admit that they broke their contract, and the question is how much they are to pay. The ordinary measure of damages where you have contracted to deliver goods and do not deliver them is the price for which similar goods can be obtained in the market at the time of the breach, because it is assumed that the party against whom the contract is broken can put himself right by buying the goods in the market and recovering the extra price he has to pay over the contract price from the person who breaks his contract; but the purchaser may frequently have sold the goods which he has bought and may have sold them at a price which will give him a profit, if he can deliver the goods to his purchaser, and it has always been a question in commercial circles whether when a man deliberately breaks his contract to deliver goods he ought not to pay the profit which the purchaser loses on the contract which he is not able to perform because his seller has broken his contract. Certain rules have been established in English law for dealing with that matter; it is very likely that they do not give an exact indemnity for loss; unfortunately the rules of English law frequently do not give an exact indemnity for the actual loss. They make up for it by sometimes giving much more than the actual loss; in one notorious case, *Salford Corpn.* v. *Lever* (6), they gave twice the actual loss; whatever they are they have to be administered by the courts.

The rule which the courts have laid down for deciding whether a purchaser who has not had goods delivered to him can recover the profit he has lost on a contract he has made while relying on the fact that he had bought the goods, has been stated in a number of cases, and is stated three times in *Hammond & Co.* v. *Bussey* (4), in the passage which was read by LORD HEWART, C.J. I take the way in which it is stated by FRY, L.J., as a matter for the court, as a matter of law, to consider:

> "Having thus ascertained the special circumstances under which the contract was made and the knowledge of the parties with regard to them we come to the last question, viz., What may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming that parties to have applied their minds to the contingency of there being such a breach?"

That last sentence was put in because the keen common sense of BRAMWELL, B., pointed out that those who make contracts are not usually thinking about breaking them when they make them. What facts have we before us in this case from which we can reasonably suppose that the parties here contemplated a loss of profit on a sub-contract? [HIS LORDSHIP dealt with the findings of the arbitrators and continued:] I feel unable to say that those are materials on which one can say that a probable result of a breach of this contract in the circumstances known to the parties at the time when the contract was made would be a loss of profit on a sub-contract.

I have considered whether it is possible to get out of the events which subsequently happened something which one cannot get out of the original contract, and, so far as I understand the odd transactions between Jan. 26 and 29, the sellers did say to a number of people who had made contracts about grain: Will

you treat yourselves as a string, all dealing with the grain that we are going to deal with in our contract, the first of these contracts—that is the only way to get your profits? Then, having said that and got the agreement, they being the first persons in the string and being able to deliver the goods, they deliberately broke their contract and declined to deliver, thereby stopping the other persons from getting their profit. If I could have seen my way to get out of that anything to hit the sellers I should gladly have done it; but I do not see my way to allow those circumstances to alter the view which I have taken of the measure of damages under the original contract. Neither do I see my way, agreeing in this with the last paragraph of ROWLATT, J.'s, judgment, to hold that the nomination for a particular cargo, a cargo by the steamship *Indianic*, at a time when the sellers knew that there was a string of contracts, and, indeed, had invited persons concerned to make a string of contracts, to say that that alters the measure of damages which results from the original contract. For these reasons, while expressing great reluctance so far as a judge may do so, I think this appeal should be allowed.

*Appeal allowed.*

Solicitors: *Coward, Chance & Co.; Thomas Cooper & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

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## PRATT *v.* PRATT

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P. and Bateson, J.), April 27, 1927]

[Reported 96 L.J.P. 123; 137 L.T. 491; 43 T.L.R. 523; 71 Sol. Jo. 433; 28 Cox, C.C. 413]

*Husband and Wife—Summary proceedings—Maintenance order—Discharge—Adultery—Divorce petition by husband on ground of same adultery—Dismissal of petition—Revival of maintenance order—Criminal Justice Administration Act*, 1914 (4 *& 5 Geo.* 5, *c.* 58), *s.* 30 (3).

By the Criminal Justice Administration Act, 1914, s. 30 (3): "Any order made . . . by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order."

A husband obtained the discharge of a maintenance order on the ground of his wife's adultery. He subsequently presented a petition for divorce, charging the same act of adultery against his wife, but failed to establish the adultery and his petition was dismissed. On an application by the wife under s. 30 (3) the justices revived their previous order. The husband appealed.

**Held:** the finding of the judge on the husband's divorce petition that the wife had not committed the adultery alleged was conclusive, and, when brought to the notice of the justices, was "fresh evidence" on which they had jurisdiction, under s. 30 (3), to revive the order.

**Notes.** Section 30 (3) of the Criminal Justice Administration Act, 1914, has been replaced by s. 53 of the Magistrates' Courts Act, 1952, which, as s. 30 (3) did, empowers magistrates to revive an order for the periodical payment of money, but omits the provision in s. 30 (3) that the revival must be "upon fresh evidence." But in *Underwood* v. *Underwood*, [1945] 2 All E.R. 561, a case decided after s. 9

of the Money Payments (Justice's Procedure) Act, 1935, became law (which repealed the words "upon fresh evidence" in s. 30 (3) of the Act of 1914) it was held that, while an application to revive could be supported by evidence which was available to the applicant at the previous hearing, but not then produced by him, it could not be supported by the same evidence as was given at the previous hearing. The value of the present case, therefore, remains, despite the altered wording of s. 30 (3).

Followed: *Markham* v. *Markham*, [1946] 2 All E.R. 737. Considered: *James* v. *James*, [1948] 1 All E.R. 241; *Winnan* v. *Winnan*, [1948] 2 All E.R. 862; *Kendall* v. *Kendall*, [1952] 2 All E.R. 1038n. Doubted: *Re D.* (*an infant*), [1953] 2 All E.R. 1318. Referred to: *Knott* v. *Knott*, [1935] All E.R. Rep. 38; *Hudson* v. *Hudson*, [1948] 1 All E.R. 773; *Smyth* v. *Smyth*, [1956] 2 All E.R. 476; *Thompson* v. *Thompson*, [1957] 1 All E.R. 161.

As to varying maintenance orders see 12 HALSBURY'S LAWS (3rd Edn.) 491–493, and for cases see 27 DIGEST (Repl.) 722 et seq. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Cases referred to:

(1) *Colchester* v. *Peck* [1926] 2 K.B. 366; 95 L.J.K.B. 1038; 135 L.T. 32; 90 J.P. 130; 42 T.L.R. 535; 28 Cox, C.C. 225, D.C.; Digest Supp.

(2) *Johnson* v. *Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 16 T.L.R. 26, D.C.; 27 Digest (Repl.) 727, *6940*.

**Appeal** by a husband against an order made by Leicester city justices reviving a separation order which had been discharged on the ground of the wife's adultery.

On Nov. 28, 1924, the wife obtained a separation and maintenance order against her husband on the ground of his persistent cruelty. Custody of the child of the marriage was given to the wife and the husband was ordered to pay 20s. per week for their maintenance. On July 25, 1925, the order was revoked by the justices on the ground of the wife's adultery. The husband then presented a petition in the High Court for dissolution of his marriage, making the same charge of adultery against the wife as that on which the separation order of Nov. 28, 1924, had been revoked. In November, 1926, the petition was heard at Leicester Assizes, but the husband failed to establish the adultery, and his petition was dismissed. On Nov. 18, 1926, the wife issued a summons under s. 30 (3) of the Criminal Justice Administration Act, 1914, asking that the separation order of Nov. 28, 1924, should be revived. This summons was heard on Dec. 4, 1926, and the justices then made an order reviving their previous order, giving as the grounds of their decision that the judgment of the judge of assize was binding on them and was fresh evidence on which they had jurisdiction to revive an order. The husband appealed on the following grounds: (i) That the decision of the justices was bad in law. (ii) That the justices had no power to revive the order. (iii) That the justices admitted evidence which was not legally admissible. (iv) That the matter was res judicata.

*W. K. Scrivener*, for the husband, referred to *Colchester* v. *Peck* (1) and *Johnson* v. *Johnson* (2).

*C. E. Loseby*, for the wife, was not called on to argue.

**LORD MERRIVALE, P.**—Here was a case where the husband, who was the subject of a maintenance order obtained by his wife upon grounds sufficient to support such an order, had gone before the magistrates and had convinced them that his wife had committed adultery upon a specified occasion. The justices thereupon, as they had jurisdiction to do and as they had no alternative but to do, if they were satisfied upon the allegation of fact, rescinded the order. The statutes which govern their jurisdiction empower them, if they do not direct them, upon proof of adultery by a wife after an order for maintenance, to discharge the order. The husband, having obtained the discharge of the order, filed a petition in this court for dissolution of his marriage on the ground of adultery, alleging the adultery

which had been found in point of fact by the justices. That allegation of adultery, made in that way upon a petition for divorce, came on to be tried. The decision of the justices was effective for the purpose for which it was applied, but it did not conclude the matter. The difference as between that decision and the decision of the learned judge who heard the petition for divorce was that he could make a conclusive finding, and the learned judge, after hearing the evidence tendered by the husband, came to the conclusion that the wife had not committed the alleged adultery, and he so found. Thereupon the wife was advised to proceed before the justices, under the Criminal Justice Administration Act, 1914, s. 30 (3), for an order that the revoked order of the justices should be revived. The husband was represented before the justices. The wife was able to show to the justices that it had been conclusively established beyond challenge or appeal that she had not been guilty of the alleged adultery. That was a new fact. On reading the notes of the proceedings before the justices I find other facts. I find an officer of a benevolent authority casting great discredit upon the evidence of the husband on the previous occasion. Those were facts which were alleged to have occurred since the making of the previous order, but, as to the fact that the wife had not committed adultery and the establishment of that fact, that was a fact newly established. The finding of the learned judge was itself a fact. Those matters having been brought to the notice of the justices and they having statutory jurisdiction to revive an order which had been revoked, they exercised that statutory jurisdiction. Counsel for the husband has recognised that, if that be the state of the facts, this appeal cannot proceed. My view is that it cannot proceed. The justices acted not only within their jurisdiction but quite properly.

I may say this with regard to the magisterial jurisdiction in respect of maintenance to find women guilty of adultery, that it is only by the most jealous care on the part of magistrates that injustice of the gravest kind can be avoided. If it was once supposed that, because an order had been discharged upon an allegation of adultery, that adultery had been established and the matter closed finally once and for all, it would be a means of injustice which would need most serious attention. No such injustice has occurred in this case. The court below has taken a proper course. The appeal therefore fails, in my judgment.

**BATESON, J.**—I agree.

*Appeal dismissed.*

Solicitors: *Peacock & Goddard*, for *Basil W. Edwards*, Leicester; *H. W. Clarkson*, for *Herbert Simpson & Bennett*, Leicester.

[*Reported by* R. Wavell Paxton, Esq., *Barrister-at-Law.*]

A

# THE JUPITER (No. 3)

[Probate, Divorce and Admiralty Division (Hill, J.), July 21–23, 27–30, October 25, 26, 1926, January 14, 1927]

B [Reported [1927] P. 122; 96 L.J.P. 62; 137 L.T. 333; 43 T.L.R. 210]

[Court of Appeal (Bankes, Atkin and Lawrence, L.JJ.), June 29, 30, 1927]

[Reported [1927] P. 250; 97 L.J.P. 33; 137 L.T. 333; 43 T.L.R. 741; 17 Asp. M.L.C. 250]

C *Conflict of Laws—Foreign law—Recognition—Decree of foreign State nationalising property—Property in England—Ship.*

As a general principle, the passing of chattels is governed by the law of the place where they are locally situate. Decrees by a foreign State effecting the nationalisation of property will not operate on property outside the territory of the foreign State. In this connexion a ship is not to be governed by any

D principles other than those applicable to other chattels.

*Evidence—Declaration of foreign sovereign—Ownership of personal property—Admissibility in suit between private persons—No question of immunity from jurisdiction.*

Where no question of immunity from the jurisdiction of the court is con-

E cerned the declaration of a foreign sovereign as to the ownership of personal property in this country is not conclusive in an action between private persons relating to the property. If the property is said to have passed by an Act of State of the foreign sovereign that fact must be proved by proof of the Act of State, of its application to the property, and of the local situation of the property.

F *Ship—Master—Servant of owner—Custodian, not bailee, of ship.*

At the present day the master of a ship cannot be regarded as the bailee of the vessel, although that may have been the position in former days when on a foreign voyage the master passed altogether beyond the control of the owners, perhaps sold and bought cargo on the owner's account, and was treated as the employer of the crew and responsible for their wages and negligence. But

G that is quite inapplicable to the conditions of modern commerce, and the matter now falls within the rule that where an owner delivers a thing to a servant to be by him kept, used, carried, or applied in the course of his employment the owner's possession continues. The master's position, therefore, is that of a mere custodian.

H **Notes.** This case should be compared with *Princess Olga Paley* v. *Weiz*, [1929] All E.R. Rep. 513, where the plaintiff was held not to be entitled to recover property of which, while it was situate in Soviet Russia, she had been deprived by decrees of the Russian government.

Considered: *Frankfurther* v. *Exner, Ltd.*, [1947] Ch. 629. Referred to: *First Russian Insurance Co.* v. *London and Lancashire Insurance Co., Ltd.*, [1928]

I Ch. 922; *Re Russian Bank for Foreign Trade*, [1933] All E.R. Rep. 754; *Re Amand (No. 2)*, [1942] 1 K.B. 445; *Bank Voor Handel en Scheepvaart* v. *Slatford*, [1951] 2 All E.R. 779; *Re Banque des Marchands de Moscou (Koupetschesky)*, *Royal Exchange Assurance* v. *The Liquidator, Re Banque des Marchands de Moscou (Koupetschesky)*, *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269; *Nizam of Hyderabad* v. *Jung*, [1956] 3 All E.R. 311.

As to jurisdiction over movable property see 7 Halsbury's Laws (3rd Edn.) 9, 43, 266, and as to proof of foreign law see ibid., vol. 15, pp. 328–332, 373–376. For cases see 11 Digest (Repl.) 384–389, 613 et seq., 22 Digest (Repl.) 611 et seq.

Cases referred to :

(1) *The Jupiter (No. 2)*, [1925] P. 69; 94 L.J.P. 59; 133 L.T. 85; 16 Asp. M.L.C. 491, C.A.; Digest Supp.

(2) *Aksionairoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 325, *19*.

(3) *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1297, *9151*.

(4) *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1925] A.C. 150; 93 L.J.K.B. 1084; 132 L.T. 116; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1298, *9156*.

(5) *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd*, [1926] 1 K.B. 1; 133 L.T. 808; 41 T.L.R. 663, C.A.; affirmed sub nom. *Employer's Liability Assurance Corpn.* v. *Sedgwick Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 42 T.L.R. 749; sub nom. *Sedgwick Collins & Co., Ltd.* v. *Rossia Insurance Co. of Petrograd*, 136 L.T. 72, H.L.; 10 Digest (Repl.) 1299, *9160*.

(6) *Biddle* v. *Bond* (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L.J.Q.B. 137; 12 L.T. 178; 29 J.P. 565; 11 Jur. N.S. 425; 13 W.R. 561; 122 E.R. 1179; 3 Digest 30, *219*.

(7) *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q.B. 318; 60 L.J.Q.B. 187; 64 L.T. 406; 55 J.P. 452; 39 W.R. 114; 7 T.L.R. 69, C.A.; 3 Digest 101, *285*.

(8) *Moore* v. *Robinson* (1831), 2 B. & Ad. 817; 1 L.J.K.B. 4; 109 E.R. 1346; 41 Digest 255, *968*.

(9) *Pitts* v. *Gainee and Foresight* (1700) 1 Ld. Raym. 558; Holt, K.B. 12; Salk. 10; 91 E.R. 1272; 41 Digest 255, *967*.

(10) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp. M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516*.

(11) *Vavasseur* v. *Krupp* (1878), 9 Ch.D. 351; 39 L.T. 437; 27 W.R. 176; 22 Sol. Jo. 702, C.A., 36 Digest (Repl.) 956, *3008*.

(12) *Jeffries* v. *Great Western Rail. Co.* (1856) 5 E. & B. 802; 25 L.J.Q.B. 107; 26 L.T.O.S. 214; 2 Jur. N.S. 230; 119 E.R. 680; sub nom. *Jeffries* v. *South Western Rail. Co.* 4 W.R. 201; 37 Digest 160, 42.

(13) *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd. and Schmidt*, [1914] A.C. 197; 83 L.J.P.C. 122; 110 L.T. 321, P.C.; 37 Digest 160, *47*.

(14) *Farquharson Bros. & Co.* v. *King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584, H.L.; 43 Digest 510, *494*.

(15) *Hooper* v. *Gumm*, *Maclellan* v. *Gumm* (1867), 2 Ch.App. 282; 36 L.J.Ch. 605; 16 L.T. 107; 15 W.R. 462; 2 Mar.L.C. 481; L.C. & L.J.; 37 Digest 169, *114*.

(16) *The Winkfield*, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 246; 18 T.L.R. 178; 46 Sol. Jo. 163; 9 Asp. M.L.C. 259, C.A.; 37 Digest 160, *45*.

(17) *Lecouturier* v. *Rey*, [1910] A.C. 262; 79 L.J.Ch. 262; 79 L.J.Ch. 394; 102 L.T. 293; 26 T.L.R. 368; 54 Sol. Jo. 375, H.L.; 11 Digest (Repl.) 386, *467*.

(18) *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (1924), 20 Lloyd, L.R. 308.

(19) *The Lomonosoff*, [1921] P. 97. 90 L.J.P. 141; 37 T.L.R. 151; 41 Digest 825, *6829*.

(20) *Richmond* v. *Branson & Son*, [1914] 1 Ch. 968; 83 L.J.Ch. 749; 110 L.T. 763; 58 Sol. Jo. 455; 33 Digest 236, *1526*.

(21) *Russian Volunteer Fleet* v. *R.* (1923) 15 Lloyd, L.R. 35.

(22) *Steam Saw Mills Co.* v. *Baring Bros. & Co.*, *Archangel Saw Mills* v. *Baring Bros. & Co.*, [1922] 1 Ch. 244; 91 L.J.Ch. 325; 126 L.T. 403; 38 T.L.R. 200; 66 Sol. Jo. 170, C.A.; Digest Supp.

(23) *Wilson* v. *Barker* (1833), 4 B. & Ad. 614; 1 Nev.M.K.B. 409; 110 E.R. 587; 43 Digest 422, *475*.

(24) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Gt. Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 2 Digest (Repl.) 219, *315*.

(25) *The Broadmayne*, [1916] 1 P. 64; 85 L.J.P. 153; 114 L.T. 891; 32 T.L.R. 304; 60 Sol. Jo. 367; 13 Asp. M.L.C. 356, C.A.; 41 Digest 814, *6753*.

**Action in rem** in which the plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, Claude Marie Auguste Adolphe Emile Bourgeois, Leonidas Tcheloff, and Gregoire Margoline, on behalf of themselves and others trading as Compagnie Russe de Navigation à Vapeur et de Commerce, claimed to have possession of the steamship *Jupiter* against the defendants, the Cantiere Olivo Societa Anonima, an Italian company.

The plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, claimed by their statement of claim to be a Russian shipowning company whose head office was originally at Petrograd and was transferred at the beginning of 1919 to Marseilles. The plaintiffs claimed that the plaintiff company was at all material times being administered under orders of the French courts. The plaintiff Bourgeois was the official administrator appointed by the French courts. In March, 1924, while the *Jupiter* was laid up at Dartmouth, her master, Captain Lapine, without the authority of the plaintiffs, surrendered her to the representatives of Soviet Russia in this country. The plaintiffs commenced an action claiming possession of the *Jupiter*, but the writ was set aside upon the application of the Soviet Government, who claimed that by virtue of a decree for the nationalisation of ships, they were entitled to possession of the *Jupiter*. Subsequently Arcos Steamship Co., Ltd., an English company, on behalf of the Soviet Government, sold the *Jupiter* to the defendants, an Italian company. The plaintiffs thereupon issued the writ in the present action.

*Langton*, *K.C.* and *Carpmael* for the plaintiffs.
*Dunlop*, *K.C.*, *Dumas*, and *Harold Murphy* for the defendants.

The following authorities were referred to in the argument: *The Jupiter* (*No. 2*) (1), *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.* (2), *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (3), *Banque International de Commerce de Petrograd* v. *Goukassow* (4), *Employers' Liability Assurance Corpn.* v. *Sedgwick Collins & Co.* (5), *Biddle* v. *Bond* (6), *Rogers, Sons & Co.* v. *Lambert & Co.* (7), *Moore* v. *Robinson* (8), *Pitts* v. *Gainee and Forsight* (9), *The Parlement Belge* (10), *Vavasseur* v. *Krupp* (11), *Jeffries* v. *Great Western Rail. Co.* (12), *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd. and Schmidt* (13), *Farquharson Bros. & Co.* v. *King & Co.* (14), *Hooper* v. *Gumm* (15), *The Winkfield* (16), *Lecouturier* v. *Rey* (17), *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (18), *The Lomonosoff* (19), *Richmond* v. *Branson & Son* (20), *Russian Volunteer Fleet* v. *R.* (21), *Archangel Saw Mills* v. *Baring Bros. & Co.* (22), *Wilson* v. *Barker* (23), *Daimler Co.* (*Gt. Britain*), *Ltd.* v. *Continental Tyre and Rubber Co.* (24), *The Broadmayne* (25).

Jan. 14. **HILL, J.**, read the following judgment:—In this action the plaintiffs claim possession of the steamship *Jupiter*. The ship at the date of the writ and arrest was lying at Dartmouth. The writ was originally issued in the name of the Compagnie de Navigation à Vapeur et de Commerce, which was stated in the writ to be a corporate body according to the laws of France with their head office, 255, Rue St. Honoré, Paris. By subsequent amendments, three persons were added as plaintiffs, Mr. Bourgeois, Mr. Tcheloff, and Mr. Margoline, who were

expressed to be suing on behalf of themselves and others trading as Compagnie Russe de Navigation à Vapeur et de Commerce. Appearance was entered by an Italian company—Cantiere Olivo Societa Anonima. The defence has been conducted in the name of that company by representatives of the Union of Socialist Soviet Republics, commonly known and hereinafter referred to as the U.S.S.R.

Three main questions have to be determined. First, whether the plaintiffs or any of them have given any authority to sue. Secondly, whether the plaintiffs of any of them had and have any such title to or interest in the ship as to give them the right to maintain an action of possession. The burden of those two issues is upon the plaintiffs. The burden of the third issue is upon the defendants. It is this. Assuming that any of the plaintiffs would otherwise have had any such title or interest, whether its acquisition has not been prevented or its enjoyment destroyed by a change in the property in the ship by virtue of governmental acts of the U.S.S.R. or its predecessors in sovereignty, the Italian company resting its right upon a transfer from the U.S.S.R. as owners and alleging that the *Jupiter* had become the property of the U.S.S.R.

The first question was raised upon motion to set aside the writ and was referred by the Court of Appeal to this court: see *The Jupiter* (*No. 2*) (1). Now that the facts have been ascertained, it is clear that no retainer has been given by the first-named plaintiffs. There is no such corporate body according to the laws of France as the Compagnie Russe de Navigation à Vapeur et de Commerce. There is or was a corporate body of which the head office and seat of control were in Petrograd under a style of which the French title is a translation, known for short as "Ropit." It never established a branch in France. It was in controversy whether it is an existing corporation. If it is non-existing, it cannot sue. If it is existing, it has given no authority to sue. The name of the Compagnie Russe de Navigation à Vapeur et de Commerce ought to be struck out of the writ as a separate plaintiff. A retainer by Messrs. Bourgeois, Tcheloff, and Margoline was not disputed. Affidavits were filed by each of them. This disposes of the question referred to the court by the Court of Appeal.

I now pass to the issues in the case, and first as to the right of the remaining plaintiffs to sue either on their own account or in a representative capacity. So far as is necessary for this part of the case, the facts are as follows. In 1917 the *Jupiter* was one of a fleet of steamers owned by the Petrograd company—Ropit. The ships were registered at Odessa and the management of them was entrusted to a managing director stationed at Odessa. In December, 1917, the *Jupiter* was at Odessa, and was there also on January 26, 1918, and Mar. 4, 1919, and remained there till April 9, 1919. I am not quite sure that she was not there throughout that period, but those are the specific dates mentioned in the evidence. I shall have later on to consider what was the political position of Odessa between November, 1917, and March, 1918, but for the present purpose it is enough to say that there was no settled form of government there at that time. From March, 1918, to October or November, 1918, Odessa was in the occupation of the Austrians. From October or November, 1918, to April, 1919, Odessa was in the occupation of the French, together with Gen. Denikin. On April 9, 1919, the *Jupiter* left Odessa; she went to Constanza and thence to the United Kingdom and thence to America. She was never again in a Russian port. Between the Aug. 28, 1920, and Sept. 30, 1920, she was lying at Bordeaux. Except for this period she does not appear to have been in any French port. From Bordeaux she made a voyage to America and thence to the United Kingdom. She arrived in the United Kingdom in Dec., 1920, and was then laid up in Plymouth until September, 1922, and at Dartmouth from September, 1922, until March, 1924. On Feb. 1, 1924, His Majesty's government recognised the U.S.S.R. as the de jure rulers of those territories of the old Russian Empire which acknowledged their authority On Mar. 9, 1924, Jacob Lapine, who had been master of the *Jupiter* since Aug. 30, 1920, handed the ship's papers to representatives in England of the U.S.S.R. and the

U.S.S.R. took actual possession of the ship. Then followed a writ in rem for possession, which was set aside on the ground that it impleaded the U.S.S.R.: see [1924] P. 236. The *Jupiter* remained in the actual possession of the U.S.S.R., and in September, 1924, a contract of sale of the ship was entered into between the Arcos Steamship Co., Ltd. and the Cantiere Olivo Societa Anonima. The Arcos Steamship Co., Ltd., was acting on behalf of the U.S.S.R. By this contract the Arcos company guaranteed the buyers against claims by third parties. Actual possession was transferred to the buyers. On Oct. 8, 1924, while the *Jupiter* still lay at Dartmouth, a claim for the return of the ship was made by the plaintiffs on the Cantiere Olivo Societa Anonima and was refused. The writ in the present action was issued on the same day.

When the *Jupiter* left Odessa in April, 1919, a number of other ships which formed part of the Ropit fleet left at the same time. A number of them proceeded to France. By the summer of 1920 some persons were carrying on business in France under the style of Ropit, or of its French equivalent—the Cie Russe de Navigation à Vapeur et de Commerce. They were managing from an office in Marseilles the Ropit ships which had left Odessa. I was given no precise information as to who these persons were. It would appear from the decrees of the French courts that they included some who were shareholders in the Petrograd company, and the names of a few such shareholders were given by M. Bourgeois in his evidence. It would also appear from the decrees that Admiral Kanine was taking an active part in the management. According to the evidence of Mr. Kriloff, Admiral Kanine had been a director of the Petrograd company. Mr. Alexieff in his evidence spoke of the management of the ships being in Admiral Kanine under the authority of Mr. Lefter, who had been managing director at Odessa of the Petrograd company and who at about this time appears to have been carrying on business in the name of Ropit at Sebastopol, when in occupation of General Wrangel. The French decree of Dec. 3, 1920, throws doubt upon the authority of Admiral Kanine as derived from Mr. Lefter. All I can say is that there were in France a number of persons actually carrying on business under the name of the company and actually managing the ships. The managing office was at Marseilles. There was also an office at Paris, which I gather was the head office. These persons had no communication with Petrograd and did not act under any orders from anyone in Petrograd. Nor did they recognise the authority of the Soviet Republics.

Jacob Lapine was appointed master of the *Jupiter* on Aug. 30, 1920. He had been in the service of Ropit for twenty-six years. He had left Odessa in another Ropit ship, the *Possaduiky*, and the French decree of June 8, 1920, shows that he was still master of that ship as late as June 8, 1920. It was not in so many words stated in evidence by whom he was appointed to the *Jupiter*. It is rather unfortunate that instead of the master being called before me on the trial of this case use was made of his affidavit and the cross-examination of him upon the original motion in the first application, a cross-examination which was not directed to many of the points which called for elucidation when it came to the final trial of the case, but I must make the best of the material I have got from him. He said that at Marseilles he was ordered to take over the command. Alexieff who was appointed chief engineer of the *Jupiter* in September, 1920, said that he himself was appointed by the Marseilles office of Ropit. Lapine said that he was paid by the Direction in Paris. A number of his receipts were put in, dating from May, 1921, to March, 1924. They relate to payments for wages, food allowances and other laying-up charges. They read: "Received from the Marseilles office of the Russian Steam Navigation and Trading Co." On May 13, 1922, he signed an agreement adopting an agreement concluded in Marseilles on March 1, 1922, and expressed to be "between the board of Ropit and the staff of the steamers." All I can definitely say is that Lapine was appointed master of the *Jupiter* by persons carrying on business in France under the style of Ropit or its French equivalent,

and until March, 1924, he was paid by and acted under the orders of those persons or of persons in France appointed under the French decrees to be presently mentioned. This, at any rate, is clear, that he was not appointed by the Petrograd office of Ropit or by anyone having the authority of the Petrograd company, if the Petrograd company still existed in 1920, nor was his appointment ever ratified and adopted by the Petrograd company. It is also clear that until the U.S.S.R. took possession in March, 1924, Lapine was in no sense the servant of the U.S.S.R.; he was not appointed or paid or controlled by it.

It is, in my opinion, important to understand the position of Lapine. One point made for the defendants was that the person in possession of the *Jupiter* in March, 1924, was Captain Lapine. This was put in different ways. One suggestion was that, having been appointed master by the Petrograd company and being unable to communicate with his principles, he possessed authority as negotiorum gestor of the Petrograd company. This suggestion falls to the ground when it is found that he never was appointed to the *Jupiter* by the Petrograd company. Another suggestion was that at common law the master of a ship has possession of it, as a bailee. Counsel for the defendants cited *Moore* v. *Robinson* (8), which accepted and applied *Pitts* v. *Gainee and Foresight* (9). But at the present day it is, in my opinion, impossible to regard the master as the bailee of a ship. In former days when the master on a foreign voyage passed altogether beyond the control of the owners and perhaps sold the outward cargo and bought a homeward cargo on owners' account, it might be possible to regard him as bailee of ship and cargo. Similarly, in the seventeenth century the master seems to have been treated as the employer of the crew and responsible for the wages of the crew and responsible for their negligence: see MARSDEN (8th Edn.) p. 73, note D. But to the conditions of modern commerce these considerations are quite inapplicable. The point is discussed by POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW at pp. 60 and 138–9. After stating the rule that where an owner delivers a thing to a servant to be by him kept, used, carried or applied in the course of his employment as a servant the master's possession continues, they add:

> "it may be that it will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the manner of the execution is necessarily left in a great degree to the discretion of the servant."

In my judgment, Captain Lapine never was in possession of the *Jupiter*, nor had he at any time the right of possession. He was a custodian merely. The person for whom he was custodian was in actual possession. And the question is for whom was Captain Lapine custodian ?

[HIS LORDSHIP dealt with certain decrees of French courts and continued:] What is the effect of the decrees as to the possession of the *Jupiter* ? On this point I had the benefit of the evidence of French advocates. M. Allemes, called by plaintiffs, had no doubt that a provisional administrator has legal possession of property which he has to administer. He said that the decree of Sept. 3, 1920, gave the administrator legal possession of the *Jupiter*. He said that the later decrees had the same effect. But these were made at a time when the *Jupiter* was not in France. The decree of Sept. 3, 1920, was made while the *Jupiter* was in France. There may be difficulties in this court recognising a right to possession given by a French court to a ship which was neither French nor in French territory, and which never, after the right was conferred, came within French territory. But no such difficulty arises as to a decree made while the ship was in the jurisdiction of the court which made it. If M. Allemes' view of French law is right, the decree of Sept. 3, 1920, gave Maître Pelen the legal possession, the right to possession, of the *Jupiter*. M. Duhamel, called by the defendants, did not contradict this evidence of M. Allemes. He said that the decrees did not pass the property to the administrator. No one had suggested that they did. Indeed, the decrees

A all proceed upon the assumption that the original company was still existing and the property in it, and they provide for administration until the legal owners re-enter into possession. Apart from the evidence of the French lawyers, I should be of opinion that the effect of the decree of Sept. 3, 1920, was to give the appointed administrator the right to possession of that which he was to administer, namely, the ship. I know not how else he was to administer it. I infer from the decrees B that there was some controversy between the masters of the ships and the persons carrying on the business in France, and that the administrator was at first appointed to prevent those persons dealing with the ships as they chose. Afterwards the interest of creditors and shareholders was considered, and the conflicting claims of the masters and the shareholders were met by entitling each to appoint directors to assist the administrator. But throughout the administrator was C maintained, under appointment by the court and answerable to it, and all attempts to get rid of a judicial administration of the ships were rejected by the court. I hold that the decree of Sept. 3, 1920, gave to Maître Pelen the right to possession of the *Jupiter*, and that this was a possession on his own account and not as agent for the Petrograd company or anyone else. It was a possession under the court. The D administrator was appointed by the court, could only be discharged by the court, rendered accounts to the court, and was answerable to the court for his administration. His possession was none the less his own possession because it was for the purpose of preserving the ship for the true owners. Maître Pelen continued to be sole administrator until Aug. 12, 1921. From that date the appointment of M. Bourgeois on April 10, 1923, he and M. Jaujon were co-administrators. This E covers the period of the *Jupiter's* voyage from Bordeaux to America and thence to the United Kingdom and her laying up at Plymouth and transfer to Dartmouth and part of the time she lay there. For the rest of the time at Dartmouth up to March, 1924, M. Bourgeois was administrator. If I must give effect to the decree of Sept. 3, 1920, I think I must equally give effect to the later decrees so far as they merely substitute one person for another as administrator. It seems to me that F the jurisdiction of the French court to make such substitutions does not depend on whether the *Jupiter* was or was not in France at the time they were made. If I am wrong in this, the difficulty would be removed by the addition of Maître Pelen as a plaintiff in the alternative. The legal position would in that case be this : right to possession in Maître Pelen under the decree of Sept. 3, 1920, and ship in custody of those who at his request were appointed to exercise his rights, for the substitution G was made at the instance of M. Pelen. The point is, therefore, one of form and not of substance. The result is that I hold that M. Bourgeois was entitled to possession of the *Jupiter* in March, 1924. If so, it is not of much importance whether the right to possession belonged to M. Bourgeois only or to M. Bourgeois jointly with Messrs. Tcheloff and Margoline. The evidence of the French lawyers was not, I think, directed to this point. On the whole I have come to the conclusion H with some doubt that the right of possession was in Bourgeois only. It follows that the custody of Captain Lapine was for M. Bourgeois, as it had previously been for Maître Pelen. Captain Lapine was under the orders of and paid by the administrator for the time being and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him ? If he had incurred liabilities for necessaries on I account of the ship, who else but the administrator would have been liable in personam ? If all this that I have just now said does not apply to the administrator alone, it applies to the administrator together with the other members of the board, namely, Tcheloff and Margoline. But, as I have said, I think it is the administrator alone. The practical effect is just the same whether the right be in M. Bourgeois alone, or in Bourgeois, Tcheloff and Margoline ; it is a mere question of who recovers the judgment. It is quite enough for the plaintiffs if one recovers, or if all three, if they are entitled to recover.

The result of these considerations is that in March, 1924, when Lapine allowed

the U.S.S.R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lapine may have acted as a loyal subject of the U.S.S.R., but he betrayed his trust to his employers. Primâ facie the act of Lapine was wrongful. Primâ facie M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. Primâ facie M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession and right to possession in England, and wrongful dispossession in England, and the ship is under the arrest of this court. Once this fact—possession and right to possession in this country—is grasped, a good deal of the argument as to the right to sue, based upon a consideration of *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2), *Banque International de Commerce de Petrograd* v. *Goukassow* (4), and *Employers' Liability Assurance Corpn.* v. *Sedgwick Collins & Co.* (5) is not material. If M. Bourgeois had possession and the right to possession here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantiere Olivo Societa Anonima can show that the U.S.S.R. who sold the ship to them, had a superior title. It is upon the title of the U.S.S.R. that the Cantiere defend. It is not said that the Petrograd company is still the owner of the *Jupiter*, or that it, as owner, has a superior title to the possessory title of M. Bourgeois, or that the condition of the French decrees, the re-entry of the Petrograd company into possession, has been fulfilled. The defendants' case is that before March, 1924, the Petrograd company had ceased to exist, and that all its property, including the *Jupiter*, had passed to the U.S.S.R.

Before I deal with that part of the case, it will be well to dispose of the suggestion that, apart from a right by virtue of the French decrees, Messrs. Bourgeois, Tcheloff and Margoline are in some way entitled to sue in a representative capacity. I am unable to find any facts on which such a claim can be based. Before I can recognise such a claim, I must know whom they represent, and find that the persons they represent were entitled to possession of the *Jupiter*. But the evidence leaves me very much in the dark. I know that there were some shareholders of the Petrograd company in France, but have no satisfactory evidence who they were. And I have nothing upon which I can find that they had, or were entitled to, possession. Indeed, the main contention of the plaintiffs, possession by the administrator, is inconsistent with possession in other persons. The decrees themselves show that the possession by the administrator was adverse to a possession by the persons in France, whether shareholders or others, who before the appointment of an administrator, were managing the ships in France.

I now come to the question whether a title superior to that of the administrator has been established. The Cantiere Olivo Societa Anonima set up a superior title derived from the U.S.S.R. as owners. Strictly the transfer to the Cantiere was not proved—for the contract of sale contemplated a bill of sale, and the bill of sale was not produced. It was said that it was filed with the authorities in Italy and could not be produced. But no certified copy was produced. The point, however, is not material. In any case the Cantiere Olivo have to establish the right of the U.S.S.R., and are entitled to rely on the right of the U.S.S.R., from whom they derive possession, and upon whose title and by whose authority they are defending: see *Biddle* v. *Bond* (6) and *Rogers, Sons & Co.* v. *Lambert & Co.* (7). This consideration makes it unnecessary to examine matters to which much evidence was directed, namely, the form of the authority of the Arcos company to sell, and the form of sale required by Russian law. What is pleaded is that, by virtue of a decree of the Soviet government of Jan. 26, 1918, the *Jupiter* became the property of the Soviet government, and that by virtue of a decree of March 4, 1919, the Petrograd company ceased to exist. Evidence was given on the one side and the other by a number of Russian gentlemen, some of them lawyers, upon matters of law and the constitutional history of Russia since 1917 ; there was also evidence as to what was done in the carrying out of the decrees. My difficulty, in dealing

with this conflicting evidence upon matters which are in themselves obscure, is increased by the fact that these witnesses were not even agreed as to the correct translation of documents put in evidence.

But before I come to these witnesses, I have to consider a point made by counsel for the defendants, which, if sound, concludes the matter, and relieves me from any further consideration of the evidence. It is, therefore, naturally a very tempting proposition. An affidavit by Mr. Christian Rakovsky, sworn on Nov. 25, 1924, was put in. He stated that he was chargé d'affaires in Great Britain for the U.S.S.R., and that at the time of the sale to the defendants the U.S.S.R. was in possession of the *Jupiter* and was the owner and entitled to the ownership of such vessel. Counsel's contention is that that statement by the representative of the U.S.S.R. is conclusive as to the fact stated and must be accepted by this court. What authority is there for the proposition that in the courts of this country the declaration of a foreign sovereign is conclusive evidence that personal property in this country was or is the property of the foreign sovereign ? I believe that that proposition holds good only in the case where the jurisdiction of the court, or other jurisdiction of the Crown, is sought to be enforced against property, and in such cases is limited to the declaration that the property is the property of the foreign sovereign. It is involved in the principle that a foreign sovereign and his property are immune from the jurisdiction of the Crown, unless the foreign sovereign chooses to submit to it. Professor Dicey, Conflict of Laws (3rd Edn.) p. 217, after stating the rule as to the immunity of a foreign sovereign from the jurisdiction, says :

> "The immunity, moreover, applies to the property of the sovereign to the fullest extent, provided that the property is shown to belong to the sovereign."

But where jurisdiction is invited over property in this country, as, for instance, by a writ in rem, the declaration of the foreign sovereign that the property is his must be accepted, for to investigate the truth of that declaration would be to determine the very question of jurisdiction which is in issue, and to exercise jurisdiction over the foreign sovereign, which the court cannot do against the will of such sovereign. I have always so understood and in many cases applied the judgment of Brett, L.J., in *The Parlement Belge* (10). But what authority is there for saying that where no question of immunity from jurisdiction is involved, the declaration of the foreign sovereign as to the ownership of property must be accepted ? And on what principle can such a rule be based ? Let me, first of all, consider it on principle. Suppose the foreign sovereign did not claim immunity and submitted to the jurisdiction, and the question before the court was whether the property was, or was not, in the foreign sovereign, must the declaration of the foreign sovereign be accepted as conclusive ? If so, then the declaration of a foreign sovereign would have greater weight than a declaration made on behalf of the King. In a question between the Crown and a private person as to the property in chattels here, it surely would not be conclusive if a minister of state made oath that the property was in the Crown. A fortiori is the the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in it ? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive ? What was the necessity of s. 7 of the Evidence Act, 1851, so far as foreign Acts of State were concerned, if already such Acts of State were conclusively provable by a declaration of the representative of the foreign sovereign ? Even if the question in issue be the passing of property locally situate in a foreign country, is it clear that the declaration

of the foreign sovereign is conclusive ? Undoubtedly, property passes according to the law of the place where it is situate. But if it is said to have passed by an Act of State of the foreign sovereign, is not that a fact which must be proved in the ordinary way by proof of the Act of State, of its application to the property, and of the local situation of the property ? For instance, the property in a ship is said to have passed under a sale by a maritime court following a judgment in rem. Must not the judgment be proved ? I cannot believe that a declaration by the representative of the sovereign of the court which condemned the ship must be accepted as conclusive proof. In every such case the question seems to me to be one of fact, to be determined by evidence. The Act of State must be proved by lawyers, unless it can be proved as provided by the Evidence Act, 1851. The meaning and the application of the Act of State must also be proved by lawyers. The question whether the property or person alleged to be subject to the Act of State was within the territory of the sovereign whose Act of State is in question, is equally a matter of fact to be proved by evidence. And on all three points it seems to me that the evidence of the representative of the sovereign carries no more weight than that of any other competent witness.

Counsel for the defendants relied upon what was said by SCRUTTON, L.J., in *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.* (2) ([1921] 3 K.B. at p. 555). The decision in *Sagor's Case* (2) is not in point, for the decree of the Russian Socialist Federative Soviet Republic was admitted and it was treated as having the effect of nationalising the goods in question, which at the time the decree was passed were admittedly within the territory of the R.S.F.S.R. The decision only applied the principle that the validity of the acts of an independent sovereign in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country. SCRUTTON, L.J., points out that if the Russian government had itself brought the goods into this country, and by its representative declared that they were the property of the Russian government, the courts here could not investigate the truth of the allegation. This I understand to refer to a claim against the Russian government. It is a statement of the rule that the Russian government is immune from the jurisdiction of our courts. He said :

> "It is impossible to recognise a government, and yet claim to exercise jurisdiction over its person or property against its will."

He says further, and it is on this that the defendants rely :

> "If it [the court] could not question the title of the government of Russia to goods brought by that government to England, it cannot indirectly question it in the hands of a purchaser from that government by denying that the government could confer any good title to the property. This immunity follows from recognition as a sovereign State."

I am not sure that I follow the use of the word "immunity" in this connection. Immunity, as I understand it, means immunity from jurisdiction. But the words are spoken with reference to an admitted state of facts, namely, that the goods were in the territory of the Russian government, and while there became subject to an Act of State of that government, whereby they became the property of the Russian government. In such a state of facts our courts could not deny that the government could confer a good title to the property. It is governed by the general principle that "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." In my opinion, nothing that was said in *Sagor's Case* (2) establishes the defendants' proposition. In *Vavasseur* v. *Krupp* (11) the court did consider an argument directed to show that the shells were not the property of the foreign sovereign, and pronounced it to be fallacious ; though, as the proceedings were really directed against the shells, and the representative of the foreign sovereign declared them to be his property, it would look as if the case might be within the principle

of *The Parlement Belge* (10) to which I have already referred. *Vavasseur* v. *Krupp* (11) was decided the year before *The Parlement Belge* (10). I hold that Mr. Rakovsky's declaration is not conclusive.

I must consider the evidence to see whether the *Jupiter* became the property of the U.S.S.R. or of any one of the Republics which together form the Union. The two which are material are the Russian Socialist Federative Soviet Republic—the R.S.F.S.R.—and the Ukrainian Socialist Soviet Republic, which I will refer to as the Ukrainian S.S.R. If I understand the defendants' case, it is put thus: (i) The decrees of the R.S.F.S.R., which were Acts of State having legislative effect, made on Jan. 26, 1918, and Mar. 4, 1919, dissolved the Petrograd company and transferred all its property, including the *Jupiter*, wherever that property was situated, to the R.S.F.S.R. (ii) If the decrees did not in themselves dissolve the company and transfer the property, they provided for the liquidation of the company and the transfer of the property wherever situated, and that long before March, 1924 the liquidation was completed and the transfer made. These two contentions are independent of the question whether the *Jupiter* ever was within the territorial sovereignty of the R.S.F.S.R. They are based upon the fact that the head office of the company was in Petrograd, which undoubtedly was within the territorial sovereignty of the R.S.F.S.R. (iii) They say as an alternative that at the end of 1917 and the beginning of 1918 political power in Odessa was in the hands of Soviets there, and that they, acting as members of or recognising the sovereignty of the R.S.F.S.R., seized the ships, and thereby made them the property of the R.S.F.S.R., or that their seizure, if made before the decree of Jan. 26, 1918, was nevertheless a seizure for the R.S.F.S.R., and that the decrees coupled with the seizure transferred the property to the R.S.F.S.R.. (iv) It is said as a further alternative, that the Soviets at Odessa seized the ships as an independent sovereign, and that the Ukrainian S.S.R., which subsequently came into existence and thenceforward exercised sovereignty in Odessa, is to be regarded as the successor of those who so exercised sovereignty in Odessa at the end of 1917 and the beginning of 1918. These third and fourth contentions have regard to the fact that the *Jupiter* was at Odessa. In considering these, it is vital to remember that from March, 1918, to April 9, 1919, though the *Jupiter* was at Odessa, yet Odessa was not territorially within the sovereignty of either the R.S.F.S.R. or the Ukrainian S.S.R. (which, indeed, had not come into existence) or of any persons to whom they can be regarded as successors in title, nor within the sovereignty of any persons who were of Bolshevik principles, or minded to confiscate private property. Whoever the persons were who seized the ships before March, 1918, they exercised no sort of political power in Odessa during the occupation of the Austrians and the French, except possibly for a few days in the autumn of 1918, between the Austrian and the French occupations. Before the French left, the *Jupiter* had already left Odessa, and was never thereafter within the territory of either the R.S.F.S.R. or the Ukrainian S.S.R.

As to the first contention, it seems to me that the decrees as to shipping enterprises of Jan. 26, 1918, and Mar. 4, 1919, go no further than the decrees as to banking and insurance enterprises, which were considered by the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (3), as to banking, and *Employers' Liability Assurance Corpn.* v. *Sedgwick Collins & Co.* (5), as to insurance. To adopt the words of the Lord Chancellor in the latter case, the decrees for nationalising shipping companies, which have been put in evidence, were, at least, not stronger than the decrees for nationalising the banking and insurance companies. If so they did not in themselves dissolve the Petrograd company, but merely at most provided for its liquidation. The question whether they nevertheless transferred at once the property of the company was the second question mentioned by the Lord Chancellor in the *Mulhouse Case* (3): "Have they proved that the property in the bonds in dispute is no longer in the appellant company?" But the Lord Chancellor said it was unnecessary to consider the

question, for counsel had deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country. Counsel for the defendants has not refrained from contending that the effect of the decrees was at once to transfer to the R.S.F.S.R. the property in the ships of the company wherever situate. Two questions are here involved: First, whether they at once transferred the property; and, secondly, whether they transferred the property, though it was not locally situate within the territory of the R.S.F.S.R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the transfer of the property upon the completion or in the course of the liquidation. I express this view with some hesitation, because I observe that in *Employers' Liability Assurance Corpn.* v. *Sedgwick Collins & Co.* (5) LORD SUMNER treats the *Mulhouse Case* (3) as deciding that the decrees as to banking companies

> "did not dissolve the companies themselves, but only stripped them of their assets and destroyed their goodwill by making banking a state monopoly."

If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so.

As to the second question—that is the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the *Jupiter* was not within the territory of the R.S.F.S.R. I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognised in all cases: see, for instance, ATKIN, L.J., in *Goukassow's Case* (4) ([1923] 2 K.B. at p. 693) and SARGANT, L.J., in *Sedgwick Collins & Co.'s Case* (5), in the Court of Appeal ([1926] 1 K.B. at p. 15), and the Lord Chancellor in the same case ([1927] A.C. at p. 102). The Lord Chancellor treats it as obvious that the property and rights of the company in countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R.S.F.S.R. itself, as set forth in two circulars. The first, No. 42, is dated April 12, 1922, and was addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R.S.F.S.R. abroad. It sets forth that

> "the regime of property rights established by decrees of the Russian Soviet Power regulates property relations on the territory of the R.S.F.S.R. only. But relations in connection with property rights where the objects thereof are outside the territory of the R.S.F.S.R. and are not connected with such territory, cannot be discussed outside the boundaries of the R.S.F.S.R. in accordance with Russian laws, and are determined by local legislation without regard to the nationality of the subjects of such rights, even if such subjects were Russian citizens."

The second, No. 194, is a circular under date Sept. 26, 1923. It is issued by the People's Commissariat of Justice to all district courts. It was issued after the union of the R.S.F.S.R. and the Ukrainian S.S.R. had been formed, but in terms applies only to citizens of the R.S.F.S.R. It states that

> "property rights of citizens of the R.S.F.S.R. which have to be enforced outside the boundaries of the U.S.S.R. are to be determined by the laws of the country where such rights are to be enforced."

These circulars show that the R.S.F.S.R. recognise and enforce the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular, they recognise that the nationalising decrees do not

operate upon property outside the territory of the R.S.F.S.R. It will be convenient to examine the question whether the *Jupiter* ever was within the territory of the R.S.F.S.R. when I consider counsel's third contention. But I may at once say that I find, for reasons to be stated presently, that it is not proved that the *Jupiter* ever was within the territory of the R.S.F.S.R.

The view that the decrees could not transfer property which was not in the territory of the R.S.F.S.R. applies equally whether the liquidation was completed or not. Moreover, at the date of completion, if completion ever took place, the *Jupiter* certainly was not in territory of the R.S.F.S.R., even supposing that Odessa was in such territory, from November, 1917, to March, 1918. The liquidation is said to have been completed in December, 1918, at a time when Odessa, where the *Jupiter* lay, was in the occupation of the French and General Denikin. If it was completed by December, 1918, I am puzzled by the defendants' insistence on the decree of Mar. 4, 1919. The defendants' evidence on this point is that of Mr. Kriloff and the file of the company at Petrograd, which he produced. These documents show clearly that up to November, 1918, the liquidation of the company had not been completed, but Mr. Kriloff said that he was a member of the Board of Ropit from 1913, that after the decree of Jan. 26, 1918, some of the former directors remained at Petrograd, and other directors were elected from the Petrograd staff of the company, and from the staff of the Petrograd agency of the company, that a commissary was appointed by the authorities—he did not know by whom—and that in December, 1918, they handed over all the books and documents to officials of the Supreme Council, and the board was dissolved. It is certain that up to this time the ships of the company other than those which were in Petrograd, or elsewhere in the north of Russia, had not been got into the possession of the R.S.F.S.R., and it, therefore, would look as if the chief part of the liquidation was still to be done. And I am not able to find affirmatively that the liquidation was completed before the *Jupiter* left Odessa in April, 1919. I do not know that it would be against the interest of the plaintiffs if it were proved that the liquidation was completed in December, 1918. The *Jupiter* was at that time not within the territory of the R.S.F.S.R., for reasons which I shall presently state, and the result of a completed liquidation might be that the Ropit ships at Odessa became bona vacantia, and the property of the first occupants, who were the persons who brought them to France. It is, however, the view of both Mr. Machover and Dr. Idelson that ships in the territory of the R.S.F.S.R. were nationalised before 1924. If so, the *Jupiter*, had it been within that territory, would have become the property of the R.S.F.S.R.

That brings me to the defendants' third contention: Can Odessa be regarded as having at any material time been within the territorial sovereignty of the R.S.F.S.R.? [HIS LORDSHIP reviewed the evidence and concluded:] Taking the evidence as a whole, I am quite unable to find that Odessa was at any time within the territory of the R.S.F.S.R. or of the revolutionary government of Northern Russia which afterwards took definite form as the R.S.F.S.R.

As to the defendants' fourth contention, the persons who seized the ships—whether the Sailors' Union or some association of Soviets in Odessa—either seized them as robbers or seized them as an independent sovereign and made them the property of that sovereign. But their sovereignty, if sovereignty it was, came to an end in March, 1918, and was never revived. And how can I regard the Ukrainian S.S.R. as their successors? There was a complete break. No doubt, if a government originates in revolution and is then established as a government, and is then recognised by this country, the recognition is retroactive and recognises the acts of the government from its beginning (see *Sagor's Case* (2). But that supposes a continuity in the governmental activities of the persons so recognised. What was the beginning of the governmental activities of the Ukrainian S.S.R.? Certainly there were none in Odessa until after the *Jupiter* had left Odessa. I can see less reason for saying that a seizure by the Soviets in Odessa resulted in the

property in the ships being in the Ukrainian S.S.R. than for saying that the retaking of the ships by the persons who controlled them during the occupation of the Austrians and the French and ultimately removed them to France, vested the property in those persons. In my judgment, the defendants have not shown that the property in the *Jupiter* ever was in the U.S.S.R. or any of the republics forming the U.S.S.R. In my view, therefore, each of these contentions fails, and the defendants have not discharged the burden which rested upon them on this part of the case.

The result is that, in my judgment, M. Bourgeois in March, 1924, was wrongfully deprived of possession, and that no one has established any title superior to that of M. Bourgeois. In arriving at this conclusion I have not considered it necessary to consider how far the Ukrainian S.S.R. adopted, or by what means the Ukrainian S.S.R. adopted, the legislation of the R.S.F.S.R. There may be some other matters that were discussed before me which I have not considered, but if I have not considered them it is because, in my view, the conclusions at which I have arrived, make it unnecessary for me to consider them. I find that M. Bourgeois has made out a primâ facie right, and is entitled to judgment unless a superior right is made out. No superior right has been made out, and, therefore, M. Bourgeois must have judgment for possession. Bail has been given in the sum of £7,800, and there will be judgment against the defendants and their bail for that amount with costs.

The defendants appealed.

*Dunlop, K.C.*, *Dumas*, and *Harold Murphy* for the defendants.
*Langton, K.C.* and *Carpmael* for the plaintiffs were not called upon to argue.

**BANKES, L.J.**—This is an appeal from a judgment of HILL, J., in an action of which the subject-matter of the dispute between the parties was a vessel named the *Jupiter*. The question in the action was which of the two claimants before the court—an administrator appointed by the French court, on the one hand and an Italian company on the other—was the person entitled to the vessel in the month of March, 1924. The case was fought most elaborately before the learned judge in the court below, and in a very careful and detailed judgment the learned judge deals exhaustively with the many points that were raised before him. It is not necessary, in my opinion, to refer to a number of those points. The two main questions that emerge, indeed I think the only two questions which emerge, in this appeal, are: (i) whether the Italian company have a title which is superior to any title which the French administrator can make a claim to ; and (ii) whether, in the events which happened, the French administrator has established that he has a sufficient possessory title to maintain the action. Those are the two questions and, of course, the more important is the second one, because if that one is established, it becomes unnecessary to consider the first.

The second question, in my opinion, depends entirely upon questions of fact, because it depends partly on questions of Russian law, which in this court and in the court below must be treated as questions of fact, and also upon what I may call pure questions of fact. The learned judge has come to a clear conclusion on all those points, and for reasons which I will give in a moment, I see no ground whatever for differing from his conclusions. On this point the case for the Italian government was this. It was said: True it is that the vessel originally belonged to a Russian company whose headquarters were at Petrograd—a Russian company, therefore, subject to and governed by Russian law. It was said that by the decree of the Soviet Republic of Jan. 26, 1918, the whole of the property of this Russian company was nationalised, and that, as the result of the decree and the effect of the decree, the property of the company, including this vessel, the *Jupiter*, *passed to* the Soviet Republic, provided, possibly, that they were in a position to take possession and did take possession of the property, including the *Jupiter*. It was admitted that a considerable time elapsed between the date of the decree and the nationalisation of the property of the company and the taking of possession of the

A vessel, the reason being that the vessel from some time before the decree had ceased to trade in what may be called Russian water at all, and had been occupied in trading between this country and America. For some years before March, 1924, the vessel had been laid up, partly at Plymouth and partly at Dartmouth, when, owing to the action of her captain, the Soviet Republic were enabled to take possession of her. It was said that the effect of the decree, coupled with that B taking of possession, created a complete transfer of the property in the *Jupiter* to the Soviet Republic, and that they in turn have sold the vessel to the Italian government, who in those circumstances established a title which must be superior to the title of the French administrator.

The answer to that, as found by HILL, J., was this. He said:

C "Assuming that the decree has the effect contended for, and assuming that the circumstances which occurred in March, 1924, amounted to a taking possession of the vessel, yet for two reasons which I give, I do not think that the Italian company make out their case."

The first reason is that on his view of the evidence as to Russian law he comes to the conclusion—and I see no reason whatever for differing from him—that the D decree has no operation to transfer any property except property which was in the jurisdiction of the Soviet Republic. He says:

"If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me E that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so."

I do not wish to express any opinion upon that. The learned judge then comes to the second question:

"As to [the question whether the decrees transferred the property wherever F situated] it was not suggested that ships were to be governed by any principles other than those applicable to other chattels."

He then refers to some dicta and some cases, which he thinks are in support of his view, and he then proceeds to deal with the evidence, and comes to the conclusion upon the evidence of Russian law that the decrees have no application to property not situate within the jurisdiction of the Soviet Republic. As I say, I see no G reason to differ from that conclusion.

The learned judge then proceeds to consider the next material question, that is whether this vessel, the *Jupiter*, was at any material time within the territory of the Soviet Republic. Again, that is a pure question of fact. He goes into the whole dealings, and he comes to the conclusion expressed by him, that it was not H proved that the *Jupiter* ever was within the territory of the Soviet Republic.

If that view of the law and the facts is correct—and, as I have said, I see no reason to differ from it—it follows that the Italian company have failed to establish this superior title which they were setting up as against the claim of the plaintiff that he, by virtue of the French decree, had such a possessory right in this vessel as to entitle him to maintain the action.

I The only other question is whether the learned judge was right in coming to the conclusion that of these several plaintiffs, the one plaintiff who had been appointed by the French court as administrator of the property of a number of persons who had sought to transfer the business of the Russian company to Paris, and who were, among other things, directing the managing of some of the vessels which had belonged to this Russian company, including the *Jupiter*, had a sufficient possessory title under the decree entitling him to maintain the action. I do not think the defendants seriously contended that he had not; but, whether that contention was made or was not made, in my opinion, it could not succeed, because I think it plain

on the terms of the order of the French court, that this gentleman, Mr. Bourgeois, certainly had a sufficient title to maintain this action as against anyone except someone who could establish that he had a superior title to that to which he laid claim. In these it is unnecessary to go into the many matters which were so fully and exhaustively dealt with by the learned judge. I do not wish to disagree with any of his conclusions, but I satisfy myself by saying that on these three particular, and as it seems to me, vital matters, I agree with him. The result is that the appeal fails and must be dismissed.

**ATKIN, L.J.**—In my judgment, the defendants here have not displaced any of the conclusions of fact arrived at by the learned judge below, or any of his conclusions of law based upon the conclusions of fact. The judgment of the learned judge appears to me to be an admirable one, and I content myself with saying that I agree with it, and that it is unnecessary to add anything to what we have said on the matter. For these reasons I agree that the appeal should be dismissed.

**LAWRENCE, L.J.**—I agree, and have, too, very little to add to the very careful and exhaustive judgment delivered by HILL, J., which I think was perfectly right, and which seems to me to cover all the points raised before us. In my opinion, the determining factors in this case are (i) That the nationalising decrees of the Union of Socialist Soviet Republics do not operate on property outside the territory of that republic, whether such property belonged to a Russian citizen or not ; (ii) that the *Jupiter* was not at the date when those decrees were promulgated, and has not since been within the territory of that republic ; (iii) that at the time when the *Jupiter* was handed over by the master to the Union of Socialist Soviet Republics it was in the lawful possession of the French Provisional Administrator. The learned judge has treated these three matters, and rightly I think, as pure questions of fact to be decided upon the evidence which was deduced before him at the trial. There was ample evidence to support those findings of fact, and I see no reason for disturbing them. In those circumstances it follows that the plaintiffs have established their case, and that the appeal fails, and must be dismissed.

*Appeal dismissed.*

Solicitors : *Wynne-Baxter & Keeble; William A. Crump & Son.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

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# MARBÉ v. GEORGE EDWARDES (DALY'S THEATRE), LTD.

[COURT OF APPEAL (Bankes, Atkin and Lawrence, L.JJ.), July 14, 15, 1927]

[Reported [1928] 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 43 T.L.R. 809]

B *Contract—Theatrical engagement—Collateral contract to advertise—Breach—Measure of damages—Loss of publicity and reputation.*

In the case of the employment of an actor by a theatrical manager where there is proved, in addition to the mere engagement to play a part in a play, some contract—as, for instance, an agreement, collateral to the contract of C engagement, that the manager will make special arrangements for prominently advertising the actor—which would ensure him a widespread publicity and a full opportunity of obtaining the advantages which would follow from a successful performance, the damages may properly include an award in respect of loss of publicity and/or reputation. In assessing the damages the jury are entitled to take into account, not merely the loss of possibly enhanced reputa- D tion, but also the injury caused to the actor's existing reputation by the circumstances of the breach.

*Practice—Trial—Submission of no case—Time for decision—Discretion of judge—Two causes of action—Submission on one cause.*

The discretion which a judge has, when asked by a defendant at the end of the plaintiff's case to rule that there is no evidence in support of that case to E go to the jury, whether he should rule at that time or later is not affected by there being two causes of action raised in the proceedings before the court. The fact that the defendant may be in a difficulty because, while, if the case were confined to one cause of action, he would have elected to call no evidence, he is obliged to call evidence in order to meet the other cause of action may be a matter for the judge to take into consideration when he exercises his F discretion.

**Notes.** Considered: *Withers* v. *General Theatre Corpn., Ltd.*, [1933] All E.R. Rep. 385; *Foaminol Laboratories, Ltd.* v. *British Artid Plastics, Ltd.*, [1941] 2 All E.R. 393. Referred to: *Collier* v. *Sunday Referee Publishing Co., Ltd.*, [1940] 4 All E.R. 234.

G As to the measure of damages for wrongful dismissal see 11 HALSBURY'S LAWS (3rd Edn.) 244, 285, 286, and for cases see 17 DIGEST (Repl.) 128 et seq.

Cases referred to:

(1) *Turpin* v. *Victoria Palace*, [1918] 2 K.B. 539; 88 L.J.K.B. 569; 119 L.T. 405; 34 T.L.R. 548; affirmed [1919] 1 K.B. 366, C.A.; 17 Digest (Repl.) 129, *369*.

H (2) *Newman* v. *Gatti* (1907), 24 T.L.R. 18, C.A.; 42 Digest 911, *70*.

(3) *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 578; 5 New Rep. 51; 34 L.J.C.P. 17; 11 L.T. 273; 10 Jur. N.S. 1103; 13 W.R. 80; 144 E.R. 232; 17 Digest (Repl.) 340, *1465*.

(4) *Turner* v. *Sawdon & Co.*, [1901] 2 K.B. 653; 70 L.J.K.B. 897; 85 L.T. 222; 49 W.R. 712; 17 T.L.R. 45, C.A.; 12 Digest (Repl.) 700, *5352*.

I (5) *Fechter* v. *Montgomery* (1863), 33 Beav. 22; 55 E.R. 274; 42 Digest 910, *68*.

(6) *Grimston* v. *Cuningham*, [1894] 1 Q.B. 125; 10 T.L.R. 81; 38 Sol. Jo. 143, D.C.; 42 Digest 916, *111*.

(7) *Bunning* v. *Lyric Treatre, Ltd.* (1894), 71 L.T. 396; 10 T.L.R. 583; 12 Digest (Repl.) 700, *5351*.

**Appeal** from a judgment of HORRIDGE, J., on further consideration in an action tried with a special jury.

The plaintiff, who was an American actress, claimed against the defendant com-

pany damages for breach of a written agreement dated June 2, 1926, whereby the defendant company engaged her to play the part of Lolotte in a play called "Yvonne" during rehearsals and during the run of the play at a salary of £100 per week. She claimed further damages for loss of publicity and injury to reputation in breach of a collateral contract. She also claimed damages for libel contained in a letter written on July 29, 1926, by a Mr. Paget, as general manager on behalf of the defendant company. The defendant company admitted the agreement, but contended that they notified the plaintiff that they did not consider her suitable to appear in the West End production of the play. They paid into court the amount of salary due to her, with an admission of liability in that respect. With regard to the libel they denied publication and pleaded privilege. The following questions were left to the jury, and were answered as follows: (i) Did the defendants agree, in consideration of the plaintiff entering into the agreement to advertise her in a prominent position? Yes. (ii) What damages, if any, beyond the payment of her salary, is the plaintiff entitled to for any damage to her reputation from not being allowed to act? £3,000. In regard to the claim for libel, the jury found that the statement of the defendants was defamatory and written with malice, and awarded the plaintiff £100 damages. HORRIDGE, J., after hearing argument on the jury's answers, held that the plaintiff was entitled to judgment for the £3,000 for breach of the collateral contract, and the £100 damages for libel, those sums being in addition to the moneys already paid her in respect of salary during the run of the play, with costs. The defendants appealed.

*A. Neilson, K.C.* and *Croom-Johnson, K.C.* for the defendants.
*Sir Patrick Hastings, K.C.* and *Richard O'Sullivan* for the plaintiff.

**BANKES, L.J.**—This is an appeal from a verdict and judgment in an action tried by HORRIDGE, J., and a special jury. The action was brought by the plaintiff claiming damages under two heads, one was for libel, and the other for breach of covenant of employment. The jury found in the plaintiff's favour on all points, and awarded her £100 damages in respect of her claim for libel, and £3,000 as damages for the breach of contract of which she complained. A number of points have been taken in this appeal. It is said, first of all, in reference to the claim for damages for libel, that there was no evidence of publication, and, secondly, that the learned judge was wrong in refusing to rule at the close of the plaintiff's case that there was no evidence of malice. With regard to the breach of contract, it was said that the learned judge was wrong in law in putting the construction which he did put on the contract; that there was no evidence of an alleged collateral agreement ; that there was misdirection on the part of the learned judge on several points ; and that the damages were excessive.

The plaintiff's case was that she was an actress with an established reputation in America, and that in order to increase her reputation she was anxious to come over to Europe and, if possible, obtain an engagement in one of the leading London theatres, because if an American actor or actress can do that and play a part with success, it has a great influence on his or her success in America. She came over, therefore, with the object of obtaining an engagement for that purpose, and her case was that she was introduced to those who were responsible for the management of Daly's Theatre, a theatre especially applicable to her intentions and desires ; that she did obtain a definite engagement at that theatre to play a definite part in a specified play; and that she had made two stipulations before she would enter into that agreement. The salary offered her was £100 a week, a very substantial salary but still less than she had been obtaining in America. She made two stipulations, according to her case, one was that the agreement with her must be completed and signed before there was any rehearsal—that she must have a definite engagement before there was even any attempt at a rehearsal ; and the second was that, to secure for her the certainty of the fullest possible publicity in connection with her engagement, special arrangements should be made in reference

to the advertising of her name in connection with the part. She said that she made both those stipulations quite definitely as a condition of her being willing to enter into this engagement, and that those matters had been agreed to. The formal agreement was signed, and the collateral agreement in reference to the advertisement was carried out to this extent, that there was a preliminary advertisement of the play advertising her name. The rehearsals commenced, she rehearsed, and she gave full satisfaction, and nothing untoward happened until the day of the dress rehearsal, when she was told that she would not be allowed to play the part; it was suggested that, if she was allowed to carry out her engagement and take the part, she would be overshadowing the position of another actress who was not going to allow it. That was the plaintiff's case as presented to the jury—that she was not allowed to act.

Letters were written by her solicitors and the solicitors representing the defendants. It was suggested, first of all, that in the circumstances the plaintiff was under some duty to the defendants to try to find an engagement elsewhere and she was not doing so. That was a misconception. When she wrote to say that it was a mistake, and that she was doing her best to get an engagement, she received an answer saying in substance: The reason of your not getting an engagement is because you have not got the reputation you profess to have, on which you obtained the engagement from us. In substance, that letter conveyed the imputation that the plaintiff had obtained her engagement by misrepresentation, and it was the foundation of the action for libel.

The plaintiff did not obtain an engagement. The run of the play commenced in June, and she commenced her action in August. In the defence to that action the defendants contended that on the construction of the agreement they were not bound to give her any actual employment in the sense that they were not bound to allow her to play this part or any part, and they suggested that the reason she was not allowed to play the part was that she was not qualified for it. They defended the action up to quite a late stage on all these grounds. Then they paid into court the whole of the amount of the plaintiff's salary at the rate agreed for the full run of the play, so that when the action came to be tried the matter stood in this way, that the defendants were not contending that they were not bound to pay the plaintiff's salary for the full run of the play, but they were contending that there had been no libel and she was not entitled to any damages for libel, and that she was not entitled to any damages for what is called, putting it shortly, loss of reputation, or, more properly and fully expressed, the loss which followed from not obtaining the publicity that she would have obtained if she had been allowed to act. The defendants' case was that, so far as the promise which was alleged to be a collateral agreement was concerned, it had never been made, and there was nothing in the nature of a contract.

Then the matter came on for trial. I will deal first of all with the question of libel. It was said in regard to the libel that there was no publication. I need not go into that because on the authorities, I think counsel for the defendants agreed that, at any rate so far as this court is concerned, this court would be bound to hold that there was sufficient publication of the libel to found an action for damages for a libel. But he made a strong point which was put under two heads, that there was no evidence of malice, which was a necessary part of the plaintiff's case, the occasion being privileged. The learned judge was asked to rule upon that point, and the defendants say that he ought to have ruled, at the end of the plaintiff's case, and, if he had ruled at that stage of the case, the plaintiff would have failed on that part of the case. That particular matter has been before the court on several occasions, and it has been contended on several occasions that the judge, when he is asked at the end of the plaintiff's case to rule that there is no evidence in support of that case, is bound to rule at the stage. The answer has been, and I desire to repeat it now, that under the present practice, the judge has a discretion in the matter, he may rule at that stage or he may not do so. What is more often

done now is that he says: "I shall not rule until the whole of the evidence has been called." The defendant then has to elect whether he will refrain from calling evidence and stand on his point that there is no sufficient case proved by the plaintiff, or call the defendant's evidence, and if he does that he runs a risk of the defendant supplementing the plaintiff's evidence by further evidence which the jury may accept. Counsel for the defendants has truly said that in this case that particular course places the defendants in a great difficulty there being two causes of action before the court, one for libel and the other for breach of contract, because, although, if the case were merely confined to the libel, he would have elected to call no evidence, he is obliged to call evidence in order to meet the alleged case of breach of contract. That may be a matter for the judge to take into consideration when he exercises his discretion, but, in my opinion, it is no ground on which we can say that in what the learned judge has done, he has done something that he had no right to do. It is said here that there was abundant evidence of malice, because when the letter was written to which I have referred, and which was signed on behalf of the company, the person signing it did not assent to the statements it contained. If it was desired to meet the charge of having maliciously written the letter complained of, the first thing of which the writer had to satisfy the court, was that, whether he was right or wrong in what he said, at any rate, he honestly believed it. The letter suggests that the plaintiff was obtaining this engagement by misrepresentation, and according to the plaintiff's evidence, Mr. Paget, the man who signed the letter, told her when she was informed that she could not perform the part, that he was extremely sorry that she could not be engaged, and he gave her a reason which was perfectly inconsistent with the suggestion that she had misrepresented what her reputation was. On that ground, therefore, I think on the plaintiff's own evidence, if it were necessary to decide the case on that footing, the case was one which the learned judge ought to have left to the jury, even if he had ruled at the stage at which he was asked to rule. That disposes of the case in regard to libel.

With regard to the other part of the case, so much has been said about theatrical contracts and implied terms, and the circumstances in which the court will imply certain terms, that I should like to emphasise what seems to me to be a very clear distinction between two classes of employment. Whether one uses the word "engage," or whether one uses the word "employ" seems to me to be quite immaterial. There is one class of case in which one may engage or employ a person in a certain well-known capacity, if I may use that expression, and in that class of case there may be no implication that, although one engages or employs a person in that capacity, one will actually give him work to do. Take the ordinary case of domestic service. It is ridiculous to suggest that if one employs a domestic servant, a butler, a cook, or a housemaid, or anybody else, there is an implication that one will give him or her work to do—and what some of the jury may consider sufficient work—and that a domestic servant may have a cause of action against his or her employer because the employer does not give him or her enough work to do. That seems ridiculous on the face of it. In the same way with regard to a doctor or a solicitor, one may engage a doctor not for a particular illness, or a solicitor, not for a particular piece of work, but one may engage or employ them for a certain period. Again it is ridiculous to suggest that if one engages a doctor for a year one is bound to be ill, or if one is ill one is bound to continue ill in order to give him something to do. The thing is absurd on the face of it, and one can multiply instances of that class of engagement or employment. It is the engagement or employment of a person in a particular capacity. One may give another instance which is conveniently referred to under the well-known expression of "retainer." One may retain a person, that is to say one may have a call on his services which does not necessarily mean that one will call upon them, but it gives one a right to his services if one desires to use them. That is one class of

A case, and one may multiply instances innumerable in which there can be no implication that one will provide employment for the person.

But there is quite a different class of case altogether, and that is the class of case where there is an implication. One employs a person to do a particular thing —it may be manual work. During the argument I gave the instance of employing a man to clean windows. In my opinion, if I employ a man to clean windows for B good consideration and when he comes to my house I say: "I will not allow you to do it," I may commit a breach of my contract with him, but the measure of damages in such a case is confined merely to the amount I should have had to pay him if he had done the work. That set of circumstances gives rise to the question or what is a proper measure of damages. A definite engagement to do a particular piece of work applies just as much to the engagement of an actor or actress to play C a particular part as it does to an engagement or employment of a man to do a particular piece of work. It seems to me that no question of implication arises on the face of the employment. It is expressly to do a particular thing, and if one chooses to allow the person to do a particular thing one is not committing a breach of one's agreement. In the present case the plaintiff was in this position. The manager engaged her as an artiste to play the part of Lolotte in the play called D "Yvonne" from June 1, 1926. Nothing can be more express, and nothing can be more definite, and, in my opinion, in the absence of some custom which could be read into this agreement as explaining the language used, the court has nothing to do except to put the obvious meaning upon very plain language. There is no question of implication that arises, the matter, in my opinion, begins and ends there, and in the events which have happened there was a breach of that agreement. It is E said that the plaintiff was told that she was not to play because she was not suited to the part. That may have raised a question which does not arise here, because on the verdict of the jury we must assume that they accepted her statement with regard to why she was not allowed to play, and that it had nothing at all to do with her capacity. Then it is said that the engagement was an engagement to play at such times and at such theatres in the West End of London as the manager from F time to time should direct. It is quite true that the management had a discretion in that matter, and that it was open to them to say what the theatre should be, or what the time should be but that is not what happened. What happened was that they said to her: "You are not to play at any theatre, or at any time," and there was, therefore, a distinct refusal to carry out the obvious plain terms of the arrangement to rehearse and play this particular part in this particular play.

G The question arises: What would be the measure of damages for the breach of that contract? With that we have not to deal in this particular case. It may be that if there were nothing else in the case but the express terms of this written contract—I express no opinion about it as it is not necessary—that the measure of damages would be the amount of the salary which she would have earned if she H had been allowed to play. But the plaintiff's case is: You must not only consider the written agreement; but you must also consider the circumstances in which it was also come to, and the collateral agreement. On that I should like to refer to a case to which our attention has not been called, but which is referred to in McCARDIE, J.'s, judgment in *Turpin* v. *Victoria Palace, Ltd.* (1), in which the question was not only of collateral agreement, but was one of theatrical usage, and I the possibility of the introduction of custom or usage in the construction of a contract. That is *Newman* v. *Gatti* (2). In that case there was an engagement of a lady to play the part of an understudy to a particular named actress, during the run of the piece the principal lady was unable to play, and the understudy then claimed a right under her engagement to play the part. The management refused to allow her to do so. In that case the headnote is (24 T.L.R. 18):

"By a written contract the defendants, who were the managers of a theatre, engaged the plaintiff, who was an actress, for the run of a certain play at the

theatre to understudy the principal actress at a certain salary, and the plaintiff agreed not to appear at any place of public entertainment elsewhere during her engagement without the defendants' consent. During the run of the piece the principal actress left the theatre, and the plaintiff claimed the right to play the part, which the defendants refused. In an action to recover damages for breach of the contract, evidence was given on behalf of the defendants that an understudy was not entitled as of right to play the principal's part if the latter was absent. Held, upon the evidence, and upon the true construction of the contract, that no right was conferred on the plaintiff to play the part, the contract merely imposing on the plaintiff the obligation of playing the part if called upon by the managers to do so."

In that case there was evidence given of the theatrical usage or custom in the matter. In giving judgment, VAUGHAN WILLIAMS, L.J., said (24 T.L.R. at p. 20) that in his opinion

"judgment must be entered for the defendants. It was said that there was a collateral contract [that the defendants had promised the plaintiff that she should play the part if the principal actress could not do so], and that the question whether there was or was not such a contract was a question for the jury. He entirely agreed that that would be so, if there was any evidence of such a contract. In his opinion there was no evidence of any such contract. Sometimes one had a collateral contract, the consideration for which was the entering into the principal contract, as for instance, when one party said that he would not enter into the contract unless the other party made a collateral contract with him. Another case was where, after the contract had been drawn up, it was seen by one of the parties that the contract did not deal with a particular case which might arise, and the parties agreed to provide for that event. No principle of law would prevent the parties from making such a collateral contract, unless the written contract as drawn up was intended to bind the parties to a complete contract embracing all the terms agreed upon. One had first to see if the contract as entered into was intended to be a complete record of the bargain between the parties. Sometimes, indeed, a statute required a contract to be in writing, and in such a case the whole contract must be in writing. In the case of *Lindley* v. *Lacey* (3) ERLE, C.J., dealt with the first of the instances which he (the lord justice) had given above, and BYLES, J., dealt with the second. In the present case, in his opinion, there was no evidence whatever of any collateral contract either of the first or of the second kind. That being so, they had to construe the written contract. They had to see what the word 'understudy' meant. Upon the face of it it was a term which was used in the theatrical profession and required explanation. Explanation was given in the evidence at the trial, and all the evidence was one way. It was a word which in the ordinary usage of the stage did not cover the right of the understudy to play the part of the principal actor or actress, his or her obligation and right being simply to be ready to do so if called upon by the management, and there was no right conferred upon the understudy to play the part of the principal in cases where the latter happened to be absent. The plaintiff was under the obligation to play the part if called on, but she had no right to do so. It was the duty of the learned judge to construe the contract. It was said that the contract, when properly construed, meant that the plaintiff had a right as understudy to play the part in the absence of Miss May, and in the event of Miss May's going away and it being necessary for another actress to play the part. He (the lord justice) did not agree. In his opinion the contract meant that the plaintiff should understudy the part which Miss May was to play. The only reason why he was inclined to think that the parties used the words which they did, and did not specify the particular part, was because the part which Miss May was going to play was not definitely

known. That being so, he did not think that the learned judge ought to have put to the jury either the question as to the construction of the contract—namely, whether the engagement gave the plaintiff the right to claim the part, or the question whether the defendants undertook that it should."

Then he goes into the question of when collateral contracts are admissible and finds that in that particular case there was no collateral contract, and he goes on further to deal with the construction of the contract. Then he says:

> "Once the meaning of the word 'understudy' was made clear, the construction of the contract was for the court; and when they construed it it became plain that the right which the plaintiff claimed in the action—namely to play the part if Miss May was absent, was in no way referred to or contained in the contract. He felt sorry for the plaintiff in this sense that probably she anticipated that, during the run of the piece, she would be allowed to play the part when Miss May was away. Such a clause as that was not introduced into the contract, and the plaintiff could only have succeeded here if she had been able to establish a collateral contract."

So upon the evidence, and having regard to the language of the contract in that case, it was said that the lady had not got the right which she claimed.

In the present case the plaintiff made it quite plain to the jury, and they accepted her evidence, that she only entered into this contract on the condition that they would comply with her request with regard to publicity, and the jury were asked the question, which was put in the form: "Did the defendants agree, in consideration of the plaintiff entering into this agreement, to advertise her in a prominent position?" The answer was "Yes." So it must be taken that the jury found in the plaintiff's favour that there was this collateral contract, and, in my opinion, it was the kind of contract which, if established, was admissible in evidence upon the ground upon which collateral and parol contracts are admissible in evidence where the principal contract is admissible. It is said that it was not an agreement, and the point was made that the learned judge misdirected the jury on the question whether it was something short of an agreement. As I have pointed out, I do not think that that was an argument which sounded very well on the part of the defendants, but, be that as it may, I am quite satisfied that there was no misdirection on this point by the learned judge. I do not think there was any misdirection by the learned judge at all; if there was misdirection I think on several points he put the case more favourably for the defendants than certainly I should feel inclined to do. To come back to the collateral contract, how far does that affect the question of damages? In my opinion, having regard to the authorities—I do not propose to go through them—it is now, at any rate, sufficiently established that in a case of an employment such as this, of an actor or actress whose reputation depends on the successful exhibition of their art to the public and breach of the terms of his or her engagement is accompanied by loss, as is here proved, of publicity, the measure of damages includes a right to such damages as the jury may award for what has been called the loss of publicity, or loss of reputation. In my view, the authorities establish the proposition that in this class of employment where there is proved, in addition to the mere engagement to play a particular part, some contract which would insure a widespread publicity, and a full opportunity of obtaining the advantages which would follow from a successful performance, the law does recognise as the proper measure of damages whatever a jury may award for the loss of publicity.

That brings me to consider the only point about which I have been troubled, and that is the amount which the plaintiff was awarded, namely £3,000. It is a very large sum, and, in substance, it is doubling her salary. What has troubled me principally is to satisfy myself that these damages do not represent punitive damages which the jury awarded to punish the defendants because they think they have not behaved well to the plaintiff. If I were satisfied of that, it would be my duty to

say that this verdict could not stand because it is part of the duty of this court to interfere if the court thinks that the jury, in fixing the amount of damages, have taken into consideration matters which were not proper matters for their consideration having regard to the issue which they have to deal with. It is quite plain in this case, although the jury might have awarded punitive damages in respect of the libel, which they did not do, they have no right to award punitive damages in respect of this loss of reputation or loss of publicity, which is a mere question of assessing the amount of damages, the money loss which the jury might properly think the plaintiff had sustained by reason of the loss of publicity. The question resolves itself into this: Was there before the jury material on which they could properly arrive at so large a sum based merely on this ground of loss of money by reason of the loss of publicity? What is said is this. Eliminating all other matters, eliminating all matters of prejudice, all matters on which the jury may have felt incensed by the conduct of the defendants, one has left this, that the plaintiff, with an established reputation behind her, had been, up to the date of the trial, which was in March of this year [1927], that is to say, for, at any rate, three months after the expiration of her contract, and for the whole time of the run of the play, unable to find any suitable engagement in this country. That, according to her evidence, was the test, and one finds also an admission by those representing the defendants that the events which happened would undoubtedly prejudice her seriously in obtaining suitable engagements. If one is once satisfied that those were materials properly before the jury it is impossible to say that they were not entitled to estimate for themselves the length of time for which this disability might last—whether it might be total, or partial, in the sense that, although she might obtain an engagement, it would not be at the same salary. Having regard to the large salary which the plaintiff commanded, although the damages awarded on this point are undoubtedly large, it does not seem to me possible to say that they are so large that the jury must necessarily have taken into account matters which were not proper for their consideration on this particular issue. On all grounds the appeal fails and must be dismissed with costs.

**ATKIN, L.J.**—I agree. On the question of the libel, I need only say that the only points in the objection raised by the defendants were, first of all, that there was no evidence of malice. In respect to that it is only necessary to point out that the manager of the theatre who wrote the letter said this. It is quite clear that the letter which has been referred to meant that the representations which the plaintiff had made were not true. In evidence the manager said that if that letter meant that she had made representations which were not true, the statement that she had made them would, so far as he knew, be untrue. It appears to me that there was ample evidence to go to the jury that the defendants' servant published the letter, though on a privileged occasion, without an honest belief that the statements made in it were true. If that is so, that appears to me to afford ample evidence of malice, and in this respect I am inclined to think the learned judge's direction on the question of malice was not sufficiently favourable to the plaintiff. There being ample evidence of malice, and there being no misdirection of which the defendants can complain in that respect the verdict as to libel plainly stands.

The other question is one which is, no doubt, of great importance to persons who enter into contracts in the theatrical profession, and it is the question whether or not an artiste who is employed to play a part in a particular play is entitled to recover damages beyond the mere loss of the salary which he or she is entitled to under the contract. That has been the subject of discussion now for a good many years, and it appears to me that it is quite plain that there is a distinction to be drawn between the several contracts of employment. In *Turner* v. *Sawdon & Co.* (4) the contract was one by which certain employers engaged and employed the plaintiff as a representative salesman in their business, and he complained that he had suffered damage because he was not allowed to act as representative

A salesman and claimed damages beyond the salary which he was entitled to, he having been wrongfully dismissed. The court held in that case that in such a contract as that there was no promise by the employer to give the servant the particular class of work mentioned in the contract, or any work, and that all that the employer did was to engage the person to join his staff as a servant, without any obligation to give him work. Such a case was analogous to the ordinary case B where a domestic servant is employed, in which case it obviously would be contrary to the intention of the parties that a master should be deemed to be under a promise that the servant should continually be kept on that class of work to which the engagement relates. That is a well-defined class of contract of employment. In that case STIRLING, L.J., points out quite plainly that there was another class of contract of employment under which a person might give a servant a class of C work for which damages beyond the salary might, in the proper circumstances, be recovered. There is a series of that class of case dealing with theatrical engagements, and I think that time would not be wasted in going through the cases by way of indicating that the position has, to my mind, been made quite clear that if one can find a promise to give work in the theatrical profession, damages may be recovered beyond the ordinary measure of damages.

D The first case is *Fechter* v. *Montgomery* (5), a well-known case which did, in fact, raise the question of damages. In that case, the plaintiff, the manager of a London theatre, engaged the defendant, a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the court inferred an engagement on the part of the plaintiff to employ the defendant not to perform elsewhere. The plaintiff having—in the circumstances— E delayed the defendant's appearance for five months, the defendant broke his engagement, and went to another theatre. It was held that he had a right so to do, and that the plaintiff was not entitled to an interlocutory injunction to prevent his performing there. In that case, the defendant having expressed a wish that this engagement should be in writing, Mr. Barnett, the plaintiff's stage-manager, wrote to the defendant as follows:

F

> "July 28, 1862. Dear Montgomery—I am directed by Mr. Fechter to offer you an engagement at the Lyceum Theatre for two years, commencing Jan. 1, 1863, at a salary of £7 per week for the first and £10 per week for the second year; it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter."

G The learned judge held that by reason of the correspondence and conversation that had taken place before the contract was entered into, the contract went further than its actual terms, and he said that, in his opinion, it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery during a reasonable time to act at the theatre, and that there was an agreement on the other side that Mr. Montgomery should not perform elsewhere. What happened in that H case was that some months went by, Mr. Montgomery was not given a part, and he thereupon engaged himself to play at another theatre. Mr. Fechter sought an injunction against Mr. Montgomery to restrain him from playing at the other theatre. The defence was: You have broken your contract in a material respect, and, therefore, you cannot get an injunction. SIR JOHN ROMILLY held that that was so, that there was a breach of a contract to give Mr. Montgomery a part, I and that, therefore, as there was that breach, he was entitled to withdraw from the contract in regard to acting elsewhere.

The next case that arises in this respect is *Grimston* v. *Cuningham* (6). That is a case which appears to me to be of some value in this connection. It is a case in which the late Mr. Kendal Grimston—professionally known as Mr. Kendal—was proceeding on an American tour, and made an arrangement with the defendant, Mr. Cunningham, the actor. The terms of the agreement were:

> "I hereby agree to engage with Mr. W. H. Kendal to act as a member of

his company on tour in the province of Great Britain and Ireland for a period of two weeks, or longer if required, prior to American tour commencing on or about Sept. 4, 1893, at a weekly salary of £6, and to receive fully salary for all matinées and usual railway fares. A fortnight's rehearsal to be given prior to commencement of tour. And furthermore, I agree to engage with Mr. W. H. Kendal to act and to understudy as a member of his company, on tour in the United States of America and Canada, for a period of twenty-five weeks, or longer if required, but not to exceed forty weeks, commencing on or about Oct. 9, 1893, at a weekly salary of £10."

The parties proceeded to America, and Mr. Kendal produced the play, "The Second Mrs. Tanqueray." The defendant was not given a part in it—he was only understudying one of the parts, he made up his mind that he was not going to get any part at all, and thereupon he threw up his engagement, returned to London, and engaged himself at some other theatre. Mr. Kendal Grimston sought an injunction against him, and obtained it, and the reason that he obtained it was not that there was no obligation to give Mr. Cunningham a part in the play, but on the ground that it was within the discretion of the managers to give him a part within a reasonable time, and that a reasonable time had not elapsed. WILLS, J., in giving the judgment of the court, said ([1894] 1 Q.B. at p. 131):

"In that case [*Fechter* v. *Montgomery* (5)] plaintiff was bound to give the defendant a reasonable opportunity of acting, and failed to do so. But a manager cannot be expected to give every actor whom he engages a part in every play which may be produced, and generally to attempt to do so would not be for the benefit of the actor. All that the defendant can be entitled to is to have a reasonable opportunity of acting and understudying, having regard to all the circumstances of the case."

I should like to point out that those are two cases where there has been a general engagement of an actor to appear at a theatre without giving him any particular part, and where the court has held that, nevertheless, there is an obligation on the part of the management to give an actor a reasonable opportunity of acting, though, of course, it is not a general engagement, the time and circumstances are at the manager's reasonable discretion.

The next case to which I wish to refer is *Bunning* v. *Lyric Theatre, Ltd.* (7). That was a case where the terms of the contract were very general. It was an agreement between the Lyric Theatre, of the one part, and Herbert Bunning, musical director, of the other part, and it had been agreed:

"The said Herbert Bunning agrees to act as musical director of the orchestra for London, Brighton, or Crystal Palace, in consideration of the management paying him a weekly salary of £8, commencing on the 1st Oct., 1892, this salary to be increased by the management to £10 per week on and after the 1st April, 1893, and to £12 per week on and after the 1st Oct., 1894, and to continue at that rate until the 1st Oct., 1895, thus making the total engagement for three years. . . . The above payments are to be on the usual playhouse rules—namely, that salary is paid only for performances which have actually taken place, and that no salary shall be paid for any part of the time of this agreement during which the theatre is closed, the management having the right to close the theatre at any time they think fit. . . . The said Herbert Bunning undertakes faithfully to perform all duties which fall to the lot of the musical director, such as adapting music, composing small additions, &c., all of which duties are included in the above salary. The said Herbert Bunning having had no experience in conducting a theatre orchestra in England, it is agreed that he shall give his services up to the 1st Oct. free of charge in order to enable the management to judge as to his capabilities as a musical director. . . . Name to be announced in Standard and Telegraph, and on bills and programmes."

There was a complaint because Bunning was not employed as musical director, though his salary had been paid. In giving judgment, STIRLING, J., said (71 L.T. at p. 397):

> "It is expressly stipulated that the plaintiff's name shall appear as musical director, and what is intended is that such a state of things shall exist that the defendants shall be in the position truly to make such an announcement, or, in other words, that they shall employ him in that capacity."

In that case, as they had not employed him in that capacity, the learned judge granted him an injunction, though the salary was in fact paid. In those circumstances it appears to me plain that there is a current of legal authority to the effect that on breach of a contract by which a theatrical manager has engaged a person to play a part, damages additional to the amount of salary due can be recovered.

The only general authority, so far as I can see, on this point, is the judgment of MCCARDIE, J., in *Turpin* v. *Victoria Palace, Ltd.* (1). There the plaintiff, Mrs. Turpin, had entered into a contract. It is somewhat unfortunate that the report of the case, both in the LAW REPORTS and in "The Times," does not set out the material words of the engagement, but it would appear that the plaintiff was engaged to perform at the Victoria Palace at two performances every evening for the period stated in the agreement, and there was in the contract a provision by which the plaintiff was required to send to the defendant particulars of all matters for programmes, billing, and advertisements, and the words of all songs to be used during the engagement, and that there was power given to the management to prohibit any part of the performance that they considered unsuitable or displeasing to the audience, and to require a copy of songs to be forwarded for approval two weeks before being sung. The learned judge, in a long judgment, said ([1918] 2 K.B. at p. 547):

> "It is essential to inquire whether the present contract imposes on the defendants any obligation to allow the plaintiff to appear at their music hall on the dates fixed by the agreement."

He came to the conclusion that it did not, and I am bound to say that, unless there is some special provision in the contract which does not appear in the report, as at present advised, I should not be disposed to agree with that decision, because I should have thought that, if a person is engaged to appear in a company at a theatre, without naming any part, or any particular time, he is entitled to have a reasonable opportunity to perform, and a fortiori if he was engaged to perform at a music hall for a definite fortnight and at no other time. My own view would be that such a contract would have no meaning to the artiste unless that artiste had the right to perform, subject to the performance being in other respects in conformity with the contract.

My Lord has referred to the interesting case of *Newman* v. *Gatti* (2), where the engagement was of a lady to act as understudy to a named lady in a new play. In that case there was no doubt that the contract had been performed by allowing the lady to understudy. She had understudied the principal actress, and the only question was as to the meaning of the contract—whether an engagement to understudy gave the understudy the right to play the part when the principal was not present at the theatre. That was held to be a matter for explanation by theatrical usage, and the court came to the conclusion that upon the evidence, which they said was all one way, there was no such right in the understudy.

Therefore, the only question we have to determine here seems to me to be whether this case comes within the class of cases in which the management has agreed that the artiste shall play a part. It appears to me that nothing could be plainer than the express words in this case that the management promises to the artiste that she shall play the named part at a particular time, subject to

the management fixing the time for rehearsals. I will refer to the words once more. It is an agreement made between George Edwardes (Daly's Theatre), Ltd. (hereinafter called "the manager"), of the one part, and Miss Fay Marbé, of the Savoy Hotel, Strand, W.C.2 (hereinafter called "the artiste"), of the other part, whereby it is agreed as follows: (i) The manager engages the artiste to rehearse and play the part of Lolotte in the play called "Yvonne" from the date of the first rehearsal hereinafter stated at such times and at such theatres in the West End of London as the manager shall from time to time direct, and the artiste accepts the said engagement upon the terms and conditions herein appearing. (ii) The said engagement shall be (a) for the period of rehearsal hereinafter mentioned and the run of the play. The period of rehearsal shall commence on June 2, 1926, or not later than one week thereafter and shall end on a date to be determined by the manager. Then it provides that the engagement shall commence on June 12, 1926. There is a slight inaccuracy in that. What is meant is that the salary will commence then, because the artiste is engaged to rehearse on the terms of the standard contract, which are that artistes who receive a salary of more than a certain amount have to rehearse without any reward whereas artistes who are remunerated at a lower rate are paid for rehearsals.

That appears to me to be a quite definite promise on the part of the management that the artiste named shall play that part. They have no right to offer her any other part, and the artiste could have refused to play any other part. On the other hand, if the artiste had been unwilling or unable to play that particular part, then the management would certainly not have been bound by the contract, and possibly so if she were actually incompetent. As to that I do not decide. The result of that seems to me to be that on the contract as it stands, quite apart from any collateral matter, there was a plain obligation on the part of the defendants to allow the plaintiff to play the part of Lolotte. That engagement, it is admitted, was broken, and if it was broken it appears to me to follow that the plaintiff would be entitled to recover such damages as would flow, in addition to the salary, from the fact that she was not allowed to play the part. One has the authority of STIRLING, J., that the result of that would be that she is entitled to substantial damages. There can be no question but that in such circumstances every artiste would certainly consider that he had suffered damage, and probably every management would have to admit it. In this case the circumstances are similar to those raised in *Bunning* v. *Lyric Theatre, Ltd.* (7) where, by a collateral contract, it was plainly provided that there was an express promise to bill the lady and put her in the programme. Adopting STIRLING, J.'s reasoning, that means that the fact must exist which they promised to advertise—namely, that the lady shall play the part, and that she shall be advertised to play that part. That, again, makes it quite plain that there was an obligation that she should play the part.

The only other question that arises is that in regard to damages. That is a matter for the jury. I am bound to say that for a time I had some doubt about the damages, and it appeared to me that they were very substantial, but, on the other hand, the circumstances in this case seem to indicate that the plaintiff has suffered very substantial damages from the breach of this contract. It also is to be remembered that she was an American artiste with a high reputation coming to this country desiring to obtain and maintain a substantial English reputation, and she lost that opportunity. She had an engagement at Daly's Theatre, and the management refused to allow her to play. They admitted that the result of that was disastrous, and I think the jury were entitled to take into account not merely loss of an enhanced reputation that she would have had if the contract had been performed, but the injury to her existing reputation caused by the circumstances of the actual breach. I think the damages must have been well within the contemplation of the parties, because it was contemplated that she should be advertised up to the time of the play. She was advertised up to the time the play was produced, and then suddenly and unexpectedly she was not played. I

think that that factor is one to be taken into account as arising immediately out of the circumstances of the breach. For those reasons it appears to me that there is no need to say that the damages given by the jury are unreasonable and such as no reasonable man could give, and I see no reason for supposing that the jury, in giving them, took into consideration matters that they ought to have disregarded, or omitted matters that they ought to have considered. The result is that I think this appeal should be dismissed.

**LAWRENCE, L.J.**—I agree. The solution of the main question on this appeal depends, in my opinion, chiefly, if not entirely, upon the true meaning of the contract between the parties in this case. Many authorities have been cited in which the court has dealt with the rights of parties under contracts which differ, both in form and in substance, from the contract that we have to consider in the present case. In those circumstances, speaking for myself, I do not find much assistance in construing the contract here.

I think it is plain that contracts of employment, speaking broadly, fall under two distinct categories, the first being those contracts in which an employer enters into no greater obligation towards the employee than the payment of his remuneration, and does not himself engage to give the employee active occupation or work. This class of contracts is, perhaps, the most used. On the other hand, there is the other class of contracts in which the employer engages not only to pay the salary of the person whom he employs, but also to give him the opportunity of actually doing the work for which he engages him. Whether a particular contract falls within the first or the second of these categories depends, in my opinion, entirely upon the express words of the contract, or may depend upon the nature of the employment, or the nature of the remuneration which the employer agrees to give to the person whom he employs.

With these preliminary remarks I turn to the contract in the present case. It is a contract made between the manager of a theatre with an actress to rehearse and play a particular part in a given play. The period of the employment is stated in the contract, and also the commencement of that period. Now it is clear that the contract here is one which provides for the engagement for a period of rehearsal, and for a period of actually acting in the play when produced. The actress accepts that employment, and the manager agrees to pay her a salary of £100 a week from the commencement of the run of the play. In addition to that agreement there is also proved to have been an agreement entered into at the time of the signing of that contract, namely, that the defendants agreed, in consideration of the plaintiff entering into that agreement, to advertise her in a prominent position. Dealing with the wording of that contract, the first matter to be considered is: What does the word "engaged" mean? That is a flexible term, and I think it is not disputed that it is equivalent to the expression "agrees to employ." That may mean simply that the manager agrees to retain the services of the artiste, or it may mean that he agrees to give actual work to be done by the artiste—in other words, afford the artiste an opportunity of acting in accordance with the terms of the agreement. Bearing in mind that this is a contract made with an actress to play a particular part, and bearing in mind that in such a contract the nature of the employment has this element, that it is of importance to the person engaged in his or her profession that such employment should be real, and that he, or she, should be kept in that employment in order to keep herself, or himself, before the public, and bearing further in mind the definite nature of the employment stipulated for between the parties, I have come to the conclusion that the true meaning of the contract is that the defendants agree that the plaintiff shall, if the play is produced, have an opportunity of acting the part of Lolotte in the particular play called "Yvonne" during the run of the play. It was strenuously contended by both counsel for the defendants that the words in the first paragraph of the contract, namely, "at such times and at such theatres in the West End of

London as the manager shall from time to time direct," operated to give an option to the manager to say whether he would employ her to act in that part or not, and that in spite of the play being produced, and the run having commenced, at Daly's Theatre. In my opinion, that contention is ill founded. Read in conjunction with the rest of the contract, those words, in my judgment, only mean that the manager is to have the direction or control of the times at which, and the theatre at which, the rehearsals are to take place, or the play to be produced, and all that in accordance with the engagement which he has made to employ her. It involves that he may, in so far as is necessary, direct rehearsals at different theatres. It also may mean that if the production of the play takes place first at one theatre, and then at another, he may direct the theatre at which the actress is to act, and also fix the time of the commencement of the performance. It seems to me that it does not mean that he is at liberty to give a direction that she shall not act at all at any time, or at any place. Such a construction would, in my judgment, be inconsistent with the primary obligation contracted for by the parties that the manager was to employ the actress to rehearse and play the particular part.

It seems to me that, if that is the true construction, the question is one, not of enforcing any implied term in a contract, but of enforcing the express terms of the contract between the parties, and it follows from what I have said that there are two distinct obligations entered into by the manager, the one is to pay the salary and the other is to afford an opportunity to the actress to play her part. It further follows, in my judgment, that there has been a breach of the one term which is material for the purpose of this appeal—that is, the term to employ the actress in acting the part. There has been no breach of the agreement to pay the salary. There has been, as my Lord as said, an additional breach of the collateral agreement. But whether the breach has been of the primary agreement, or of the collateral agreement, there has been a substantial breach in this case of that term.

It follows also from what I have said that the jury were entitled to give damages for that breach. As regards the amount of the damages, I agree that they are very large, but after giving full consideration to all the facts, and after reading and considering the summing-up of the learned judge in the court below, I find myself unable to say that they are so large as to justify the court in coming to the conclusion that the jury arrived at that amount on a wrong basis, or that they are so excessive as to show that the jury were in some way misled by the speeches of counsel. For those reasons I agree that on the question of the breach of contract this appeal must fail, and be dismissed.

The only remaining point is that of the libel, and on that I agree with what has been said by my Lords. It seems to me that in the circumstances of this case the learned judge exercised a wise discretion on declining to rule at the close of the plaintiff's case that there was no case to go to the jury. It was a matter of discretion for him, and he decided to hear the evidence on the other side. That evidence having been given, I am clearly of opinion that there was evidence to go to the jury that there was malice in this case, and that the judge was right in leaving the question of malice to the jury. In the result the appeal fails on both grounds, and will be dismissed.

*Appeal dismissed.*

Solicitors: *Speechly, Mumford & Craig; Deacon & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

## Re DEBTOR (No. 883 of 1927)

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), December 2, 5, 1927]

B [Reported [1928] Ch. 199; 97 L.J.Ch. 120; 138 L.T. 440; 72 Sol. Jo. 85; [1928] B. & C. 1]

*Bankruptcy—Receiving order—Refusal—Abuse of process of court—Condition of consent to dismissal of previous petition arising out of same transaction—Demand for payment of costs for which debtor not liable—Bankruptcy Act*, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 5* (3).

C Creditors agreed that a bankruptcy petition which they had filed against a debtor should be dismissed on condition, inter alia, that the debtor should pay the whole of the costs as between solicitor and client of the proceedings taken by the creditors against him, and also of proceedings taken by them against a third party who was involved in the matters in respect of which the debtor became indebted to the creditors. The debtor failed to fulfil the D conditions imposed and the creditors then served a second bankruptcy notice and presented a second petition upon which the registrar made a receiving order. On appeal by the debtor,

**Held:** the terms imposed upon the debtor were an attempt to extort from him money which he was under no liability to pay, i.e., solicitor and client costs in the proceedings between himself and the creditors and costs incurred E by the creditors in proceedings against a third party, and were an abuse of the process of the court; it mattered not that that abuse was committed in the first, and not in the present, bankruptcy proceedings, which were founded on the same transaction; and, therefore, there was "sufficient cause" within s. 5 (3) of the Bankruptcy Act, 1914, why the receiving order should not have been made, and the petition would be dismissed.

F Per Lawrence, L.J.: An attempt, even though unsuccessful, to use bankruptcy proceedings to obtain a collateral advantage will be sufficient to disentitle a petitioning creditor from obtaining a receiving order.

**Notes.** For an illuminating examination of the rule regarding "extortion" in bankruptcy proceedings, see *Re A Debtor* (*No. 757 of 1954*), [1955] 2 All E.R. 65.

G Considered: *Re Judgment Summons* (*No. 25 of 1952*), *Ex parte Henlys, Ltd.*, [1953] 1 All E.R. 424. Distinguished: *Re A Debtor* (*No. 757 of 1954*), *Ex parte Debtor* v. *F. A. Dumont, Ltd.*, [1955] 2 All E.R. 65.

As to abuse of the process of the Bankruptcy Court see 2 Halsbury's Laws (3rd Edn.) 299, 300, and for cases see 4 Digest 158–160. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

H Cases referred to:

(1) *Re Atkinson, Ex parte Atkinson* (1892), 9 Morr. 193, C.A.; 4 Digest 158, *1488*.

(2) *Re Chapman, Ex parte Edwards* (1884), 13 Q.B.D. 747; 51 L.T. 881; 33 W.R. 268; 1 Morr. 238, C.A.; 5 Digest 641, *5761*.

(3) *Re G., Ex parte B.* (1900), 44 Sol. Jo. 345, C.A.; 4 Digest 159, *1490*.

(4) *Re Otway, Ex parte Otway*, [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 2 Mans. 174; 14 R. 389, C.A.; 4 Digest 159, *1489*.

I (5) *Re Shaw, Ex parte Gill* (1901), 83 L.T. 754; 49 W.R. 264; 45 Sol. Jo. 218, C.A.; 4 Digest 159, *1492*.

(6) *Re Sunderland*, [1911] 2 K.B. 658; 80 L.J.K.B. 825; 105 L.T. 233; 27 T.L.R. 454; 55 Sol. Jo. 568; 18 Mans. 123, C.A.; 4 Digest 160, *1495*.

(7) *Re Bebro*, [1900] 2 Q.B. 316; 69 L.J.Q.B. 618; 82 L.T. 773; 48 W.R. 561; 7 Mans. 284; sub nom. *Re M.B., Ex parte G.*, 44 Sol. Jo. 501, C.A.; 4 Digest 159, *1491*.

(8) *Re A Debtor* (*No. 20 of 1904*), *Ex parte The Debtor* (1904), 91 L.T. 664;

53 W.R. 223; sub nom. *Re Goldberg*, 21 T.L.R. 2, D.C.; affirmed 21 T.L.R. 139, C.A.; 4 Digest 159, *1493*.

**Appeal** from a receiving order in bankruptcy made by the registrar.

The facts appear in the judgment of the Master of the Rolls.

By s. 5 (3) of the Bankruptcy Act, 1914:

"If the court . . . is satisfied . . . that for . . . sufficient cause no [receiving] order ought to be made, the court may dismiss the petition."

*Clayton*, *K.C.*, and *Beyfus* for the debtor.

*R. Fortune* for the petitioning creditors.

The following cases were referred to in argument:—*Re Atkinson* (1), *Ex parte Edwards* (2), *Re G.* (3), *Re Otway* (4), *Re Shaw* (5), *Re Sunderland* (6).

**LORD HANWORTH, M.R.**—This is an appeal from an order of the registrar, who, on Nov. 1 last, made a receiving order against the debtor. The facts preceding that order are a little intricate and rather important. It appears that the debtor, who has served his articles but has not yet become a solicitor, is a man of no means. He got into touch with a man who was, in the name of a company, doing some underwriting, and this man asked the debtor to give him a cheque, dated July 22, 1926, payable to Messrs. Scott, Bros. & Co., who were, as I understand, brokers on the London Stock Exchange. The debtor signed a cheque for £500, and this cheque was used by the debtor's friend as a deposit payable under some underwriting agreement which had been entered into by a company called the Sherbourne Trust, Ltd., for the underwriting of 10,000 7 per cent. participating debenture stock of the Perak River Hydro-Electric Power Co., Ltd. At the time the debtor gave that cheque he tells us that he relied upon his friend to pay into his bank money which would enable the cheque to be met. I doubt if he had any valid assurance for such belief or hope, and one must take it that he did a very wrong thing in giving a cheque which would not be met, and could not be met, unless certain events followed which in the circumstances of the case were uncertain.

Messrs. Scott, Bros. & Co. took proceedings and on Nov. 3, 1926, obtained judgment against the debtor under Ord. 14 for £500 and £14 6s. costs. The debtor appealed to the judge and some further costs were incurred, but ultimately, founded upon that judgment of Nov. 3, Messrs. Scott, Bros. & Co. issued a bankruptcy notice dated Nov. 23, 1926, requiring payment of their debt and the costs. The debtor failed to comply with that bankruptcy notice within the specified time, and accordingly, on Dec. 3, 1926, a petition for a receiving order was filed by Messrs. Scott, Bros. & Co. The petition was adjourned and did not come on for hearing until January of this year, 1927. After that time further steps were taken to secure an adjournment in the hope that something might be done to relieve the debtor from the consequences of his act. Thus, on Jan. 8, 1927, the debtor's solicitors wrote to the solicitors acting for Messrs. Scott, Bros. & Co.:

"We are obliged for yours of yesterday and for your courtesy. The costs of the adjournment will of course be costs in the petition. With regard to the last paragraph of your letter there is no other petition on the file. With reference to the time—a fortnight—we think if you can possibly stretch this to a matter of three weeks we understand it will be of great assistance and will not prejudice your clients in any way."

On Jan. 10 the creditors' solicitors write:

"We are in receipt of your letter of the 8th inst. and we have no objection to your client having an adjournment of the petition for three weeks, subject to the conditions enumerated in our letter of the 7th inst. It must, however, be distinctly understood that should the amount of our clients' claim not be paid within this time, we shall be compelled to take a receiving order. P.S.: There is in addition to the amount mentioned in the petition the sum of

A £9 18s. 4d. due from your client in respect of his application to the Court of Appeal and the adjournment of the petition to which we are consenting is subject to your client agreeing to pay this amount when the amount mentioned in the petition is discharged."

There was also by that time the sum of £10 4s. 6d. which had been incurred on the appeal to the judge in the Ord. 14 proceedings and other costs, the total of the judgment debt and costs being £534 5s. 4d. Further adjournments took place until Mar. 8. On Mar. 7 the debtors paid £50, and on Mar. 15 the petition was dismissed.

It is important that I should pause there to see on what terms it was dismissed. I have referred to the letters securing an adjournment; on Feb. 28 the debtor wrote a letter to the creditors, Messrs. Scott, Bros. & Co., appealing for time and explaining that he had been misled into giving his cheque. He says:

"I now realise that I have to shoulder the responsibility, which unfortunately I am entirely unable to meet at the moment. I do therefore ask you to consider all the foregoing facts before taking the final steps, which will irretrievably ruin my career and which can be of no benefit to yourselves. I am as I have said ill at the moment, but I will get back to London within three days, when providing you can see your way to dismiss this petition, I will hand you the sum of £100 already mentioned and the balance within six months. I do ask you to consider this matter and accept these terms."

To that a reply to the debtor's solicitors was made on Mar. 2 by the creditors' solicitors to this effect:

"Our clients have handed to us a letter from your client purporting to have been written in Paris on the 28th ult. With regard to the specious explanations and excuses set out in that letter, we may at once say that neither our clients nor ourselves believe or accept them. Our clients are prepared to consent, if the registrar is agreeable, to the bankruptcy petition presented against your client being dismissed on the following terms being previously thereto complied with: (a) The payment of the whole of the costs as between solicitor and client incurred in connection with the proceedings they had to bring against the Sherbourne Trust, Ltd., and your client and which we are prepared to accept £160 in settlement of: (b) The payment of £100 towards reduction of the judgment debt of £500 with interest thereon as from Nov. 3, 1926, the date of the judgment: (c) The guaranteeing of the payment of the balance of this judgment debt with interest thereon until payment by George Stanley Brighten of your firm. We shall be glad to hear from you if your client is prepared to carry out these terms by the first post on Friday next, the 4th inst., so that we can at once submit to you the formal guarantee for approval, as the money must be paid and the guarantee given before the hearing of the adjourned petition on Tuesday next. We write without prejudice. P.S.: In the event of the petition being dismissed on the above lines, our clients will be prepared to wait a reasonable time for the payment of the above mentioned balance, say two or three months, but will not give any definite undertaking to wait six months."

To that a reply is made by Messrs. Brighten & Lemon on behalf of the debtor:

"We have your letter of the 2nd inst. and have seen our client thereon as he has now returned from Paris. We are instructed to answer as follows: (a) Our client is prepared to pay the proper taxed costs as between party and party with regards to which your clients would be entitled against him personally in the various proceedings; (b) Agreed; (c) Agreed. (Subject to a proper provision being made as to a reasonable time being given). In conclusion we would ask you to endeavour to keep this correspondence on the usual and rather higher plane of tone customary in business circles and particularly

between solicitors. After all it is not your individual views or ours which count—it is a question of your clients and our client and remarks calculated in an offensive tone do not tend to assist either you or ourselves in bringing to bear that clear consideration which is necessary in order to enable us to advise our respective clients."

In my judgment, that last letter was a perfectly proper letter to write. I can well understand this letter of Mar. 2 arousing a considerable amount of indignation on the part of those who received it. Let us pause to consider what it means. It means that this young man, whose means are nil, is asked, first, to pay an immediate sum of £100, and he is then asked to pay £160 in settlement of the solicitor and client costs incurred in connection with the proceedings that Messrs. Scott, Bros. & Co. had to bring against the Sherbourne Trust, Ltd., and the debtor. In respect of those solicitor and client costs against the debtor, the solicitors were not entitled to recover. Further, with regard to the costs that they had incurred against the Sherbourne Trust, Ltd., in respect of which the basis is solicitor and client costs, there was no shadow of foundation for seeking to recover those from the debtor. The term, therefore, under (a) which is inserted in the letter as an attempt for the price of the dismissal of the petition and the adjournment of the proceedings for an uncertain time against the debtor, is this: If you will pay us a sum on account of the debt which you owe, and give us a guarantee in respect of it, and if you will also pay someone else's debt which you do not owe, and pay us some costs which you do not owe, we will then agree, but not otherwise. I do not hesitate to characterise that demand as most improper. Those who are engaged in bringing bankruptcy proceedings must take care that their proceedings do not form an abuse of the process of the court; and to make a demand of this nature was mis-using an opportunity for the purpose of securing from the debtor, who was in a most difficult position—he has expressed in the letter of Feb. 28 that the ruin of his future career was involved—payment of a debt which he ought not to pay, and a sum which, apparently, the solicitors would have difficulty in recovering from the Sherbourne Trust, Ltd., and that at a quantum which neither the Sherbourne Trust, Ltd., nor the debtor could be asked to defray.

On Mar. 7 a sum of £50 was paid, and ultimately, on Mar. 15, the petition was dismissed on payment of a further sum of £144 15s. 4d. It is plain that the creditors' solicitors had reserved their right to take proceedings if the time which the debtor required was more than what they estimated as a reasonable time—say, two or three months—and they had made it quite clear that they had given no definite undertaking to wait for as long as six months. The matter came up again very soon, and a letter of June 14 was written by the creditors' solicitors:

"Referring to our interview with you on Friday last, the amount due on the judgment obtained by our clients against you is £400 and interest at 4 per cent. from the 15th March last. Our clients are willing to accept payment of this amount by the following instalments provided that interest at 4 per cent. is added to the instalments every month: £20 on the 1st July next, plus interest at 4 per cent. on £400, the balance of the amount of the judgment from the 15th March, 1927; £20 on the 1st Aug. next, plus interest at 4 per cent. for one month on the balance of the judgment; similar payment on the 1st Sept. next; £30 on the 1st Oct. next, with interest as aforesaid; similar payment on the 1st Nov. and 1st Dec. next; £50 on the 1st Jan., 1928, with interest as aforesaid"—

and similar payments until the debt was exhausted. Those terms are accepted by the debtor, but on July 2 the first instalment of £20 was not paid. Thereupon the debtor did a thing which he certainly was very wrong in doing; he again gave a post-dated cheque for £20. Inasmuch as he had not provided for the payment of interest, which was one of the terms, the creditors' solicitors asked for £4 9s. 2d.,

and again he sent a second cheque for £4 9s. 2d., asking that these cheques should not be presented until July 14. They were presented on July 1 and were dishonoured. Upon that, the solicitors served him with a bankruptcy notice on July 28. That was not complied with, so again the act of bankruptcy was complete on Aug. 5. There was some delay, but it is important to see what is the debt which forms the basis of the petition. The bankruptcy notice was founded upon this same debt; in the petition it is based upon the fact that the debtor is indebted in a sum of £405 6s. 8d. under and by virtue of a final judgment obtained in the King's Bench Division on Nov. 3, 1926, for £500 and £14 2s. 6d. costs. Then at the side there is the original judgment as set out, with the costs, £514 2s. 6d.; payment on account, £114 2s. 6d., leaving a sum of £400 due in respect of the old judgment debt to which interest has accrued, making it up to £405 6s. 8d. It is plain, therefore, that the petition is founded upon the original judgment, which formed the basis of the petition, which was dismissed in March, and the sum has only been reduced by the payment of £100.

The petition came to be heard on Nov. 1, and the registrar made an order against the debtor. There is no question about it that, in the ordinary course, this matter ought to have passed into bankruptcy. I do not for a moment palliate the conduct of the debtor ; he was wrong originally in giving his cheque for £500 ; he was wrong in giving his other two cheques which were dishonoured ; he had apparently no ground whatever for hoping that delay would afford him any real relief ; and it is only necessary to state the facts to show that blame attaches to him ; but by the time the matter came to be heard before the registrar certain payments had been made. There was the payment originally which took £50 off the debt which I have referred to, and there was the payment made on Mar. 15 on which the first petition was dismissed. The sum which was paid then was £144 15s. 4d., and of that sum £50 and no more was credited as against the debtor. The result was that by the payment on Mar. 7 and the payment on Mar. 15 £100 was reduced off the judgment debt, and it is for that £100 that credit is given in the petition. But there was this payment of £144 15s. 4d. and of that £94 15s. 4d. was taken in payment of costs of which £15 represented the margin of solicitor and client costs above the party and party costs to which the solicitors were entitled.

It seems clear that the debtor ought to be made a bankrupt, and in the ordinary course the receiving order was a perfectly right order to be made by the registrar ; but there is a principle which must be jealously guarded, and that is that the process of the Bankruptcy Court must not be abused. A number of cases have established that. I take *Re Otway* (4), in which the petitioning creditor endeavoured to obtain £25 from a debtor as a condition for agreeing to adjournment of the petition. It failed ; the petitioning creditor did not succeed, but, because he had attempted to get a sum in his own interest as the price of an adjournment from the debtor, the court held that he had attempted to extort money from the debtor for his own purpose, and it declined to allow him to have the advantage of using the process of the Bankruptcy Court against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred from using bankruptcy proceedings. Again, *Re Atkinson* (1) was a case in which, as a consideration for consenting to adjournments, various sums were paid, and it was held that the registrar was wrong in making a receiving order against the debtor, because where a bankruptcy petition had been made use of for an inequitable purpose, such as for the purpose of extorting money from the debtor, it is the duty of the court to refuse to make a receiving order. Then there is *Re Shaw* (5), where, again, a suggestion was made that the debtor should sign a promissory note. The debtor declined to accede to the suggestion, and on that transaction, Rigby, L.J., said :

> "If in the same transaction the fraud has been attempted, I think that a debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."

He agreed that the bankruptcy proceedings should not be permitted. Lastly, *Re G.* (3) was a case where there had been a first petition which was dismissed upon the terms of a new promissory note and a bonus of £20 paid to the creditor, and the old argument was used, as it always will be in these cases, that surely the creditor was entitled to ask that he should be recompensed for the indulgence thus granted and that it was unexceptional that his good will was secured upon the terms of a payment to himself, and it was also urged that that did not arise in the immediate bankruptcy proceedings which were before the court. LORD LINDLEY took the same view that the registrar has taken, that it was a case of extortion, and he upheld the view of the registrar. He says (44 Sol. Jo. at p. 346):

> "Now, there is nothing more familiar in bankruptcy than this—that we are always entitled to look behind the judgment ; and when we look behind the judgment in this case we find that the second promissory note was substantially, to some extent, obtained for extortion based on an abuse of the bankruptcy process."

It is said here that all that was done was that some £15 was obtained from the debtor in respect of costs which he did not owe, costs which were the difference between party and party costs and solicitor and client costs. That is not an accurate way of putting it ; the attempt was to get not only those costs which the solicitors were successful in getting, but it was an attempt to get a further sum of £160 in respect of costs which the debtor had no concern with at all. The whole principle of bankruptcy is that when an act of bankruptcy is committed there should be a fair distribution between all the creditors, and it is for that reason that the title of the trustee relates back to the earliest act of bankruptcy ; and thus, as in *Ex parte Edwards* (2), where payments were made, as the price of an adjournment, to the petitioning creditor's solicitor, who had paid them away to the creditor and agreed to the adjournment, the moneys had to be replaced, as that gave an advantage to a particular creditor which would not be shared on the basis of equality in bankruptcy proceedings. In the present case I have referred to the letter of Mar. 2. I do not know how it came to be written. I think it must have been written on behalf of the firm whose name it bears by some person with an imperfect knowledge of bankruptcy proceedings and actuated by too much zeal in the matter because one would not expect to find such a letter. I am not going to say more about it, except that within the authorities the letter demands a debt against the debtor which never ought to have been demanded, and that amounts to extortion. The letter resulted in getting a sum which the debtor was not liable to pay, a sum which ought to be replaced in the debtor's hands, a sum for which credit ought to have been given in the true estimate of what had been paid because, if it had not been taken by the solicitors for their solicitor and client costs, it must have been available to be appropriated to the debt which the debtor owed, and the amount would not be £400 but would be less by the amount appropriated to the solicitor and client costs. In these circumstances, it appears to be impossible that the court should allow the mis-use of its procedure by saying that a receiving order ought to be made in this case. It falls within s. 5 (3) where the court is satisfied that for sufficient cause no order ought to be made. For these reasons the appeal will be allowed and the receiving order will be dismissed with costs.

**SARGANT, L.J.**—I am of the same opinion. I need hardly say that the debtor has not my sympathy in the least. He seems to have been extraordinarily reckless and to have deserved to be made a bankrupt, but the appeal here is founded, not on any qualities of the debtor, but on alleged disqualification of the petitioning creditors by reason of what is, in bankruptcy proceedings, misconduct.

Counsel for the debtor, asked us to allow the appeal on three grounds. The third ground appears to me to be a ground fatal to the order, namely, the question of the actual obtaining of this £15 in excess of what the creditors were entitled to and,

what is much more important, the attempt to obtain £160 for costs as between solicitor and client in respect of a matter for which the debtor was in no way at all liable. To my mind, that is a demand which comes within the phrase "extortion" as it has been dealt with in a number of cases to which the Master of the Rolls has referred, and to which I will not refer again. I will only say this, that it was suggested by counsel for the creditors that *Re Shaw* (5) had been weakened by *Re Sunderland* (6). In my judgment, *Re Sunderland* (6) dealt with a totally different matter and in no way infringes on the principle of *Re Shaw* (5), and, indeed, in the judgment of BUCKLEY, L.J., there were, in my view, phrases which recognise the general principles of *Re Shaw* (5). To my mind, the attempt to obtain so large a sum as £160, costs due from some other person for which the debtor by the utmost stretch of imagination could not be deemed to be personally liable, was a very strong instance of an attempt to use bankruptcy proceedings—the threat of bankruptcy—for the purpose of obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditors. It is said that in some way or other that defect was cured by the fact that the petition on which the adjudicaion was asked to be made was a subsequent petition after this sum of £15 had been provided and the demand for £160 had been refused. Looking at the facts in this case, I think there is such a connection between the two petitions by the same creditors against the same debtor, that the circumstance that the petition is a subsequent petition and not the original petition makes no real difference. In substance, the petition which was deemed to be tainted in *Re Shaw* (5) seems to me to be tainted here, and to a very aggravated extent having regard to the large amount of the debt that was sought to be added to the liability of the debtor. I agree that in these circumstances it would be improper to allow a petition by the petitioning creditors who have been guilty of conduct so clearly amounting to disqualification according to the cases to prove successful.

**LAWRENCE, L.J.**—I agree. The debtor appeals against a receiving order which was made by the registrar on Nov. 1, 1927. The sufficiency of the debts and the act of bankruptcy are not disputed, but the debtor contends that the bankruptcy petition ought to have been dismissed because he has satisfied the court under s. 5 (3) of the Act of 1918 that for sufficient cause no receiving order ought to have been made against him. The debtor alleges that there are several sufficient causes for not making the receiving order, but the only one which seems to be of any substance is that the petitioning creditors on the occasion of the previous bankruptcy proceedings for the same debt have attempted to extort the payment of money for which the debtor was not liable as the price of allowing that petition to be dismissed, and that the attempt has partially succeeded. It is clear from the letter of Mar. 2, 1927, that the petitioning creditors made it a term of the dismissal of the previous bankruptcy proceedings that the debtor should pay the costs which the creditors had incurred in proceedings against the Sherbourne Trust, Ltd., and also the costs which the debtor had become liable to pay to them in proceedings against him, with this addition, that the payment was to include the difference between solicitor and client costs and party and party costs—a difference for which he was in no circumstances liable. Several answers are made on behalf of the petitioning creditors, but the main answer, was that this was not a case where the petitioning creditors were seeking to put money into their own pockets or to make a bargain, but were merely demanding money in order to save themselves from a loss. I confess I do not understand the difference between asking for a sum of money in order to save yourself a loss and asking for a sum of money in order to make a profit. In both cases the money is to go to the advantage of the person who receives it. It may be that he might utilise it for the payment of that or any other debt. A further answer was made as regards the costs of the Sherbourne Trust, Ltd., namely, that the demand for those was not pressed for. As regards the difference between solicitor and client costs and party and party costs of the

proceedings against the debtor himself it was said that that payment was not equitable, but was one for recouping the creditors for costs which they had had to pay owing to the conduct of the debtor. A

None of these answers, in my judgment, is sufficient for the purpose of obtaining an order from the court that the receiving order should stand. It cannot, in my opinion, be too clearly understood that bankruptcy proceedings, which are in their nature quasi-criminal, cannot be used for the purpose of obtaining a collateral advantage. An attempt, even though unsuccessful, to do so, will be sufficient to disentitle a petitioning creditor from obtaining an order, and, therefore, the fact that in the present case the debtor refused to pay the costs of the Sherbourne Trust, Ltd., and that that demand was not insisted upon does not absolve the petitioning creditors from the consequences of having made that demand. The principle upon which the court acts in these cases is that it treats a demand of this nature as evidence that the petition was presented not for the bonâ fide intention of obtaining adjudication, but for a collateral purpose. B C

I agree that the demand for solicitor and client costs for the action against the debtor stands on a footing somewhat different from that of the other matter, but it has this vice in it, that it was a sum for which the debtor was not legally liable, and that demand was agreed to and has, to a certain extent, succeeded. If these demands had been made in the proceedings now before the court, I should have had no hesitation in declining to make a receiving order upon the petition. Does it make any difference that the demands were made in previous bankruptcy proceedings ? Having studied the cases upon the subject I am of opinion that it does not. *Re G.* (3) and *Re Bebro* (7) show that the same principle applies to antecedent bankruptcy proceedings as they do in the case of the existing proceedings themselves. In both those cases there was some misconduct in a previous bankruptcy proceeding and a second petition was presented. In *Re G.* (3) antecedent proceedings were utilised for the purpose of obtaining a collateral advantage, that is to say, there was a bonus or higher rate of interest on the debt, and the second petition was then presented for the purpose of enforcing the arrangement which had been come to on the dismissal to the petition. *Re Bebro* (7) was the same kind of case, but the court held in the circumstances there that the arrangement was a bonâ fide arrangement made openly and without fraud on the other creditors, and, therefore, that the second bankruptcy petition was one that did not come within s. 5 (3) as showing sufficient cause for not making a receiving order. *Re Shaw* (5) and *Re A Debtor* (8) were of a different nature. They were cases in which before any bankruptcy proceedings had been commenced the debtor had sought to obtain a fraudulent advantage over the other creditors in connection with an assignment for the benefit of creditors in which they had tried to gain a secret advantage, and it was held that the petitions ought to be dismissed. *Re Sunderland* (6) was a similar case to *Re Shaw* (5) and *Re A Debtor* (8), but on the other side of the line. In that case it was held that the arrangement which the creditor sought to make on the occasion of the question of the assignment for the benefit of the creditors was a bonâ fide arrangement made openly and did not in any way prevent the creditor when his suggestion was not accepted from making the assignment for the benefit of the creditors the foundation of a subsequent petition. D E F G H

Applying the underlying principle of all those cases to the present case, it seems to me to be clear that in the present case the creditors have utilised bankruptcy proceedings themselves for the purpose of extorting, or attempting to extort, money from the debtor for which the debtor was in no sense liable. In other words, the petitioning creditors have utilised, or attempted to utilise, bankruptcy proceedings for a collateral purpose, and that is a thing which the court does not allow. For these reasons I agree that the appeal ought to be allowed and the receiving order be discharged. I

[*Reported by* H. Langford Lewis, Esq., *Barrister-at-Law.*]

# Re BOWER WILLIAMS. Ex Parte TRUSTEE

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), January 21, 1927]

[Reported [1927] 1 Ch. 441; 96 L.J.Ch. 136; 136 L.T. 752; 43 T.L.R. 225; 71 Sol. Jo. 122; [1927] B. & C.R. 21]

*Bankruptcy—Settlement—Avoidance—Intestacy of wife—Property devolving on husband jure mariti—Voluntary settlement by husband on daughter—Property "accrued to settlor in right of his wife"—Subsequent bankruptcy of husband—Bankruptcy Act*, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 42 (1).

A husband and wife married in 1913. In 1925 the wife died intestate, and the husband became entitled jure mariti to certain shares in a company which had belonged to her. The husband took out letters of administration to her estate and then made a voluntary settlement of the shares on certain trusts for the benefit of the daughter of the marriage and himself. Ten months later he was adjudicated bankrupt. On the question whether the property settled accrued to the husband "in right of his wife" within the meaning of the Bankruptcy Act, 1914, s. 42 (1), which provides that, with certain exceptions, any settlement of property shall, if the settlor becomes bankrupt within two years of the date of the settlement, be void against the trustee in bankruptcy,

**Held:** the property had accrued to the husband "after marriage in right of his wife" within the meaning of the exception in s. 42, and under that section the settlement, so far as the daughter was concerned, was valid against the trustee in bankruptcy.

*Smart* v. *Tranter* (1) (1890), 43 Ch.D. 587, applied.

**Notes.** Referred to: *Jagger* v. *Jagger*, [1926] P. 93.

As the avoidance of a voluntary settlement in bankruptcy see 2 Halsbury's Laws (3rd Edn.) 548–553; and for cases see 5 Digest 837–841. For the Bankruptcy Act, 1914, s. 42, see 2 Halsbury's Statutes (2nd Edn.) 379.

Cases referred to:

(1) *Smart* v. *Tranter* (1890), 43 Ch.D. 587; 59 L.J.Ch. 363; 62 L.T. 356; 38 W.R. 530, C.A.; 23 Digest (Repl.) 296, *3623*.

(2) *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch.D. 626; 57 L.J.Ch. 927; 59 L.T. 429; 23 Digest (Repl.) 296, *3622*.

(3) *Rees* v. *Cart* (1719), 2 Hag. Ecc. App. 161; 162 E.R. 1050; sub nom. *Cart* v. *Rees*, cited in 1 P.Wms. 381; 23 Digest (Repl.) 147, *1554*.

(4) *Squib* v. *Wyn* (1717), 1 P.Wms. 378; 24 E.R. 432, L.C.; 23 Digest (Repl.) 296, *3620*.

**Motion.**

A motion by the trustee in bankruptcy to set aside a voluntary settlement made by the debtor within two years of his bankruptcy. Astbury, J., held that the settlement was not void against the bankrupt under the Bankruptcy Act, 1914, s. 42. The trustee in bankruptcy appealed. The facts are set out in the judgment of Lord Hanworth, M.R.

*Tindale Davis* for the trustee in bankruptcy.

*F. Whinney* for the settlement trustees.

**LORD HANWORTH, M.R.**—This is an appeal from the judgment of Astbury, J., sitting in bankruptcy, dated Nov. 15, 1926. The appeal is by the trustee in bankruptcy and the respondents are the trustees of the settlement, the bankrupt being one of them. The bankrupt married his wife on May 20, 1913. On Mar. 30, 1925, she died intestate. On May 9, 1925, the husband took out letters of administration to her estate. On June 4, 1925, the bankrupt made a voluntary settle-

ment, the nature of which was this: there was a daughter of the marriage, and part of the property of the wife consisted of a certain number of shares in a private company, the articles of which contained a clause restricting the transfer of shares except to those who were members of the wife's family, these shares having come to the wife from her father. Owing to this difficulty of transfer, the husband, having become possessed of the shares, covenanted with the trustees of the settlement to hold them on trust to pay to the trustees out of the income for the benefit of the daughter during her life the yearly sum of £200, the balance of the income and the corpus to be for his own benefit. Notice of this settlement was given to the company in July, 1925. Unfortunately the husband got into difficulties, and on April 15, 1926, a receiving order was made against him, and on April 26, he was adjudicated bankrupt.

Section 42 of the Bankruptcy Act, 1914, which is in pari materia and almost identical in terms with s. 91 of the Bankruptcy Act, 1869, provides, by sub-s. (1), that

> "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy,"

subject to certain provisions which I need not recount. The trustee in bankruptcy says that the bankrupt has made a settlement, and that he became bankrupt within two years from its date, and hence that it is void as against him. No question arises as to the interest taken by the bankrupt under the settlement, but what is said is that the settlement, so far as the daughter is concerned, is equally void under the section. The answer of the trustees of the settlement is that the operation of the section is excluded in the case of the daughter because the section excepts settlements made "on or for the benefit of the wife or children of the settlor of property which has accrued to him after marriage in right of his wife," and they say that this property came to the bankrupt only in right of his wife, and that it is a settlement for the child of this marriage alone. To that the trustee in bankruptcy replies that, since the Married Women's Property Act, 1882, although the husband in the wife's intestacy becomes administrator of the wife's estate, yet so far as he takes anything he does not take it in right of his wife, and that, under the Act of 1882, the property of a married woman is held by her completely free from the husband in respect of all rights which formerly accrued to him jure mariti.

The question, therefore, is whether the property settled is property which accrued to the husband in right of his wife. There is no question as to its being for a child, or its accruing after marriage, so, in effect, we have only to construe the meaning of those five words "in right of his wife." Counsel for the trustee in bankruptcy, in the course of an interesting argument, said that those words were only retained in the Act to meet the case where there had been a marriage before the Married Women's Property Act, 1882, and that in all cases where the Act operates there is no scope for the words of the section. It becomes, therefore, necessary to see what was and is the position of a husband. It appears to me that the point raised has been decided by a case which is binding on this court, but in deference to the argument which has been addressed to the court, I will call attention to how the matter stands historically. It appears that originally an administrator took beneficially such residue as fell into his hands. The Statute of Distributions altered the law as to administrators generally, and removed that loose privilege, and a doubt arose whether or not the husband's rights in respect of the wife's property were cut away if he acted as administrator of his wife's estate. Consequently, by the Statute of Frauds, s. 24, it was provided that

A "Neither the Statute of Distributions nor anything therein contained shall be construed to extend to the estates of femes coverts that shall die intestate, but that their husbands may demand and have administration of their rights credits and other personal estates and recover and enjoy the same as they might have done before the making of the said Act."

B That means that the husband, as administrator of his wife, took all the property he was entitled to take jure mariti, and he got the legal title by the grant of administration. But what was the relation of the husband to the wife's property which lay outside the hands of the wife when she died ? I am reading from Lush on Husband and Wife (3rd Edn.), p. 66, where he says :

C "Marriage was only a qualified gift to the husband of the wife's choses in action. It depended upon himself whether he made them his absolute property or not. If he brought the outstanding fund under his own exclusive control and dominion, by obtaining payment, or otherwise—if, as it was said, he reduced it into possession—during the coverture, the wife's right was gone. But if he did not, her choses in action remained her property, and upon the husband's death in her lifetime she was entitled to them as against his legal personal

D representatives."

Now here we have shares which are choses in action, and the husband would have to take out administration to bring them into his hands. We have been referred to two cases in which the property was not reduced into possession during marriage, and which the wife held after the Married Women's Property Act, 1882.

E Stirling, J., in *Re Lambert's Estate, Stanton* v. *Lambert* (2), after dealing with the two Acts to which I have referred, said this (39 Ch.D. at p. 630) :

"Accordingly the husband, when living, was absolutely entitled to be the administrator of his wife. After his death, however, there were cases in which the Ecclesiastical Court considered itself bound to grant administration to the next of kin of the wife. Nevertheless, in equity, the title of the husband

F prevailed, and the administrator of the wife was held to be a trustee for the legal personal representative of the husband."

Then he cites cases and continues :

"The equitable interest of the husband vested on the death of the wife, and passed not merely to his legal representatives, but to his assignees in

G bankruptcy."

Now what is the effect of that ? It is said that though by the Statute of Frauds he is entitled to be administrator, yet what he takes he takes as administrator, that he does not take anything which reaches him jure mariti, as husband. It is said that that is how the situation has been completely altered since 1882, that the

H right of the husband now is no more than the statutory right to be administrator, and that that does not fulfill the words of s. 42 "in right of his wife." In *Smart* v. *Tranter* (1), Lord Lindley, in a judgment which is binding on us said (43 Ch.D. at p. 596) :

I "It is clear that since the Statute of Frauds, if the husband takes out administration, he can get the reversionary choses in action of the wife ; but if he does not, the Statute of Frauds does not in terms apply. That doubt was raised and solved very early in the case of *Cart* v. *Rees* (3), which is stated in the following terms by Cowper, L.C., when giving judgment in *Squib* v. *Wyn* (4) (1 P.Wms. at p. 381) :

'A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord Parker held that the administrator to the wife was but a trustee for the executor of the

husband, the right to the wife's choses in action being, by the Statute of Distributions, vested in the husband, as next of kin of the wife ; and whereas there is a proviso in the Statute of Frauds saying that the Statute of Distributions shall not extend to the estates of femes coverts who die intestate, but that their husbands may have administration of their personal estate, as before the making the Act, his Lordship said, this clause was made in favour of the husband, and not to his prejudice ; so that it was intended by the Parliament that the husband should be within the Statute of Distributions, so as to take the wife's choses in action, as to his benefit, but should not be within the same as to his prejudice ; and that this was not a new point, but had been settled, and upon very good reason ; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute.' "

That shows very clearly that the relation of husband and wife secures that administration shall be granted to the husband, and if granted to a person other than the husband, that person would hold for the husband ; because the beneficial interest in the wife's property vested in him on her death, though certain steps had to be gone through, because he was entitled to be treated as being in a higher position than next of kin for the reason that he was the husband. So I think that here the husband takes because he is the husband, not because he is the administrator. I think the judgments of COTTON, L.J., and LORD LINDLEY both make that clear. A little further on LORD LINDLEY says :

"There is now no doubt as regards the choses in action of the wife not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity ; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in PEERE WILLIAMS."

For these reasons, and because that case is binding on this court, it appears to me that we must hold that the beneficial interest in these shares accrued to the bankrupt in right of his wife, and therefore, the settlement on the daughter remains good. The appeal, therefore, fails and must be dismissed.

**SARGANT, L.J.**—I am of the same opinion. The question is whether the settlement made by the bankrupt is void against the trustee in bankruptcy under s. 42 of the Bankruptcy Act, 1914. Under that settlement, the daughter took £200 a year for life. The rest of the income of the property was settled on the bankrupt for life and the corpus on the survivor of the husband and daughter. No practical question arises as to the beneficial interest of the bankrupt himself under the settlement, for this would undoubtedly pass to his trustee in bankruptcy without any avoidance of the settlement. The sole practical question is as to the retention by the daughter of the beneficial interest given to her by the settlement. She was the daughter of the wife of the bankrupt, who was married to him on May 20, 1913, and died intestate on Mar. 30, 1925, and the property consisted of shares in a private company which belonged to the deceased wife, and to which the bankrupt became entitled on her death.

The sole question is whether the property was property which had accrued to the bankrupt in right of his wife, within the meaning of s. 42 of the Bankruptcy Act, 1914, and it is conceded that all the words of the exception are satisfied except those words. The judge below has decided that the property accrued in the right of the wife, and, in my opinion, he was right in so holding. It was argued against this that the bankrupt did not take the property in right of his wife by virtue of his

A title as her husband, but because he had constituted himself administrator of his wife's estate. I think that this is not so, and that that is shown by *Smart* v. *Tranter* (1) and in *Re Lambert's Estate* (2) where it is recognised that, on the death of the wife intestate, the husband at once becomes entitled to the full beneficial interest in the choses of the wife, and the process of taking out administration is only a process of reducing them into possession. It is only a method of com-
B pleting his legal title and has no bearing on any beneficial interest in the property. The beneficial title is the main thing we have to consider, but even if we have to regard the taking out of administration as an essential step, those two cases show that the right which the husband got to take out administration was because he was the husband of his deceased wife, and so the need to take that step does not prevent the husband from being entitled to the property in right of his wife.
C Counsel for the trustee in bankruptcy sought to limit the jure mariti to a right which the husband exercises during coverture, but, in my view, the term "jure mariti" also includes the rights which a husband may have on her decease, including the right to take out letters of administration in order to get possession of her property. If, as I think, the husband, as husband, has a right to get the property of his wife, it is impossible to say that he does not get it "in right of his
D wife." The appeal must be dismissed.

**LAWRENCE, L.J.**—The question is whether the property settled by this settlement does not fall within the exception in s. 42 of the Bankruptcy Act, 1914, as property which has accrued to the bankrupt after marriage "in right of his wife." The property consists of shares in a limited company which stood in the name
E of the bankrupt's wife at her death. It is not disputed that the beneficial interest in these shares vested in the bankrupt on the death of his wife, but it was strenuously contended that, as the husband took no interest in the shares during his wife's lifetime, they did not accrue to him in right of his wife. It is said that the words "in right of his wife" in the exception in s. 42 only apply to property acquired by the husband during the coverture, and are not applicable to property
F acquired by the husband after the determination of the coverture and in respect of which property it is necessary to take out letters of administration. There is no authority which binds the court to confine the language of s. 42 in that way. The property accrued to the bankrupt solely by virtue of his position as husband. Further, the beneficial interest would have vested in him, whether letters of administration had been taken out by him or by some other person. In my
G opinion, the shares were property which accrued to him "in right of his wife," within the ordinary meaning of that expression. I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Osborn & Osborn; Teff & Teff.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-law.*]

# SOCIÉTÉ ANONYME DES GRANDS ESTABLISSEMENTS DE TOUQUET PARIS-PLAGE *v.* BAUMGART

[KING'S BENCH DIVISION (Shearman, J.), February 24, 1927]

[Reported 96 L.J.K.B. 789; 136 L.T. 799; 43 T.L.R. 278]

*Gaming—Money lent for—Recovery—Loan made abroad where gaming lawful —Action on security, alternatively for money lent—Gaming Act*, 1710 (9 *Anne*, *c.* 14), *s.* 1, *as amended by Gaming Act*, 1835 (5 *& 6 Will.* 4, *c.* 41), *s.* 3.

The defendant cashed in France, where gaming was not illegal, three cheques with the plaintiffs for the purpose of obtaining money for gaming in France. The cheques were drawn on an English bank, and they were all dishonoured on presentation. The plaintiffs sued the defendant on the cheques, and, in the alternative, claimed the money as money lent to the defendant. The defendant contended that the money was not recoverable under the Gaming Act, 1710, s. 1, as amended by the Gaming Act, 1835, s. 3.

**Held:** the plaintiffs could not sue on the cheques (*Moulis* v. *Owen* (1), [1907] 1 K.B. 746, applied), but, since the money was lent in France for gaming which was lawful in France and could have been recovered there, the plaintiffs were entitled to sue in England as for money lent to the defendant. *Robinson* v. *Bland* (2) (1760), 2 Burr. 1077, *Quarrier* v. *Colston* (3) (1842), 1 Ph. 147, and *Saxby* v. *Fulton* (4) [1909] 2 K.B. 208, applied.

**Notes.** Considered: *Carlton Hall Club, Ltd.* v. *Laurence*, [1929] All E.R. Rep. 605.

As to gaming transactions taking place abroad, see 18 HALSBURY'S LAWS (2nd Edn.) 182–183; and for cases, see 25 DIGEST 420–421. For the Gaming Act, 1710, s. 1, as amended, see 10 HALSBURY'S STATUTES (2nd Edn.) 737.

Cases referred to:

(1) *Moulis* v. *Owen*, [1907] 1 K.B. 746; 76 L.J.K.B. 396; 96 L.T. 596; 23 T.L.R. 348; 51 Sol. Jo. 306, C.A.; 25 Digest 420, *240*.

(2) *Robinson* v. *Bland* (1760), 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull. N.P. 275; 97 E.R. 717; 25 Digest 420, *239*.

(3) *Quarrier* v. *Colston* (1842), 1 Ph. 147; 12 L.J.Ch. 57; 6 Jur. 959; 41 E.R. 587, L.C.; 25 Digest 421, *243*.

(4) *Saxby* v. *Fulton*, [1909] 2 K.B. 208; 78 L.J.K.B. 781; 101 L.T. 179; 25 T.L.R. 446; 53 Sol. Jo. 397, C.A.; 25 Digest 421, *245*.

**Action.**

The plaintiffs were the proprietors of the casino at Le Touquet. In August, 1926, they cashed three cheques for the defendant—two for £100 each and one for £200. All three cheques were drawn on an English bank, and they were all dishonoured on presentation. The plaintiffs sued the defendant on the cheques, and in the alternative claimed £400 as for money lent to the defendant. The defendant pleaded that the money he obtained on the cheques was given to him for the purpose of gaming and the plaintiffs knew that it would be so used, and, therefore, it was not recoverable in law under the Gaming Act, 1710, s. 1, as amended by the Gaming Act, 1835, s. 3. It was proved in evidence that the money was advanced chiefly for the purpose of gaming at the casino. It was also proved that, according to French law, gaming was not illegal, and that an action would lie in the French courts both on the cheques and for the money as lent for gaming.

*J. B. Melville* for the plaintiffs.

*J. B. Mathews, K.C.*, and *Goodman* for the defendant.

**SHEARMAN, J.**—I do not think this exact case has ever been decided. The facts are that, in my view, and according to my finding of fact, the defendant, having lost money at cards, went to the manager of the casino and borrowed three sums of money by way of exchanging his cheques for French notes. In my view, the manager knew that the notes which were advanced against the cheques were to be used to a large extent in games. I do not want to go at length into the nature of the games. They are illegal and unlawful games in this country. I am satisfied that the playing of those games is lawful in France. I am satisfied by the evidence of the French advocate that an action for money lent for the purpose of being used for gaming at those games can be enforced in the French courts. I accept the evidence of the French advocate that one could sue in France on the loan if one wanted to instead of suing on the security which was given for the loan. One has the same option in France, when a negotiable security is given to cover a loan or another consideration, of discarding your negotiable security and suing on the loan.

It is well decided by *Moulis* v. *Owen* (1) that if the plaintiffs sue on the cheque they cannot succeed. I need not go into the reasons. There was a dissentient judgment, but that is the settled law which binds me. On the other hand, the cheque has been disregarded, and, relying principally on the original case of *Robinson* v. *Bland* (2), and partly relying on *Quarrier* v. *Colston* (3), it has been decided that, if there is no cheque given, and if there is merely a parol contract to lend money to game abroad at games which are lawful abroad but unlawful here, then I am bound by authority that one can sue. It is a curious state of affairs, because in this case there is an alternative claim, both on the cheque and on the consideration for the cheque, but, in my view, although it is a curious state of affairs, I think the plaintiffs are entitled to succeed. This money was lent in France. It could have been recovered in France. It could have been paid back in France. Having regard to the dicta and the reasons given in *Robinson* v. *Bland* (2), *Quarrier* v. *Colston* (3), and *Saxby* v. *Fulton* (4), it seems to me that that is the line of cases I have to follow. Although it may make rather curious results, that one succeeds or does not succeed according to how one frames one's action, I am not prepared to hold that the plaintiffs here could have succeeded if they had not taken a cheque, but because they took a cheque they cannot succeed. That does not seem to be reasonable, nor does it seem to be in accordance with the authorities. I am satisfied that the plaintiffs are entitled to sue in this country on their alternative claim, and that on the alternative claim they are entitled to succeed. I, therefore, give judgment for them for money lent.

*Judgment for plaintiffs.*

Solicitors: *Burnett L. Elman; Redding, Bloomer & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

## Re DEBTOR (No. 229 of 1927)

[Court of Appeal (Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.), May 20, 1927]

[Reported [1927] 2 Ch. 367; 96 L.J.Ch. 381; 137 L.T. 507; [1927] B. & C.R. 127]

B

*Bankruptcy—Receiving order—Rescission—Act of bankruptcy founded on voidable contract—Moneylender's petition—Commission paid by moneylender to borrower's agent without borrower's knowledge—Prevention of Corruption Act*, 1906 (6 *Edw.* 7, *c.* 34), *s.* 1 (1)—*Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 5 (3).

C

L., acting as agent for the debtor, negotiated a loan for him with a moneylender, the petitioning creditor, of £60 on the debtor's promissory note for £100. The debtor paid L. a commission, and, without his (the debtor's) knowledge, the petitioning creditor also paid him a commission. The petitioning creditor, having obtained judgment against the debtor for the amount of the promissory note in default of appearance by the debtor, issued a bankruptcy notice based on the judgment. The debtor failed to comply with the bankruptcy notice and the petitioning creditor presented a bankruptcy petition against him. On the hearing of the petition before the registrar, it appeared for the first time that the petitioning creditor had paid a commission to L. The registrar made a receiving order against the debtor holding that, although L. was, no doubt, the agent of the debtor, he was not satisfied that he was acting solely as the debtor's agent.

D

E

**Held:** the transaction was so corrupt as to be voidable under the Prevention of Corruption Act, 1906, s. 1 (1); the act of bankruptcy being founded on a contract voidable by the debtor, the court ought not to be satisfied with the proof of the petitioning creditor's debt within the meaning of the Bankruptcy Act, 1914, s. 5 (3); and, therefore, the receiving order must be rescinded.

F

**Notes.** Considered: *Industries and General Mortgage Co.* v. *Lewis*, [1949] 2 All E.R. 573.

As to receiving orders, see 2 Halsbury's Laws (3rd Edn.) 313 et seq.; and for cases, see 4 Digest 153 et seq. As to corruption of agents, see 1 Halsbury's Laws (3rd Edn.) 226–228. For the Prevention of Corruption Act, 1906, s. 1, see 5 Halsbury's Statutes (2nd Edn.) 924, and for the Bankruptcy Act, 1914, s. 5, see 2 Halsbury's Statutes (2nd Edn.) 332.

G

Cases referred to:

(1) *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369; 68 L.J.Q.B. 360; 80 L.T. 11; 15 T.L.R. 145, C.A.; 1 Digest 485, *1638*.

(2) *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515; 45 L.J.Ch. 121; 32 L.T. 517; 23 W.R. 583, C.A.; 1 Digest 484, *1635*.

H

(3) *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624; 74 L.J.Ch. 673; 93 L.T. 627; 54 W.R. 231; 21 T.L.R. 742; 12 Digest (Repl.) 304, *2339*.

(4) *Bonnard* v. *Dott*, [1906] 1 Ch. 740; 75 L.J.Ch. 446; 94 L.T. 656; 22 T.L.R. 399, C.A.; 35 Digest 204, *302*.

I

(5) *Whiteman* v. *Sadler*, [1910] A.C. 514; 79 L.J.K.B. 1050; 103 L.T. 296; 26 T.L.R. 655; 54 Sol. Jo. 718; 17 Mans. 296, H.L.; 35 Digest 204, *294*.

(6) *Cornelius* v. *Phillips*, [1918] A.C. 199; 87 L.J.K.B. 246; 118 L.T. 228; 34 T.L.R. 116; 62 Sol. Jo. 140, H.L.; 35 Digest 207, *327*.

(7) *Re Flatau, Ex parte Scotch Whisky Distillers, Ltd.* (1888), 22. Q.B.D. 83; 37 W.R. 42; 5 T.L.R. 5, C.A.; 5 Digest 324, *3043*.

(8) *Re Fraser, Ex parte Central Bank of London*, [1892] 2 Q.B. 633; 67 L.T. 401; 36 Sol. Jo. 714; 9 Morr. 256, C.A.; 4 Digest 324, *3038*.

(9) *Re Van Laun, Ex parte Chatterton*, [1907] 2 K.B. 23; 76 L.J.K.B. 644; 97 L.T. 69; 23 T.L.R. 384; 51 Sol. Jo. 344; 14 Mans. 91, C.A.; 4 Digest 326, *3058*.

(10) *Re A. H. Van de Heydt* (June 20, 1919), C.A., unreported.

(11) *Bartram & Sons* v. *Lloyd* (1904), 90 L.T. 357, C.A.; 1 Digest 485, *1640*.

(12) *Re Lennox, Ex parte Lennox* (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest 154, *1453*.

(13) *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549; 47 L.J.Q.B. 594; 39 L.T. 120; 42 J.P. 744; 26 W.R. 740; 1 Digest 480, *1603*.

(14) *Smith* v. *Sorby* (1875), 3 Q.B.D. 552 n.; 30 J.P. Jo. 100; 1 Digest 485, *1636*.

**Appeal** by the debtor from a receiving order made against him on May 13, 1927, by Mr. Registrar Mellor.

The facts appear in the judgment of Lord Hanworth, M.R.

*Edward Clayton, K.C.*, and *Harold Simmons*, for the debtor, referred to *Shipway* v. *Broadwood* (1); *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (2); *Victorian Daylesford Syndicate, Ltd.* v. *Dott* (3); *Bonnard* v. *Dott* (4); *Whiteman* v. *Sadler* (5); *Cornelius* v. *Phillips* (6); *Re Flatau, Ex parte Scotch Whisky Distillers, Ltd.* (7); *Re Fraser, Ex parte Central Bank of London* (8); *Re Van Laun, Ex parte Chatterton* (9); and *Re A. H. Van de Heydt* (10).

*H. J. Wallington*, for the petitioning creditor, referred to *Re Van de Heydt* (10), and *Bartram & Sons* v. *Lloyd* (11).

**LORD HANWORTH, M.R.**—In this case we have to deal with the facts and the decision come to on them by the registrar who made a receiving order on May 13, 1927. P. Bennett was a moneylender. The debtor, the present appellant, was, in the early part of last year, anxious to raise money and employed a Mr. Latter to introduce him to a moneylender and as his agent to negotiate a loan with the moneylender. The debtor was thirty-five years of age and had since 1922 four previous transactions with moneylenders. The present transaction was negotiated by Mr. Latter, whose business was the negotiation as agent of such transactions, and from him the debtor had received a circular. I have not looked at that circular as I have not thought it necessary, no reliance having been placed on it. It is clear that Mr. Latter got into touch with the debtor and, acting as his agent, took him to Mr. Bennett, the moneylender. The evidence as to that is agreed. The debtor says: "I paid Latter £6 commission; I did not know Bennett was paying him anything." The petitioning creditor said: "I negotiated with Latter the terms of the loan. He is not a partner of mine." It is clear that Mr. Latter came to the lender as the acknowledged agent of the borrower and that Mr. Latter gave assistance to his client, the debtor. On those terms the transaction was entered into. The amount to be lent was agreed at £60, and for that a promissory note was taken by the petitioning creditor for £100. The terms of the loan were very hard, but the case does not turn on whether the charge made for interest should be re-opened. It is, therefore, unnecessary to form an opinion whether the amount of the interest charged should stand. The petitioning creditor says: "I paid Latter a commission of 7½ per cent. on the £60 I lent." It is clear that the debtor knew nothing of that commission paid by the petitioning creditor to Mr. Latter. It is also clear from the evidence that a commission was paid to Mr. Latter on this transaction which was not revealed, as it ought to have been, to the debtor, and it was paid by the petitioning creditor to Mr. Latter without the knowledge or consent of the debtor. The registrar says: "Although Latter was no doubt the agent of the debtor I am not satisfied that he was acting solely as the debtor's agent. Nor am I satisfied that in the circumstances of the present case Latter acted corruptly in accepting the commission of 7½ per cent. from the petitioning creditor." It is plain, as the matter stands, that the commission was paid to Mr.

Latter for acting in the matter in the interests of the lender and without the knowledge or consent of the debtor. A

I respectfully agree with what was said by CHITTY, J., in *Shipway* v. *Broadwood* (1) ([1899] 1 Q.B. at p. 373) that

> "Directly it is established that money was paid or promised to the agent of the other party, it is quite unnecessary to go further and see what effect that had on the mind of the person to whom it was paid or to be paid." B

It would appear, therefore, that if money were paid by the lender to the borrower's agent without the consent of the borrower, whose agent Mr. Latter was, that is sufficient. Counsel for the petitioning creditor has suggested that there is nothing to show that the commission paid by the lender to Mr. Latter was not paid as a matter of generosity, or that it altered, to the debtor's disadvantage, the terms of the loan or induced Mr. Latter to act against the interest of his principal, the debtor, and that such a commission was not fraudulent unless paid with the object of inducing Mr. Latter to act in the interest of the lender only, and that the only question was: Did the lender pay it with a dishonest motive? But it seems to me, following the *Shipway Case* (1), that, if a sum is offered by the moneylender to the borrower's agent, it can only be accepted with the knowledge and assent of the borrower. C D

By a writ issued on Jan. 26, 1927, an action for repayment of £100 due on the promissory note was commenced by the petitioning creditor. The debtor did not enter an appearance in the action and judgment on Feb. 5 was given against him by default. On Feb. 16 a bankruptcy notice was issued, based on the judgment obtained in that action, requiring payment of £105 12s. 6d. within seven days. It appears that, after the writ was issued, £5 was paid by the debtor reducing the amount due on the promissory note to £95, and that the petitioning creditor obtained judgment for £105 12s. 6d. made up of the £95, £3 5s. interest and £7 7s. 6d. costs. The debtor failed to comply with the bankruptcy notice, and on Mar. 1, 1927, a bankruptcy petition was presented again him. On Mar. 31 an application was heard for a receiving order, and on May 13 a receiving order was made against the debtor. After evidence had been given on the hearing of the petition, from which it appeared for the first time that a commission had been paid by the lender to Mr. Latter, the point was taken that the payment of commission by the lender to Mr. Latter was so corrupt as to void the whole transaction and brought the case within the provisions in s. 1 (1) of the Prevention of Corruption Act, 1906, and cases were cited in support of that contention. *Victorian Daylesford Syndicate, Ltd.* v. *Dott* (3), before BUCKLEY, J., was cited, whose judgment in that case was approved by the Court of Appeal in *Bonnard* v. *Dott* (4) ([1906] 1 Ch. at p. 747 n), and also *Whiteman* v. *Sadler* (5). Those cases go to show that, where there is a criminal act, the contract is tainted by that act and cannot be relied on. They are clear authority that Mr. Latter could not recover commission from the petitioning creditor, and the petitioning creditor could not enforce any contract with Mr. Latter. But the question is how far that affects the contract between the petitioning creditor and the debtor. The act of bankruptcy in this case was committed by a man who, if and when he knew the facts, had the right to set aside the contract as voidable, as follows from the decision in *Shipway* v. *Broadwood* (1) and from what was said in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (2) that such a contract is voidable. The debtor did not know until the hearing before the registrar that, at the time of the transaction, he, being unaware of the commission given by the petitioning creditor to Mr. Latter, was entitled to declare the contract void and, therefore, now having discovered his right he is entitled to set it up, though it is said that, as he did not put forward his right before he cannot now rely on it. It was argued before the registrar that the transaction ought not to E F G H I

A be treated as one originally voidable or void, as the borrower never offered to pay back the money borrowed.

In what circumstances the court can go behind a judgment was considered in *Re Lennox, Ex parte Lennox* (12), and also in *Re Fraser, Ex parte Central Bank of London* (8), where Lord Esher, M.R., said ([1892] 2 Q.B. at p. 636):

B "The decision is based upon the highest ground, viz., that in making a receiving order, the court is not dealing simply between the petitioning creditor and the debtor, but is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the court ought not to exercise this extraordinary power unless satisfied that there is a good debt due to the petitioning creditor."

C Applying that principle in the present case, as the act of bankruptcy was founded on a contract voidable by the debtor, ought the court to be satisfied that the proof of the petitioning creditor's debt, or the act of bankruptcy, was a good one, and if not, under s. 5 (3) of the Bankruptcy Act, 1914, dismiss the petition? That sub-section is as follows:

D "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

In this case, in my opinion, the act of bankruptcy being founded on a debt in respect of a voidable contract, the court ought not to be satisfied with the proof E of the debt.

We have been referred to *Re A. H. Van de Heydt* (10) in this court, in which the question of the payment of an improper commission arose. An amendment was there allowed by the registrar substituting a claim for money lent in lieu of a claim for the balance due on a promissory note. The court decided that the amendment ought not to have been allowed and held that the contract was voidable and F not void. Warrington, L.J., said:

"I think that the registrar should have left the petitioner to such right of enforcing liability as he might have. By the 3rd April there was no available act of bankruptcy, but I do not rely upon that, but on a more general ground."

G And the appeal was allowed, the general ground being that the court will not help a creditor who is basing his claim to a sum on one ground, but which in the bankruptcy he has claimed on a totally different ground. I hold, therefore, that, in accordance with s. 5 (3), the court is not satisfied with the proof of the petitioning creditor's debt, that no alteration ought to be allowed in the nature of the petitioning creditor's claim and that there is sufficient cause for the court to say that no H order ought to be made. Therefore, this appeal will be allowed and the receiving order will be discharged.

**SCRUTTON, L.J.**—This is not an easy case to determine, and as I have said, I have some doubt about it, but I do not feel able to dissent as my brothers see their way to decide it in favour of the debtor. The facts are simple, but the legal I result of them is a difficult question. The petitioning creditor founds his petition on a default judgment. It is well settled that it is open to the Bankruptcy court to go behind a judgment, and the question raised before the registrar was whether a commission paid to the borrower's agent by the lender without the borrower's knowledge was corrupt under the Prevention of Corruption Act, 1906, so as to render the whole transaction fraudulent and void, and that consequently the petition ought to have been dismissed.

The registrar said that, though Mr. Latter was no doubt the agent of the debtor, he was not satisfied that he was acting in the transaction solely as the debtor's

agent. Nor was he satisfied that, in the circumstances, Mr. Latter acted corruptly in accepting the commission of 7½ per cent. from the petitioning creditor. That conclusion of the registrar is one very dangerous to the commercial world and to commercial morality. A man who is the agent of A. and who also secretly acts for B. in a transaction between A. and B. is presumed to act corruptly. Common law authorities require the court to hold that that is a corrupt practice, and, in my opinion, the court ought to presume fraud in such circumstances. It seems to me to be a dangerous thing to allow a man to say, "although you did not know it, I was also agent for the other party." I rest my judgment on *Harrington* v. *Victoria Graving Dock Co.* (13), *Smith* v. *Sorby* (14), and on the decisions of this court in *Shipway* v. *Broadwood* (1) and in *Bartram & Sons* v. *Lloyd* (11). Therefore, I feel that there is no difficulty in holding that there was here fraud by which the contract sued on was secured. What is the effect of that? It was argued that, under the Prevention of Corruption Act, 1906, the contract was wholly void. If it was wholly void, though the contract should be for the benefit of the borrower, he could not enforce it, and it is said that a contract obtained by a bribe is necessarily void as against both parties, but I cannot agree with that contention. If the contract is voidable only, it gives the innocent party a right to rescind. There is no authority that a contract obtained by a bribe is void against both parties. Then comes the question whether, the contract being voidable, a party to it can rescind without repaying the money received by him under the contract. Usually you cannot rescind unless you restore in integrum. I have considerable doubt whether it is enough for a person who discovers fraud in the contract to say "I rescind," without offering to repay the money received by him under the contract, and whether he is entitled under those circumstances to say the contract has gone, it never existed. I have no sympathy with persons who pay bribes to other persons' agents, and, in the circumstances, I do not dissent from a judgment which refuses to give a remedy in bankruptcy to persons who do such things. I do not wish in what I have said to prejudice any proceedings which may be taken hereafter.

Section 5 (3) of the Bankruptcy Act, 1914, allows the court to dismiss a petition if it is not satisfied with the proof of the petitioning creditor's debt. The borrower not being aware of his right to rescind the contract, I am not satisfied here with the proof of the petitioning creditor's debt, as it was founded on a judgment obtained on the contract when the debtor was not aware he had a right to rescind the contract, and I think it is best to leave the parties to their legal remedies. There is, however, a default judgment outstanding which is not touched by these proceedings, and the debtor can proceed to have it set aside if he wishes. It is based on a contract obtained by fraud.

**SARGANT, L.J.**—I agree that this appeal should be allowed. The debtor was brought into contact with Mr. Latter who appears to have been a tout of the petitioning creditor. He appears to have accepted a bribe from the lender unknown to the borrower whose agent he was. It is a very gross case of bribery and is clearly struck at by the Prevention of Corruption Act, 1906, but that is not sufficient to make the transaction void throughout. The Prevention of Corruption Act merely hits the transaction between lender and borrower. Here it is quite clear that, directly the debtor found out that a bribe had been paid to Mr. Latter by the petitioning creditor, he was entitled to set it up as a defence to a claim by the petitioning creditor under the promissory note. In *Shipway* v. *Broadwood* (1), there was no contract to rescind, the cheque was merely stopped and that was sufficient to defend the action. Here it is sufficient to say that the promissory note was bad. In this state of things it is said that the debtor has submitted to judgment and there is no reason for interfering. But that is to neglect the principle of *Re Fraser, Ex parte Central Bank of London* (8). In the present case, it can be said against the debtor that he did not take the objection, when sued on the

promissory note, that the transaction was voidable and let judgment go by default. But he was at that time unaware of his right to rescind the contract as he was not then aware Mr. Latter had been paid commission by the petitioning creditor. That fact did not come out until the examination of the petitioning creditor in the bankruptcy proceedings. I think the case is well within s. 5 (3) of the Bankruptcy Act, 1914, and that the court ought not to allow an amendment which would substitute one cause of action for another.

*Appeal allowed.*

Solicitors: *C. Butcher & Simon Burns; Isadore Goldman & Son.*

[Reported by GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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## NEWCASTLE BREWERIES, LTD. *v.* INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore and Lord Carson), May 10, 1927]

[Reported 96 L.J.K.B. 735; 137 L.T. 426; 43 T.L.R. 476; 12 Tax Cas. 927]

*Excess Profits Duty—Profits of trade—Time when profit arose—Goods requisitioned by Crown in 1918—Compensation awarded in 1921.*

In 1918, a company, carrying on business as brewers and wine and spirit merchants, had large stocks of raw rum (which the company would not normally sell in the course of its business until it had been refined and blended), and the government, acting under reg. 2B of the Defence of the Realm Regulations, took possession of a substantial proportion of it. The question arose as to the amount of compensation which the company should receive. The government paid £10,300 to the company without prejudice to the company's right to claim a further sum. On the company's claim to receive the market price of the rum, the court found in the company's favour, whereupon the Indemnity Act, 1920, was passed (inter alia) restricting the company's right to take proceedings for compensation and rendering void the proceedings taken, but permitting compensation to be assessed by the War Compensation Court. In November, 1921, that court awarded the company further compensation of £5,309. Excess profits duty was claimed on that sum on the footing that it was business profit of the company and arose in the accounting year 1917–18.

**Held:** (i) the transaction was a sale in the course of the company's business, and although the transaction affected the circulating capital of the company, it was proper to bring the compensation into the profit and loss account as income; (ii) the profit arose in the year 1917–18 when the right to payment first accrued.

Decision of the Court of Appeal (1926), 135 L.T. 618, affirmed.

**Notes.** Excess profits duty was imposed by the Finance (No. 2) Act, 1915, ss. 38–45, and terminated by the Finance Act, 1921, ss. 35–42, but the case is reported as an example, for all tax purposes, of what is a revenue profit.

Distinguished: *Kirkness (Inspector of Taxes)* v. *John Hudson & Co., Ltd.*, [1955] 2 All E.R. 345. Applied: *London Investment and Mortgage Co., Ltd.* v. *I.R. Comrs.* [1957] 1 All E.R. 277. Referred to: *Imperial Tobacco Co.* v. *Kelly and I.R. Comrs.* (1943), 169 L.T. 133.

As to receipts of a revenue nature, see 20 HALSBURY'S LAWS (3rd Edn.) 149 et seq.; and for cases, see 28 DIGEST (Repl.) 20 et seq.

Cases referred to:

(1) *Guinness & Co., Ltd.* v. *I.R. Comrs.*, [1923] 2 I.R. 186; 28 Digest (Repl.) 44, **105.*

(2) *Glenboig Union Fireclay Co., Ltd.* v. *I.R. Comrs.*, 1922 S.C. (H.L.) 112; 12 Tax Cas. 427; Digest Supp.

(3) *J.P. Hall & Co., Ltd.* v. *I.R. Comrs.*, [1921] 3 K.B. 152; 90 L.J.K.B. 1229; 125 L.T. 720; 37 T.L.R. 744; 12 Tax Cas. 382, C.A.; Digest Supp.

**Appeal** by Newcastle Breweries, Ltd., from an order of the Court of Appeal (LORD HANWORTH, M.R., WARRINGTON and SARGANT, L.JJ.), reported 135 L.T. 618, on a Case stated by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Special Commissioners of Income Tax held on Oct. 30, 1923, for the purpose of hearing appeals, the Newcastle Breweries, Ltd., hereinafter called the company, appealed against an additional assessment to excess profits duty in the sum of £4,247 for the accounting period of twelve months ending Oct. 30, 1918, made on the company by the Inland Revenue Commissioners under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments. The company was incorporated under the Companies Acts, and carried on the business of brewers and wine and spirit merchants at Newcastle-on-Tyne. In the course of this business it imported rum and sold it either retail through public houses belonging to and managed by itself or wholesale to tied public houses and free customers. The company kept a large stock of rum, of different kinds, the bulk of which was stored in bonded warehouse and was of a strength considerably over proof. This rum had to be and was always reduced and blended before it was removed from warehouse, and sales of the rum so reduced and blended were made in relatively small quantities, usually of about four liquid gallons. The largest bulk of wholesale sales in the ordinary course of business were of quarter-casks, which vary from twenty-five to thirty liquid gallons, though this was a very unusual sale. No proof rum was sold by the respondent company, all sales being of reduced rum in bulk or in liquid gallons. On Oct. 6, 1917, the Admiralty issued an order under reg. 2B of the Defence of the Realm Regulations, issued under s. 1 of the Defence of the Realm (Consolidation) Act, 1914, giving notice of their intention to take possession of all stocks of rum in bonded warehouses in the United Kingdom, prohibiting any person owning or having control of any such stock from buying, selling, removing, or otherwise dealing in any such rum without the consent of the Admiralty, and requiring any person who owned or had in his custody or under his control more than ten puncheons of such rum to furnish them with full particulars thereof. On Oct. 16, 1917, the company made the required return of all the rum in bonded warehouses owned by it, amounting to approximately seven hundred puncheons. (A puncheon contains, on the average, about 150 proof gallons.) After permits had been granted to clear two small parcels for ordinary trade purposes, the Admiralty on Nov. 20, 1917, gave notice that they had decided to take over provisionally 239 puncheons of rum specified by them (over two-sevenths of the company's stock of rum), and that, as it had not yet been definitely fixed what amount of profit should be allowed, it had been decided to pay in the first instance only the prices at which the company had actually purchased the rum, plus the incidental charges which had since accrued in the ordinary course for carriage, rent and insurance to Dec. 31 then next, and interest calculated at the rate of 5 per cent. per annum. At the same time it was intimated that a further communication as to the extra amount to be paid to the company for its profits would be addressed to the company in due course, and that the Admiralty would not require any other quantities of the rum, and that a public notice removing

the restrictions imposed by the Order of Oct. 6, 1917, would be published during the next few days. The whole of the rum so provisionally taken over was considerably over proof and was the oldest rum the company had in stock. The rum taken was very largely Demarara rum, which was the best the company had and which would not have been sold by the company without blending it with others. It was stated by the managing director of the company that the action of the Admiralty had injured their stock very seriously, and upset their business for some years. On Dec. 12, 1917, the company wrote to the Admiralty protesting against the manner in which the rum taken over had been selected, on the grounds that the oldest rums had been selected, that an excessive quantity of Demerara rum had been requisitioned, thus leaving the company with a proportion of Jamaica rum in its stock enormously larger than it had ever used in its blends, and that unnecessary additional labour would be caused by taking all the rum requisitioned out of the stock at Newcastle, while the stock in London, which would not require to be carried a long distance by rail, had been left untouched, presumably because it had been bought later and at higher prices than the Newcastle stock. The Admiralty consented to the substitution of the rum lying in London for an equivalent quantity out of the Newcastle stock on condition that the substituted rum should be supplied on terms not less favourable than would have resulted if the parcels originally specified had been taken, and on Jan. 10, 1918, asked that delivery orders for the rum provisionally requisitioned should be forwarded at once. The company thereupon (on Jan. 14, 1918) sent delivery orders for the parcels lying in London and explained that as the warehouse in Newcastle was its own property no delivery order was necessary for the rum lying there, and the whole quantity of 239 puncheons requisitioned was delivered in due course. After some discussion and correspondence between the Admiralty and the Brewers' Society, the Admiralty wrote to the company on Feb. 8, 1918, announcing that they were prepared to pay, over and above the payments already mentioned (i.e., the actual first cost of the rum and all out-of-pocket expenses incurred in connection with it up to Dec. 31 plus interest at the rate of five per cent. on all such expenditure actually incurred by the holders of the rum) the appropriate Customs rebates and also a sum of 1s. per proof gallon as a consolidated allowance to cover (i) appreciation in value, due to maturing in the rum itself, and (ii) overhead profit on the transaction. They stated that the terms offered were the best which they felt justified in paying, though it would, of course, be open to any holder to appeal to the Defence of the Realm (Losses) Commission if he was not prepared to accept the Admiralty's offer, and they asked to be furnished with a statement of claim for these additional allowances accompanied by a statement showing the actual gauges and strength of the rum supplied.

On Feb. 26, 1918, the company wrote to the Admiralty stating that they did not accept the terms of the letter of Feb. 8, and protesting against the manner in which they were being treated. They also asked for reconsideration of the terms laid down, and inquired whether meanwhile they could have a payment on account, without prejudice to a final settlement, on invoices showing cost price, expenses and interest in accordance with the Admiralty letter of Nov. 20, 1917. The Admiralty refused to reconsider the terms offered, but stated that there would be no objection to making payment for the rum on the terms offered both in Admiralty letters of Nov. 20, 1917, and Feb. 8, 1918, while allowing the company to reserve its right to appeal to the Defence of the Realm (Losses) Commission. On April 8, 1918, the company's solicitors wrote to the Admiralty that they were instructed to contest the validity of any regulation that could be construed as authorising the requisition of the goods by the government without payment being made for them at the market price and as of right, and on April 11 they wrote a further letter, accepting the Admiralty offer to make a payment on account, and forwarding statements made up in accordance with the principles laid down by the Admiralty, without prejudice, and reserving their clients' legal rights. On April 15 the Admiralty acknowledged the receipt of the company's claims and stated

that payment would be made in due course without prejudice and reserving all rights in respect of any action which the company might intend to take, and on May 17 they replied to the letter of April 8 referring to reg. 2B of the Defence of the Realm Regulations and announcing that any firm which considered that the amounts offered were inadequate was at liberty to appeal to the Defence of the Realm (Losses) Commission. In the meantime (in May, 1918) a cheque had been sent to the company by the Admiralty for the sum of £10,315 1s. 4d., which was brought into the company's accounts under the head of "Sales of rum," and thus entered into the calculation of the balance of profit in respect of which the company was originally assessed to excess profits duty for the period of twelve months ending Oct. 30, 1918. The company did not appeal against the original assessment to excess profits duty, and no question arose in the present case in regard thereto, but the company did not admit that the said sum of £10,315 1s. 4d. was rightly included in its assessable profits. (The sum due in respect of the sum calculated according to the principles laid down by the Admiralty was £10,774 9s. 3d., and in the subsequent proceedings this sum was treated as having been received by the company, although through a clerical error the Admiralty cheque had in fact been drawn for the sum of £10,315 1s. 4d. only).

Following the course foreshadowed in its correspondence with the Admiralty, the company presented a petition of right claiming the market value of the rum. The case was tried before SALTER, J., who on Feb. 12, 1920, gave judgment in favour of the company, holding that reg. 2B, so far as it purported to deprive persons whose goods were requisitioned by the naval or military authorities of their right to the fair market value and to a judicial decision of the amount, was ultra vires, and declaring that the company was entitled to be paid the fair market value of the 239 puncheons of rum acquired by the Admiralty, and in the event of dispute as to the amount of such market value, to have the same fixed by a County Court judge. The case is reported as *Newcastle Breweries, Ltd.* v. *R.* ([1920] 1 K.B. 854). The Crown gave notice of appeal against the decision, but before this appeal was heard, namely on Aug. 16, 1920, the Indemnity Act, 1920, was passed, whereby the proceedings taken by the company were rendered void, and it was provided that a person who had incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise during the war of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, should be entitled to payment or compensation in respect of such loss or damage, such payment or compensation to be assessed on the principles and by the tribunal mentioned in the regulation. On Oct. 7, 1920, the company presented a claim to the War Compensation Court for compensation in the sum of £28,571 less the amount already received on account. The War Compensation Court gave judgment on Nov. 7, 1921, adjudging that payment should be made to the company of £15,624 11s. 4½d. as compensation for the 239 puncheons of rum (being at the rate of 8s. 9d. per gallon), credit to be given for the sum already received. The further sum of £5,309 10s., being the difference between the sum of £15,624 11s. 4½d. awarded and the sum of £10,315 1s. 4d. previously received, was paid by the Admiralty in pursuance of this judgment in January, 1922, and was brought into the company's profit and loss account for the half year ending April 30, 1922, under the head of "Sales of rum." The additional assessment under appeal was made in respect of the said sum of £5,309 10s. for the accounting period ending Oct. 30, 1918, at the rate of 80 per cent. in force for that period. The War Compensation Court found as a fact that at the time of the requisition of the rum by the Admiralty there was no market price for rum, and it was stated to us on behalf of the company that the only evidence available as to the market value of rum at that time was that some damaged rum which had been under water for some time sold at 14s. a gallon.

A It was contended on behalf of the company: (a) that the sum of £5,309 10s. was not a receipt of the company's trade or a profit arising from its trade or business; (b) that the rum taken over by the Admiralty in the foregoing circumstances was not, and could not be said to have been, sold by the company in the course of its trade or business or at all; (c) that the case was concluded by the judgment of the Court of Appeal in Southern Ireland in the case of *Guinness & Co., Ltd.* B v. *I.R. Comrs.* (1), and the payment received by the company under the judgment of the War Compensation Court as compensation for loss or damage by reason of interference with its property or business was not assessable to excess profits duty as a profit arising out of its trade or business. Reliance was also placed on the decision in *Glenboig Union Fireclay Co., Ltd.* v. *I.R. Comrs.* (2). (d) Alternatively, that if the said payment were a profit arising out of the company's trade or business, C it did not arise in the accounting period ending Oct. 30, 1918, or in any other accounting period to which excess profit duty applied. Reference was made to, and reliance placed on, the decision in *J. P. Hall & Co., Ltd.* v. *I.R. Comrs.* (3); (e) that the additional assessment under appeal ought to be discharged. It was contended on behalf of the Crown: (a) that the rum in question was sold in the course of the trade of the company; (b) that the sum of £5,309 10s. was a receipt arising D from the company's trade or business; (c) that the said sum of £5,309 10s. was properly to be included in computing the profits of the company for the accounting period ending Oct. 30, 1918; (d) that the decision of the Court of Appeal in Southern Ireland in *Guinness & Co., Ltd.* v. *I.R. Comrs.* (1), above referred to was not applicable to the present case, and (e) that the assessment under appeal was correct and ought to be confirmed.

E The commissioners who heard the appeal considered that, whether or not they were strictly bound by the decision of the Court of Appeal in Southern Ireland in *Guinness & Co., Ltd.* v. *I.R. Comrs.* (1), they ought to follow it. In that case a large quantity of barley which had been purchased by Messrs. Guinness for use in the manufacture of stout had been requisitioned by the Food Controller under the Defence of the Realm Act and sold under his instructions at prices fixed by F him. On an appeal heard in 1921 the commissioners held that the profit arising from the sale of this barley to or under the instructions of the government formed part of the profits arising from the trade or business carried on by Messrs. Guinness and fell to be included in the computation of their profits for the purposes of excess profits duty, but that decision, though upheld by the Court of King's Bench, was reversed by the Court of Appeal, who held, by a majority, that there G was no sale of the barley to Messrs. Guinness and that the compensation money paid for it was not a trade profit. The commissioners were unable to distinguish the present case from that of *Guinness & Co., Ltd.* (1) in any essential particular, and they accordingly felt it to be their duty to discharge the assessment under appeal. The Court of Appeal held, affirming the decision of ROWLATT, J. H (134 L.T. 506) that the compensation was a profit arising from the company's trade or business. They held also that as the payment in 1918 was on account only, and the transaction throughout was treated as one, the £5,309 was a balance due in respect of the original requisition, and was a profit of the accounting period ended October, 1918, at which date excess profits duty was payable. The company appealed.

I *A. M. Latter, K.C.*, and *Cyril King* for the company.

*The Solicitor-General* (*Sir Thomas Inskip, K.C.*), and *Reginald P. Hills* for the Crown.

**VISCOUNT CAVE, L.C.**—The appellant in this case is a company of brewers and wine and spirit merchants and it deals in rum, its practice being to buy raw rum, put it through a process of reducing and blending, and then sell the thing so produced. In 1918 it had a stock of raw Jamaica rum ; and the Crown, acting under reg. 2B of the Defence of the Realm Regulations, took possession of a large

quantity of that rum for the use of the forces. A question arose as to the price or compensation which should be paid to the company for the rum so taken. The Crown said that the price was to be regulated by reg. 2B, and that under that regulation the company was not entitled to the market price of the rum taken, but only to a sum calculated on the cost and the pre-war rate of profit. The company, on the other hand, maintained that so much of reg. 2B as purported to limit the price to be paid for goods taken was ultra vires, and it presented a petition of right claiming a declaration to that effect. Pending the dispute, the Crown paid about £10,300 to the company without prejudice to any claim for a further sum. On the hearing of the petition of right, SALTER, J., held in favour of the company, and declared that the part of the regulation to which it had objected was not binding on it, and that it was entitled to the market price of the rum. Thereupon the Indemnity Act, 1920, was passed. That Act prohibited all legal proceedings in respect of the exercise of the royal prerogative during the war, and swept away all pending proceedings and judgments, including the judgment of SALTER, J., in favour of the company. The Act further provided that, if any person had suffered any direct loss or damage by reason of interference with his property or business through the exercise of any prerogative right, that person should be entitled, in any case in which a regulation had purported to prescribe any special principle for assessment of any payment, including any price—a category which included the present case—to payment or compensation to be ascertained by the War Compensation Court in accordance with that regulation. Accordingly, the company applied to the War Compensation Court, and that court awarded to them a further sum of about £5,300, which was duly paid. The question is whether, for the purposes of excess profits duty, that sum of £5,300 or thereabouts, is to be treated as profit arising in the accounting year 1917–18. If it is, it is a net profit, for no deduction falls to be made from that sum in respect of outgoings, and accordingly excess profits duty would be payable to the extent of eighty per cent. of the amount. If it was not a business profit or did not arise in the accounting period 1917–18, then, as excess profits duty ceased to be payable at some date in the year 1920–21, no such duty would be payable on this sum. It has been held by ROWATT, J., and by the Court of Appeal that the sum in question is liable to excess profits duty, and I agree with their conclusion.

Two points are made on behalf of the company. First, it is said that the £5,300 is not a profit from the company's business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the company's capital. I cannot agree with that contention. It is true that the rum taken by the Crown had not been refined or blended and was not, therefore, in the state in which rum was usually sold by the company ; but it was rum which they had bought for the purposes of their business, and the cost of the rum was no doubt treated as an outgoing of the business. If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the company's profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle. Both the sums received for the rum—the £10,300 and the £5,300—were in fact brought into the company's books under the heading: "Sales of rum"; and, although that entry may not be binding on the company, it seems to me to have been correct. The transaction was a sale in the business, and, although no doubt it affected the circulating capital of the company it was none the less proper to be brought into its profit and loss account. As to the authorities cited, there is nothing in *Glenboig Union Fireclay Co., Ltd.* v. *I.R. Comrs* (2), which is inconsistent with the view which I have taken; and if *Guinness & Co., Ltd.* v. *I.R. Comrs.* (1) says anything to the contrary then I can only say that I do not agree with it. Secondly, it is said that if the £5,300 was a business profit, at all events it was not profit which arose in the accounting year 1917–18. I think it did, and I cannot see in what other year it can be said to have arisen. The rum was taken in 1918, and the right to some payment arose

A at once, though there was delay in ascertaining the amount to be paid. It is true that the Indemnity Act, 1920, entrusted the duty of ascertaining the amount to a new tribunal, namely the War Compensation Court, but on the principle of the regulation as it stood in 1918. The change of the tribunal which was to ascertain the amount and enforce payment did not create the right to payment, or alter the date when the right to payment in fact arose. An illustration was put in B the course of the argument when it was asked whether, if a partner had been interested in the profits of the company's business for 1918, he would have had a right to share in this sum. I think the answer should clearly be in the affirmative ; and just as the sum was part of the profits of the year so as to entitle a partner to share in it, so it appears to me that it was profit of the year so as to entitle the government to take a share in the form of excess profits duty.

C My conclusion is that the sum in question was a profit arising in the accounting year 1917–18; and as it was not then either included in the company's return or valued, and consequently was not then the subject of assessment to excess profits duty, I think that it could be assessed to that duty in 1923 at its actual amount as then ascertained. I think that this appeal fails, and I move your Lordships that it be dismissed with costs.

D **VISCOUNT DUNEDIN.**—I concur. As to the first point, I think the taking of rum had no analogy with the embargo on working the clay fields in the *Glenboig Case* (2). The payment for the rum was in no sense a return of capital. It was simply a realisation of a portion of the stock-in-trade at rather an earlier stage of the process than was the case with ordinary sales. *Guinness's Case* (1) is not E identical with this. If it were then I think the judgment in it would have to be reconsidered. As to the date, if I should read the Indemnity Act as a statutory extension of the right which arose on the taking of the rum and the conferring of an entirely new right then I should consider that the date was the date when the award was made by the War Compensation Tribunal. I do not so read it. I think it left the actual right to be paid where it was, but provided that that right could F only be made effectual to the claimant in a certain way. Then the thing for which he was paid was the thing taken, and the date of the taking was 1918. The addition of the £5,000 odd is in the same position as the interim payment of £10,000 odd in 1918.

**LORD ATKINSON.**—I concur with the judgment that has just been delivered by my noble friend on the Woolsack and have nothing to add to it.

G **LORD PHILLIMORE.**—I am of the same opinion. As to the first point I never had a doubt. It is quite usual in trade that manufacturers should from time to time for particular reasons dispose of the raw material which in ordinary course they make up for sale. The rum was purchased for trade purposes, and the particular sale was none the less a trade sale because the trade was forced on the H company. The second point has given me more trouble. I think, however, that if the Indemnity Act had not been passed and the company had been left to enforce its claim in accordance with the judgment of SALTER, J. (123 L.T. 58) the money which it should so recover would have represented profit earned in 1918, and that the taking away of this claim or right by the Indemnity Act, accompanied as it was uno flatu by the substituted remedy given by the same Act, did not create a new I source of profit.

**LORD CARSON.**—I agree that this appeal fails. I do not think it necessary to express any opinion as to whether *Guinness's Case* (1) decided by the Court of Appeal in Southern Ireland was rightly decided as I do not think it has any application to the facts of the present case.

*Appeal dismissed.*

Solicitors: *Godden, Holme & Ward; Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

## SEYMOUR *v.* REED

[House of Lords (Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore and Lord Carson), May 3, 5, 24, 1927]

[Reported [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 43 T.L.R. 584; 71 Sol. Jo. 488; 11 Tax Cas. 625]

B

*Income Tax—Professional cricketer—Benefit match—Net "gate" money—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. E., r.* 1.

In 1920 a cricket club awarded one of its professional players a benefit match. The money paid for admission by spectators at the match, less some expenses, was, in accordance with the club's regulations, held by the club for the player until, in 1923, it was applied in the purchase of a farm for him. Income tax was claimed on the net admission money under the Income Tax Act, 1918, Sched. E, as income of the player for the year 1920–21.

C

**Held** (Lord Atkinson dissenting): the money was not taxable under Sched. E., because it was not salary, fees, wages, perquisites or profits from an office or employment of profit within r. 1 of that schedule, but was a personal gift.

D

Decision of the Court of Appeal, [1927] 1 K.B. 90, reversed.

**Notes.** The Income Tax Act, 1918, Sched. E, r. 1, was replaced by the Income Tax Act, 1952, Sched. 9, para. 1.

Considered: *Davis* v. *Harrison* (1927), 11 Tax Cas. 707; *Calvert* v. *Wainwright*, [1947] 1 All E.R. 282. Distinguished: *Moorhouse* v. *Dooland*, [1955] 1 All E.R. 93. Considered: *Bridges* v. *Hewitt*, *Bridges* v. *Bearsley*, [1957] 2 All E.R. 281. Distinguished: *Wright* v. *Boyce*, [1958] 2 All E.R. 703. Referred to: *Staney* v. *Starkey*, [1931] 2 K.B. 148; *Dewhurst* v. *Hunter*, [1932] All E.R. Rep. 753; *H. and A. Denny* v. *Reed* (1933), 18 Tax Cas. 254; *Weight* v. *Salmon* (1935), 19 Tax Cas. 174; *Corbett* v. *Duff*, *Dale* v. *Duff*, *Feebery* v. *Abbott*, [1941] 1 All E.R. 512; *Weston* v. *Hearn*, *Carmouche* v. *Hearn*, [1943] 2 All E.R. 421; *Temperley* v. *Smith*, [1956] 3 All E.R. 92.

E

F

As to voluntary payments to holder of an office, see 20 Halsbury's Laws (3rd Edn.) 322 et seq.; and for cases, see 28 Digest (Repl.) 222 et seq.

Cases referred to:

(1) *Herbert* v. *McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 18 T.L.R. 728; 4 Tax Cas. 489, C.A.; 28 Digest (Repl.) 225, *973*.

(2) *Cowan* v. *Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 36 T.L.R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C.A.; 28 Digest (Repl.) 225, *971*.

G

(3) *Great Western Rail. Co.* v. *Bater*, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 38 T.L.R. 448; 66 Sol. Jo. 365; 8 Tax Cas. 231, H.L.; 28 Digest (Repl.) 222, *957*.

H

(4) *Inland Revenue* v. *Strang* (1878), 15 Sc.L.R. 704.

(5) *Blakiston* v. *Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 25 T.L.R. 164; sub nom. *Cooper* v. *Blakiston*, 53 Sol. Jo. 149; 5 Tax Cas. 347, H.L.; 28 Digest (Repl.) 226, *976*.

**Appeal** by the taxpayer, James Seymour, from a decision of the Court of Appeal (reported [1927] 1 K.B. 90) reversing a decision of Rowlatt, J., on a Case stated for the opinion of the King's Bench Division of the High Court of Justice by the General Commissioners of Income Tax pursuant to s. 149 of the Income Tax Act, 1918.

I

At a meeting of the General Commissioners Purposes of Income Tax held on Oct. 23, 1924, at Tunbridge Wells for the purpose of hearing appeals, James Seymour, professional cricketer (hereinafter called "the appellant") appealed against an assessment made on him under Sched. E of the Income Tax Act, 1918, in the sum of £939 16s. for the year 1920–1921. The following facts were admitted or proved: (a) The appellant was a professional cricketer in the employment of the Kent County

Cricket Club. (b) During 1920 a match under the direction of the Kent County Cricket Club was played at Canterbury for the benefit of the appellant, and the net proceeds derived therefrom amounted to £939 16s. 11d., as shown in the following account: Gate money, £1,568 3s.; less entertainment tax, ground and other expenses and insurance, £628 6s. 1d.—£939 16s. 11d. (c) A professional cricketer in the service of the Kent County Cricket Club was granted a benefit on the express understanding that he should allow the proceeds of the benefit to be invested in the names of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested was paid to the beneficiary. The invested sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer was over, or when he found an investment (such as a share in a business or farm) of which the trustees approved. The following was an abstract from the regulations for the staff of the Kent County Cricket Club bearing on the point and in force at the time when the above-mentioned match was played:

> "Benefits and tours—The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiare. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

(d) The net proceeds derived from the benefit match above mentioned, together with certain other sums obtained by public subscriptions were invested by the Kent County Cricket Club during the year 1920 in the purchase of the following investments: £800 Corporation of London 5 per cent. stock, purchase price £672 2s.; £1,622 6s. 5d. local loans, 3 per cent. stock, purchase price £820 6s. 7d.—£1,492 8s. 7d. (e) Dividends on the above-mentioned investments were received by the Kent County Cricket Club less income tax deducted and were paid to the appellant. (f) Certificates of deduction of income tax from the above-mentioned dividends were furnished to the appellant by the secretary to the Kent County Cricket Club and the appellant preferred claims for repayment of income tax for the years 1921–1922, 1922–1923, and 1923–1924, on which claims he declared that the dividends on the above-mentioned investments formed part of his income for each of the years mentioned. (g) During the year 1923 the above-mentioned investments were realised and the proceeds thereof amounting with the addition of certain other moneys to £1,914 14s. 5d. were paid by the Kent County Cricket Club to the appellant in two sums as follows: £1,492 on November 30, 1923; £422 14s. 5d. on Dec. 10, 1923. The benefit moneys so realised were applied by the appellant, with the approval of the trustees of the club, to the purchase of a farm.

The sole point at issue between the appellant and the Crown was whether the appellant was assessable under the Income Tax Acts in respect of the net proceeds acounting to £939 16s. derived from the benefit match above mentioned. The appellant did not dispute that the net proceeds amounting to £939 16s. were actually realised from the benefit match in question, or that the whole of this amount has since been paid to him by the Kent County Cricket Club, and it was not contended by the Crown that there was a liability to assessment in respect of that portion of the benefit moneys paid to the appellant which was obtained by public subscription.

It was contended by the appellant: (a) that the net proceeds of £939 16s. derived from the benefit match above mentioned were in fact received by him from the funds of the general public, and not from the funds of his employers, and that they were therefore not an emolument or profit appurtenant to his employment; (b) that the net proceeds of £939 16s. awarded to him as above mentioned were a donation or gift and not assessable to income tax.

It was contended by the inspector of taxes (inter alia): (a) that the profit amounting to £939 16s. derived from the benefit match in question had been awarded by the Kent County Cricket Club to the appellant for services rendered by him as a professional cricketer in their employment; (b) that the above-mentioned award of £939 16s. was a perquisite or profit accruing to the appellant from, and by reason of, his employment as a professional cricketer; (c) that the appellant was assessable under Sched. E of the Income Tax Act, 1918, in respect of the sum of £939 16s. above mentioned; (d) alternatively that the said sum of £939 16s. was other annual profits or gains of the appellant not charged under Scheds. A, B, C, or E, and not specially exempted from tax and that the respondent was assessable in respect thereof under Sched. D 1 (b) of the Income Tax Act, 1918.

The commissioners who heard the appeal were of the opinion that the contentions of the appellant were correct, and therefore discharged the assessment. Whereupon the inspector of taxes expressed his dissatisfaction with the determination of the commissioners as being erroneous in point of law and in due course required a Case to be stated for the opinion of the High Court pursuant to s. 149 of the Income Tax Act, 1918. There was no dispute as to the correctness of the amount or of the basis of computation of the said assessment, and the sole question for the opinion of the court was whether the said sum of £939 16s. was a profit from the said employment of the appellant within the meaning of r. 1 of the Rules applicable to Sched. E, or, alternatively, was an annual profit or gain of the appellant within the meaning of Sched. D 1 (b). In the Court of Appeal it was held by Lord Hanworth, M.R., and Warrington, L.J., reversing the decision of Rowlatt, J., that the £939, having regard to the regulations of the club, accrued to the appellant by virtue of his office, and although it was a voluntary payment on the part of the persons who made it, the amount was liable to income tax: *Herbert* v. *McQuade* (1), *Cowan* v. *Seymour* (2) distinguished. Sargant, L.J., held that the £939 did not come to the appellant merely as a member of the county eleven but as a gift or testimonial to the personal qualifications of the individual, and that was the decisive matter, and not the fact that the individual held an office. Therefore the sum was not liable to income tax, not being an actual profit or gain.

*Sir John Simon, K.C.* and *W. T. Monckton* for the appellant.

*The Attorney-General* (*Sir Douglas Hogg, K.C.*), *the Solicitor-General* (*Sir Thomas Inskip, K.C.*), and *R. P. Hills* for the Crown.

The House took time for consideration.

May 24. The following opinions were read.

**VISCOUNT CAVE, L.C.**—In this case James Seymour, a professional cricketer, appeals against a judgment of the Court of Appeal in England by which, differing from the General Commissioners of Income Tax and from Rowlatt, J., they held the appellant liable for income tax in respect of the net proceeds of a benefit cricket match.

In 1920 the appellant, who had been for many years in the employment of the Kent County Cricket Club at a salary and had played fine cricket, was allowed by the club to have a benefit match, the match selected being the Kent *v.* Hampshire match played in the Canterbury week. The club's regulations for the staff contained the following provision:

> "Benefits and tours—The committee reserve to themselves an absolute and unfettered discretion as regard benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiare. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

The gate-money received at the match in question, less some expenses, amounted to £939 16s. 11d., and this sum, together with other sums obtained by public

A subscription, was invested by the direction of the committee in certain securities, of which the income (less tax) for the years 1921, 1922, and 1923, was paid to the appellant. In 1923 the securities were realised and the proceeds, amounting with the addition of certain other moneys to £1,914 14s. 5d., were paid to the appellant with a view to their being applied, with the approval of the committee, to the purchase of a farm. Thereupon the respondent, the inspector of taxes, made an B assessment on the appellant under Sched. E of the Income Tax Act, 1918, in the sum of £939 16s., being the net gate-money received from the benefit match for the tax year 1920–21, and the question for your Lordships to determine is whether this assessment was valid. In considering this question, I will assume that the appellant was assessable (if at all) under Sched. E of the Act. It would appear that in the year 1920–21 any assessment on him must have been made, not under C Sched. E, but under Sched. D (see *Great Western Rail. Co.* v. *Bater* (3)): but the law was altered by the Finance Act, 1922, and it has not been disputed that the assessment in the year 1923, if allowable at all, was properly made under Sched. E.

The question, therefore, is whether the sum of £939 16s. fell within the description, contained in r. 1 of Sched. E, of "salaries, fees, wages, perquisites, or profits whatsoever therefrom" (i.e., from an office or employment of profit) "for the year D of assessment," so as to be liable to income tax under that schedule. These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships ; and it must now, I think, be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such E payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, "Is it in the end a personal gift or is it remuneration?" If the latter, it is subject to the tax ; if the former, it is not. Applying this test, I do not doubt that in the F present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the committee of the club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement ; G and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription ; and, just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such, so H the gate-moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are, I think, in the same category. If the benefit had taken place after Mr. Seymour's retirement, no one would have sought to tax the proceeds as income ; and the circumstance that it was given before but in contemplation of retirement does not alter its quality. The whole sum—gate-money and subscriptions alike—is a testimonial and not a perquisite. I In the end—that is to say, when all the facts have been considered—it is not remuneration for services, but a personal gift. I am of opinion that this appeal should succeed, and that the order of ROWLATT, J., should be restored with costs here and below, and I move your Lordships accordingly.

**VISCOUNT DUNEDIN.**—I concur in all that my Lord has said. I have had the advantage of reading the opinion which is about to be delivered by my noble friend, LORD PHILLIMORE, and I concur entirely with his exposition and analysis of what are generally known as the Easter offerings cases. Personally, I cannot help thinking

that the whole trouble in this case has rather arisen from the fact that although the controversy necessarily turned on the particular words of Sched. E, yet at the same time, I think it was a little forgotten to pay attention to the warning which I remember LORD MACNAGHTEN gave us years ago when he said: "My Lords, I wish to remind you that income tax is a tax upon income." When I think of this little nest egg, which paid income tax as an investment and which now that it has taken the form of a farm will pay income tax under Sched. A, being treated, the whole sum as income, had it not been for the fact that honourable judges, whose opinions I respect, have come to another conclusion, I would have thought the contention was quite preposterous. I therefore concur in the motion which has been made.

**LORD ATKINSON**.—I regret that I am unable to concur with the judgment which has just been delivered by my noble friend on the Woolsack, the Lord Chancellor, and I further regret that I am unable to concur with the judgments about to be given by my other noble friends. In those circumstances I must, of course, assume that the conclusions at which I have arrived are erroneous, though I cannot feel convinced of it. I have this consolation, however, that if I err, I err in good company, namely, in that of the Master of the Rolls and of WARRINGTON, L.J., as he was when he delivered judgment in this case in the Court of Appeal. In my view, this latter judgment, especially, appears to be sound, logical, sustained by the facts proved and consistent with the authorities cited in support of it. What has given me most trouble in the case is this—the bald, meagre and sketchy way in which the facts of the case have been stated.

It is rightly stated in the Case that the sole question for decision is whether the large sum of £939 16s. 11d. derived by Mr. Seymour, the professional cricketer, from the benefit match played on the cricketing field of the Kent County Cricket Club, accrued to him, or came to him from his employment as the professional cricketer of this club, or was a gift not earned by him by the discharge with special efficiency of his duties as professional cricketer to the club, but independently of the discharge of those duties, unconnected with them, nor in any way springing from them. Accordingly, one would, I think, suppose that in order to determine this question, the first thing to be fully ascertained would be what were the terms on which Mr. Seymour was hired ; what were his duties, what were the functions which he discharged upon the occasion of a benefit match being held ; did he himself play in it ? Did he in any way select the competing teams or aid in the management of the fête, as it may well be styled ? The only statement contained in the case at all touching these matters is the following :

> "(c) A professional cricketer in the service of the Kent County Cricket Club is granted a benefit on the express understanding that he shall allow the proceeds of the benefit to be invested in the names of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested is paid to the beneficiare. The invested sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment (such as a share in a business or farm) of which the trustees approve."

The following is an extract from the regulations for the staff of the Kent County Cricket Club bearing on the point, actually in force when the above-mentioned match was played. The regulation is headed "Benefits and tours" and runs thus :

> "The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiare. The committee also reserve the like discretion in regard to granting permission to any player to go

on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

This regulation may be fully adequate to protect the committee from any legal obligation towards their professional cricketer being imposed on the club or the committee in respect of the matters named, but it is quite inadequate to prevent that cricketer from having a hope or an expectation, or a formed belief that he had a chance, if he discharged his duties well and to the satisfaction of his employers, of being given the prize of a benefit match. For all that appears, he owed no duties to the Kent club or to its committee save those which spring from his position of professional cricketer. If he got the reward of a benefit match by reason of the efficient discharge of those duties, it must, I think, in the absence of all evidence of the committee's being influenced by any other motive, object, or aim, be held that this reward accrued to him by reason of the office or employment he held within the meaning of Sched. E of the Act of 1842, or came to him from that employment within the meaning of Sched. E. r. 1, of the Income Tax Act, 1918.

I cannot find anything in the Case suggesting that the club, or its committee, had any motive, object or aim in giving the benefit of this match to Mr. Seymour, their officer, other than to reward him for the efficient discharge of the duties of his post. It is here that the bald, incomplete and unsatisfactory provisions of the Case Stated cause embarrassment. Surely it would have been easy to have ascertained from Mr. Seymour or the committee what, if any, was the agreement made with, or assurance given to him as to the result of holding a benefit match, or whether it was the usual practice of the club to permit any professional cricketer they had in their service to obtain this benefit if he discharged the duties of his post well, though admittedly it was a matter entirely in their discretion, and they were not bound to do so. Suppose, for instance, that when Mr. Seymour was originally appointed, the committee or secretary of the club said to him, "The committee have absolute powers to let you have the advantage of a benefit match or not just as they please. Their discretion is absolute and unfettered, but if you discharge the duties of your post to their entire satisfaction they may possibly be inclined to let you have the benefit of such a match. They make no promise whatever to do so." It certainly would appear to me that if that remark or any equivalent remark had been made at the time suggested, it ought to be held that Mr. Seymour might naturally and reasonably anticipate that he would have a fair chance of obtaining the benefit of a test match conferred upon him by his employers, if he discharged the duties of his post to their entire satisfaction. A grave injustice might be done to an employee or to his employer by the omission to elicit what took place when the employee was first engaged.

What were the precise conditions of his employment? WARRINGTON, L.J., deals with these points of view in a lengthy passage of his judgment. I quote it in full by reason of its importance, and because I thoroughly concur with it ([1927] 1 K.B. at p. 99):

> "Now did this money come to the respondent by virtue of his office? Looking at the regulations, I am satisfied that from that alone one must come to the conclusion that it did come to him by virtue of his office. It is something which obviously was contemplated as a possibility amongst the terms under which he was serving the Kent County Cricket Club, but more than that, it seems to me that this came to him not merely by virtue of his office, because it was something which he might expect to get from his office, but it came to him from his employers, when one comes to think of what really happened. If this match had been held without the exercise by the club of their discretion in this man's favour by making it a benefit match, the gate money would have been the property of the club and would have gone into their coffers. It is quite true that the gate money which would have been taken at the match if it had not been a benefit match may have been less in

amount, but that seems to be quite immaterial. They were under no obligation to give the benefit. They were under no obligation to give him any portion of the gate money that day, and it seems to me that by making a match a benefit match, it was their act which gave him the right to receive this gate money. That seems to me to be one extremely and perhaps the most important factor of all, and it is that fact which distinguishes the gate money from the subscriptions which were gathered outside. As regards those subscriptions, the club never had any interest in them at all. They were, as it seems to me, quite properly treated by the Crown as falling on the other side of the line, and as donations purely personal given by outsiders to the man for whose benefit they were given. That seems to me to be the crucial point in this case, that this was money given to him by the will of his employers and in a manner contemplated by the actual terms of his employment so far as shown by the regulations."

The fact that the giving of permission by the committee of the club to the holding of benefit matches is purely voluntary and discretionary is entirely immaterial. In *Herbert* v. *McQuade* (1), COLLINS, M.R., quoted a passage from the judgment of LORD CURRIEHILL, in a Scottish case (*Inland Revenue* v. *Strang* (4)) to the following effect:

" 'It is,' said the learned judge, 'with some reluctance that I have formed the opinion that the commissioners are wrong, and that the appellant is liable for income tax on the £100 mentioned in the case. It is true it is a voluntary contribution by the parishioners, one which they are under no obligation to make and which they may withdraw at any time, but still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes'."

SIR RICHARD HENN COLLINS, M.R., in commenting on this judgment, laid down a test in these words ([1902] 2 K.B. at p. 649):

". . . the test is whether, from the standpoint of the person who receives it [i.e., the payment], it accrues to him in virtue of his office; if it does it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this, that the money has come to, or accrued to, a person by virtue of his office, it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

*Herbert* v. *McQuade* (1) has been often approved of and followed. It may well be that there is nothing to prevent the Kent County Cricket Club from giving a handsome gift to their professional cricketer though they knew he was the worst cricketer that ever held a bat or bowled a ball, but these regulations do not appear to me to contemplate such a case. A benefit match permitted in such a man's interest would naturally secure very little money either in the shape of subscriptions or gate money. A professional cricketer such as Mr. Seymour must have had some special merit to secure such a splendid prize as he obtained in this case. The money of both subscribers and of persons who passed the gate was rather lavishly given. It is difficult to imagine what special merit he could have had other than skill and efficiency in the game he was employed by his employer to play, and to teach. It is much to be regretted that Mr. Seymour was not examined, not only as to the terms of his employment, but also as to how he regarded this sum of £939 odd, and on what ground he demanded a return of the income tax paid yearly by his trustees. According to the decision in *Herbert* v. *McQuade* (1) it establishes that the test is whether from the standpoint of the

person who receives the money it accrues to him in virtue of his office of employment. LORD HANWORTH, M.R., deals with this point in the following passage of his judgment. He said ([1927] 1 K.B., at p. 97):

> "But after recounting the facts as I have done and giving consideration to the substance of the matter and bearing in mind the regulations which I have read, it appears to me that this sum of £939 cannot be considered to be an extraneous addition to Mr. Seymour's wages or a fortuitous donation, but that it was an addition arranged by and through his employers at a time when they considered that a benefit match should be allowed to him, and was an addition contemplated as a possibility in the course of his employment in the very terms which regulated the employment of their staff, including the respondent. For these reasons it appears to me that this sum of £939 falls within the principle which has been laid down in *Herbert* v. *McQuade* (1), and the other cases, and is taxable just as any other sums are taxable which are received in the course of employment and are profits arising therefrom."

It is not disputed that the effect of these regulations is, according to a well-known principle of law, to create in Mr. Seymour an absolute ownership in the fund vested in the appointed trustees. The mode in which the trustees discharged their trust affords an indication of how they and their beneficiary must have regarded the fund resulting from the benefit match. In the Stated Case it is set forth that the net proceeds of the match, with certain other sums amounting on the whole to £1,649 8s. 7d., were, by the Kent County Cricket Club, invested in the purchase of the stocks named, that dividends from these investments were received by the county club, less the income tax which was deducted, and were paid to Mr. Seymour by cheques drawn by the county club in his favour on Oct. 21, 1921, Oct. 21, 1922, and Oct, 21, 1923, for the respective amounts of £55 8s. 6d., £64 5s. 8d., and £67 12s. 2d. The Case Stated sets forth that certificates of the deductions of income tax from these sums were furnished to Mr. Seymour by the Kent County Cricket Club, and that he, Mr. Seymour, claimed for repayments of the income tax deducted on the sums above mentioned. *Herbert* v. *McQuade* (1) and the cases which followed it decided that it was the standpoint of the receiver of the money that determines the liability to income tax. It was essential then that it should be ascertained in what light Mr. Seymour regarded these dividends. He is not apparently asked a single question upon the subject.

The judgment of LORD LOREBURN in *Blakiston* v. *Cooper* (5) has been frequently referred to. The headnote fairly states what was the pith of the decision. It is there set forth that voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as "profits accruing to him by reason of his office" under Sched. E, r. 1, of the Income Tax Act, 1842. There was, I think, a disposition during the argument to treat LORD LOREBURN's judgment as having laid down a test as to when Easter offerings of this kind would be properly assessable to income tax and when not. I doubt very much if LORD LOREBURN intended to lay down any test of the kind. I doubt very much if the alleged test would have been workable, for he said ([1909] A.C. at p. 107):

> "Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

In the present case no evidence was given to show that Mr. Seymour was possessed of anything beyond his skill in cricketing or the discharge of his professional duties to give him a claim to the benefit of a benefit match, but that skill he was hired to exercise and display in the performance of the duties of his post; the money he thus secured accrued to him by reason of that, not as far as appears by reason of

anything else. The judgment of LORD ROBERTSON in *Blakiston* v. *Cooper* (5) is well worth a careful perusal on this point. He said ([1909] A.C. at p. 108):

> "When the broader facts of the case are remembered, I confess that it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The cause of collecting the money was to supplement the legal income of the vicar, and, while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices."

I think that when no reason is shown for the gift to an official such as Mr. Seymour of the large and substantial prize given to him through the medium of a benefit match, it must in reason be assumed that it was given to him for the efficient and satisfactory discharge of the duties he was employed to discharge, and if so that the reward accrued to him came to him from his employment. I am therefore of opinion that the judgment of the Court of Appeal was right and should be affirmed and that this appeal should be dismissed with costs.

**LORD PHILLIMORE.**—The result of the assessment having been made on the appellant as a person holding an office or employment under Sched. E and not on him in respect of his professional earnings under Sched. D, has been to bring under your Lordships' notice two different classes of authorities: those which deal with a public officer receiving some emolument not from his employers (if indeed he has any) but from persons with whom he has official relations, and those which deal with an employee receiving from his employers some benefit other than and additional to his contractual salary. The conditions of these two classes of case seem to me so different that very little assistance can be derived in one case from the decisions applicable to the other.

The reported cases dealing with a public officer which have been brought to your Lordships' notice are cases concerning ministers of religion. It is suggested that at any rate from these cases it can be deduced that a perquisite or profit of office is none the less a perquisite or profit because the emolument bestowed is voluntary. I doubt whether the analogy can be carried so far. In these religious cases the offering may be voluntary, but it is not spontaneous. In the Easter offering case, *Blakiston* v. *Cooper* (5), the moral or religious duty to make the offering was inculcated by the Bishop, and, as pointed out in the judgment of your Lordships' House, ecclesiastical machinery was set in motion to procure it. Nor does the matter rest here. For a portion of the collection definite legal acts were required to effect the purpose. The collection at the offertory in the communion service is provided for by rubric, and by another rubric this offertory is to be disposed of

> "to such pious and charitable uses as the minister and churchwardens shall think fit, wherein if they disagree, it shall be disposed of as the ordinary shall appoint."

Moreover, though the Easter offerings collected on the occasion in question were not the fruits of legal compulsion, they did represent and supersede in respect of some of the contributions a legal due. The rubric preceding the one I have just quoted, says as follows:

> "Yearly at Easter every parishioner shall reckon with the parson, vicar or curate, or his or their deputy or deputies; and pay to them or him all ecclesiastical duties, accustomably due, then and at that time to be paid."

Easter offerings or Easter dues are due of common right from the householder for every member of his family of sixteen years of age and upwards. True it is that the common law rate is 2d. per head only, though by custom it may be more. It is, I believe, not uncommon, though at the moment I cannot think of an instance, and probably was more common when more offices were paid by fees than are so endowed now, that there should be a legal fee of small amount which it was

usual to augment. Such fees of office are intended to be covered by the words of Sched. E as profits or perquisites. Easter offerings along with mortuaries and surplice fees are dealt with as part of the legal income of the clergy by the Tithes Commutation Acts, the first (The Tithe Act, 1836, s. 90) providing that a parochial agreement shall not extend to their commutation, while a later Act (The Tithe Act, 1939, s. 9) allows them to be included in a parochial agreement. They are also dealt with in the New Parishes Act, 1843, s. 15.

*Herbert* v. *McQuade* (1) has not the authority of your Lordships' House. But if it be taken to be law, it was a case where, though the particular incumbent had no title to the annual grant, the annual income of the fund had to be distributed among selected incumbents of his class. In that case, too, there was an element of periodicity. In fact, in these cases of ministers of religion there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the cases of a single gift by an employer or employers. If they be put aside, little is left in the way of authority on which the Crown can rely except that in the case of *Cowan* v. *Seymour* (2) the Court of Appeal thought it important to point out that the gift to the liquidator did not come from his employer, the incorporated company, but from the several shareholders, who in combination made up the company.

I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Sched. E. Nor do I think it matters that the gift is made during the period of service, and not after its termination, or that it is made in respect of good, faithful and valuable service. During the course of the argument, however, a subtler consideration seemed to emerge. It was suggested that the hope or chance of a benefit match was part of the inducement to a man to become a professional cricketer in the service of the Kent County Cricket Club, and I suppose it must be put as one of the terms under which he was engaged. This line of argument is a departure from that hitherto put forward by the Crown. On the part of the Crown it has been accepted that the grant of the benefit match was voluntary; and the whole weight of the contention has been, that though voluntary, it was still a profit or perquisite. Anyhow the materials for this contention are wanting. The Case Stated by the commissioners does not find any facts to support it. The contentions on behalf of Mr. Seymour were either that the money which he received came from the general public and not from his employers, or that if it came from his employers, it was to be treated as a donation or gift, and the commissioners accepted these contentions. If it had been otherwise, a number of facts ought to have been found which we have not before us. The Case would probably have stated the number of benefit matches which were usually held yearly, the number of professional cricketers in the service of the club, the usual duration of the tenure of office, or at least the percentage of cricketers in the service of the club who got benefit matches; and I think it would be defective if it did not state that the expectancy of such a benefit was part of the inducement to Mr. Seymour to take his post. I am not sure that it would not be necessary to find further that this inducement was held out to him by his employers. The Case does not, either in its narrative or in its extracts from the regulations of the club, show that there is any provision in the rules for granting benefit matches. All that it shows is that there are such matches of sufficient frequency to make it desirable to frame rules as to the distribution of the proceeds of such matches when they occur. In my judgment, this is a case of a plain gift and not taxable as a profit or perquisite of employment, and I think that this appeal should be allowed.

**LORD CARSON.**—I concur with the motion proposed by the Lord Chancellor. In each case it is important that the words of the Rule should be kept prominently in mind. They are plain words of no technical import, and, in my opinion, no

previous authorities can assist, as each case must depend upon the particular facts proved. In the present case, the General Commissioners were, in my opinion, fully entitled to decide as a question of fact that the sum in question was not wages or perquisites or profits accruing by reason of the employment of the appellant. In fact, the money was never, in my opinion, the money of the club at all, but was subscribed by the public for the benefit of the appellant. Speaking for myself, although the respondent was acting within his rights in the course this litigation has taken, I cannot help thinking that the case might well have been allowed to rest after the determination of the question by the General Commissioners and ROWLATT, J. Protracted litigation, whilst easy sailing for the Revenue, is a great burden on the subject in a case where so far as I can see no question of principle was involved. I hope the appellant will be fully indemnified against costs.

*Appeal allowed.*

Solicitors: *Halsey, Lightly & Helmsley; Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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## Re FLINT (DECEASED). FLINT AND OTHERS *v.* FLINT AND OTHERS

[CHANCERY DIVISION (Astbury, J.), March 9, 10, 1927]

[Reported [1927] 1 Ch. 570; 96 L.J.Ch. 248; 137 L.T. 178]

*Settled Land—Trust for sale—Land held in undivided shares vested in possession—Pre-emption—Right of trustees to exercise statutory powers of sale—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35, *Sched. I, Part* 4, *para.* 1 (3).

By his will, made in 1917, a testator, who died in 1920, gave his residuary real and personal estate to his trustees on trust to receive the rents and profits during the life of his wife and to pay to her thereout an annuity of £660 per annum, and to each of his two daughters £100 per annum, and then to divide the remainder of the rents and profits among his children. The testator further directed that after the death of his wife his trustees should hold the trust estate on similar trusts for his children and their issue with remainders over. The testator declared that his trustees should have power to sell the whole or any part of his estate, but that before selling his D. land, they should offer it to his son A. at such price as should be fixed by a valuer, and if A. would give that price the D. land should be sold to him. On Jan. 1, 1926, the land, being settled land held in equity in undivided shares vested in possession, vested in the trustees on the statutory trusts for sale under the transitional provisions of the Law of Property Act, 1925, Sched. I, Part 4, para. 1 (3). On the question whether A. was entitled to require the trustees before exercising their statutory power of sale to offer the D. land to him,

**Held:** the trustees were entitled to exercise the statutory power of sale without regard to A.'s right of pre-emption because (a) on the construction of the will the trustees were primâ facie only bound to offer the D. land to A. on exercising the power of sale given to them by the will, and (b) s. 35 of the

Act of 1925 provided in full the trusts which affected land held on the statutory trusts, and the Act made no provision for giving effect to A.'s right.

**Notes.** Applied: *Re Thomas, Thomas* v. *Thompson*, [1929] All E.R. Rep. 129. Distinguished: *Re Armstrong's Will Trusts, Graham* v. *Armstrong*, [1943] 2 All E.R. 537. Considered: *Re Fison's Will Trusts, Fison* v. *Fison*, [1950] 1 All E.R. 501. Referred to: *Re Robins, Holland* v. *Gillam*, [1928] All E.R. Rep. 360; *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; *Re Hanse, Westminster Bank* v. *Everett*, [1929] 2 Ch. 166; *Re Buchanan-Wollaston's Conveyance, Curtis* v. *Buchanan-Wollaston*, [1939] 2 All E.R. 302.

For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

**Adjourned Summons** to determine whether the option to purchase property, given by a will to a son of the testator, when the property was sold by the trustees, applied when, by reasons of the provisions of the Law of Property Act, 1925, the property was to be sold by the trustees under the statutory trusts.

Henry Thomas Flint, by his will dated Oct. 23, 1917, appointed his wife, Agnes, his son, Alfred Thomas, his daughter, Ada Louisa, and Charles Frederick Arnold his executors and trustees, and after giving certain legacies, gave the residue of his real and personal estate to his trustees on trust to receive the rents and profits during the life of his wife and thereout to pay his wife the annual sum of £660 during her life, to each of his two daughters £100 per annum, and to divide the remainder of the income of his trust estate among all his children, with certain directions as to the share of the income of any child who should die during the lifetime of the testator or his wife. He directed that after the death of his wife his trustees should hold the trust estate on similar trusts for his children and their issue, and after the death of his last surviving child he directed his trustees to sell and realise the whole of his residuary estate and to hold the proceeds on trusts therein declared. The testator declared that his trustees should have power at any time in their sole discretion to sell, at such price or on such terms as they might think fit, the whole or any part of his estate, and that, as regarded his Digbeth and St. Martin's Lane property, before selling the same it should be offered to his son, Alfred Thomas, at such price as should be fixed by a valuer to be employed by his trustees, and that if his said son would give the price so fixed the said property should be sold to him, and he might purchase the same, notwithstanding that he was a trustee of the will. The testator also declared that, as regarded any real or leasehold property which should for the time being be the subject to the trusts of his will, his trustees should be at liberty to let the same as therein mentioned, and that his son Alfred Thomas might, notwithstanding that he was a trustee of the will, take a lease of the Digbeth and St. Martin's Lane property, or any part thereof, for such a term as his trustees—exclusive of the said Alfred Thomas—might think proper. at a rent to be fixed by a valuer to be employed by his trustees—exclusive of the said Alfred Thomas—and he declared that it should be lawful for the said Alfred Thomas to purchase either by public auction or private treaty his freehold property in Digbeth and St. Martin's Lane, notwithstanding he was an executor and trustee of the will. The testator died on Feb. 7, 1920. The testator's widow, Agnes Flint, was still living. The trustees had not sold any part of the testator's estate, but the testator's son, Alfred Thomas Flint, was desirous of exercising the option of purchasing the Digbeth and St. Martin's Lane property given to him by the will and requested the trustees to sell the same to him on the terms of the will. On the Law of Property Act, 1925, coming into force, the testator's real estate being devised on trusts, whereby the income, subject to the annuities, was divisible among his children in undivided shares, the real estate fell within the provisions of Part 4 of Sched. I of the Act, and was vested in the trustees of the will on the statutory trusts. A question arose whether in these circumstances the option to purchase applied when the trustees were selling under the statutory trusts and not under the trusts of the

will. The trustees, other than Alfred Thomas Flint, issued this summons, to which Alfred Thomas Flint and the other beneficiaries were defendants, asking (i) whether Alfred Thomas Flint was entitled to require the trustees, before exercising the statutory trust for sale, to offer first the Digbeth and St. Martin's Lane property to him at a valuation as in the will mentioned, and whether in the event of such offer being declined the trustees were at liberty to sell at a less price by public auction or private treaty to other persons; (ii) whether, in the event of the trustees exercising the statutory trust for sale, Alfred Thomas Flint was still entitled to purchase the property notwithstanding that he was a trustee; and (iii) whether the trustees still had power under the will to let the property to the said Alfred Thomas Flint notwithstanding that he was a trustee.

*Beebee* for the trustees.

*Topham, K.C.*, and *Greenland* for Alfred Thomas Flint.

*W. M. Hunt* (*Farwell, K.C.*, with him) for the other beneficiaries.

**ASTBURY, J.** (after stating the facts and reading the will): The principal question to be determined is whether the Law of Property Act, 1925, and the Settled Land Act, 1925, have any and what effect on the option to purchase or right of pre-emption given by the testator's will to his son, Alfred Thomas Flint. The question is one of extreme difficulty and depends on the interpretation of a number of sections of the new Acts.

The power of sale given to the trustees by the will has not been exercised, and under the Law of Property Act, 1925, the testator's residuary estate is, as all parties admit, held by the trustees on the statutory trusts. I have before me all the beneficiaries under the will. It is not disputed that, in the terms of para. 1 of Part IV of Sched. I to the Act the testator's estate immediately before the commencement of the Act was held in undivided shares vested in possession, nor that under cl. 3 of that paragraph the Act vested the estate in the trustees on the statutory trusts. The son contends that, notwithstanding that the property is now held on the statutory trusts, the trustees holding it on trust for sale are under an obligation before selling it to offer the particular real estate to the son as directed by the will. The other beneficiaries contend that this direction to offer the property, or right of pre-emption, only applied to the exercise of the trust or power of sale under the will and does not attach on a sale under the new statutory trusts. Primâ facie on the construction of the will the direction to offer the property to the son is a direction to the trustees to make such offer prior to exercising the trust or power of sale under the will. If that is so, there is an end of the question. But it is contended by the son that the direction to offer the property is a general one, and I must deal with his argument, and with what I believe to be the answer to it.

First, under the beneficial interest created by the will there were before the new Acts several persons who jointly had the powers of a tenant for life, and it is not disputable that if they had exercised those powers the option to purchase would not have applied, so that before the new Acts there was a chance of the property being sold so as to defeat the right of pre-emption. Assuming that the direction was general and that, if and when the trustees—apart from the tenant for life—sold, the offer was to be made to the son, does the direction bind the trustees when they are selling under the statutory trusts declared by the Law of Property Act? Section 35 declares the statutory trusts, which are to sell the land and hold the net proceeds of sale

> "upon such trusts and subject to such provisions as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

Primâ facie that provides that once the statutory trusts are established the trustees shall hold the proceeds of sale on the trusts declared by the section. It

A is difficult to see how those provisions can be applied to a person who merely has a right of pre-emption, and unless there is something in other parts of the Act to give effect to a right of pre-emption it seems to me that s. 35 is a complete provision for what is to be done. Counsel for the son has argued with great ability that there is sufficient in the Act to give effect to what he calls the rights of the son. I will do my best to deal with his argument. Section 2 (1) provides:

B "A conveyance to a purchaser of a legal estate shall overreach any equitable interest or power affecting that estate, if . . . (ii) the conveyance is made by trustees for sale and the equitable interest or power is capable of being overreached by such trustees under the provisions of sub-s. (2) . . . or independently of that sub-section, . . ."

C Sub-section (2) provides that, if there are trustees for sale,

"such equitable interest or power shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale."

D Section 109 of the Settled Land Act, 1925, provides:

"(1) Nothing in this Act precludes a settlor from conferring on the tenant for life, or (save as provided by the last preceding section) on the trustees of the settlement, any powers additional to or larger than those conferred by this Act. (2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like E manner, and with all the like incidents, affects, and consequences as if they were conferred by this Act on a tenant for life."

It is suggested that under those provisions the net result is that trustees, holding under the statutory trusts, have such additional or larger powers as are conferred by the settlement, and that that enables them to give effect to a right of pre-F emption. But a direction to offer the property to the son is not an additional or larger power to that given by s. 35. In fact it is a restriction on the power of sale.

It is next contended that under s. 3 of the Law of Property Act, 1925, the son has an equitable interest, that is, his right of pre-emption. Section 3 provides:

"(1) All equitable interests and powers in or over land shall be enforceable G against the estate owner of the legal estate affected in manner following (that is to say) . . . (b) where the legal estate affected is vested in trustees for sale . . . (ii) where, by reason of the exercise of any equitable power or under any trust affecting the proceeds of sale . . . any person of full age becomes entitled to require a legal estate in the land to be vested in him in priority to the trust for sale, then, unless the claim is satisfied out of the net proceeds of H sale, the trustees for sale shall (if so requested in writing) be bound to transfer or create such legal estates, to take effect in priority to the trust for sale, as may be required for . . . giving legal effect to the rights of the person so entitled."

It is contended that s. 3 (1) entitles the son, prior to the exercise of the trust for sale, to require the legal estate to be vested in him, if he exercises the right of I pre-emption. I am unable to read into the sub-section any language sufficient to enable the son to demand as against trustees exercising the statutory trusts the right of pre-emption given by the will. His right under the will was not in priority to the trust for sale, and I cannot think that s. 3 (1) (b) (ii) was intended to apply to such a case as this, and I do not think that it does apply.

Then reliance is place on s. 3 (3):

"Where, by reason of a statutory or other right of reverter, or of an equitable right of entry taking effect, or for any other reason, a person becomes entitled

to require a legal estate to be vested in him, then and in such case the estate owner whose estate is affected shall be bound to convey or create such legal estate as the case may require."

That, I think, was intended to apply to a wholly different class of circumstances and that sub-section does not apply to the present case. Section 35, as I have said, provides for full trusts which are to affect the proceeds of sale, and it is plain that the son's rights, such as they are, cannot in any way be satisfied out of the proceeds of sale. It is said that s. 35 must be read subject to s. 3. That is correct so far as s. 3 provides for rights paramount to the trusts for sale, but under sub-s. (1) (b) (i) in such a case as this s. 3 provides for a similar case to that provided for by s. 35 :

"The trustees shall stand possessed of the net proceeds of sale . . . upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the same respectively, of which they have notice, and whether created before or after the disposition upon trust for sale, according to their respective priorities."

Turning to s. 205 (1) (x), the definition section, it is provided that " 'equitable interests' mean all the other interests and charges in or over land or in the proceeds of sale thereof," that is, other than legal estates. The right of the son is not, in my opinion, an equitable interest within s. 3 or s. 35. The argument of counsel as to the effect of s. 3 and s. 35 is not accurate. An "overriding trust" does not include this direction to the trustees. In fact, that direction is, I think, overriden by the statutory trusts. As far as I can understand the Act, I am unable to appreciate how and in what manner the statutory trusts, which have displaced the power given by the will, can be bound by the direction of the testator as to what the trustees were to do under the will. Why the Act should interfere with carrying out the trusts of the will is not for me to say, but, for the reasons I have given, I am of opinion that, in exercising the statutory trusts, the trustees are not bound by the direction.

*Order accordingly.*

Solicitors : *Kingsford, Dorman, & Co.*, for *Arnold, Son & Rose*, Birmingham.

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

# R. v. KENT JUSTICES. Ex parte TRIPLOW

[King's Bench Division (Lord Hewart, C.J., Avory and Salter, JJ.), January 14, 1927]

[Reported 137 L.T. 25; 91 J.P. 38; 43 T.L.R. 227; 25 L.G.R. 120]

*Magistrates—Jurisdiction—Refusal of jurisdiction—Refusal in pursuance of general rule—Application for ejectment order—Refusal on ground of greater suitability of county court.*

A landlord applied to the county court for possession of a cottage which he owned, but the application was dismissed. Subsequently the landlord applied, on different facts, to justices sitting in the petty sessional division where the cottage was situated for an ejectment order under the Small Tenements Recovery Act, 1838, s. 1. The justices refused the application on the ground that it was not their practice to hear such applications as they considered that they were more suitable for the county court. The applicant obtained a rule nisi for an order in the nature of a mandamus to the justices to hear and determine the application.

**Held:** the justices had refused jurisdiction in pursuance of a general rule, and, as they were not entitled to do so, the rule nisi must be made absolute.

**Notes.** As to issuing mandamus to justices, see 25 Halsbury's Laws (3rd Edn.) 319–321; and for cases see 33 Digest 422–429. As to recovery of possession before magistrates, see 23 Halsbury's Laws (3rd Edn.) 710–713; and for cases see 31 Digest (Repl.) 615 et seq. For the Small Tenements Recovery Act, 1838, s. 1, see 13 Halsbury's Statutes (2nd Edn.) 855.

**Rule nisi** for an order in the nature of a mandamus to justices of the Sittingbourne petty sessional division of the county of Kent to hear and determine pursuant to the statutes in that behalf the matter of an application by Frank Triplow under s. 1 of the Small Tenements Recovery Act, 1838, for possession of a small tenement occupied by one Wheatley and known as No. 3, Duvards Place, Borden, in the said county. The rule was obtained on the grounds that the tenement was within the jurisdiction of the justices, and that the justices were wrong in law in refusing to hear the application. The facts are set out in the judgment of Lord Hewart, C.J.

*A. L. B. Thesiger* showed cause.

*Elliot M. Gorst* in support of the rule.

**LORD HEWART, C.J.**—In my opinion, this case is perfectly clear. It is common ground that the tenement was within the jurisdiction of the justices; the question is whether they refused to hear the application. Two classes of material are put forward to show that they refused, first, a report in the first person from the "East Kent Gazette," from which it appears that as counsel was opening the applicant's case the chairman interrupted and asked whether there had been any application to the county court. Counsel said that there had been an application, but under a different Act, and that this was a different set of facts and a speedier method of justice. The chairman then said: "This court, as a rule, does not deal with these things. They should go to the county court. This case has been examined by the county court judge?" Counsel replied: "Yes. It was before him on a certificate from the county agricultural committee." The magistrates' clerk interposed: "And it was adjourned for plaintiff to get it?" Counsel: "And he got it. The facts were entirely different from those which will come before you." The chairman: "The attitude of this court is that these cases should go to the county court, and, in my opinion, it is better that they should. The county court judge knows better than we do. If he has turned it down, I don't think this court ought to deal with it." Counsel: "Does the Bench not wish to hear this case?" The chairman: "That is our attitude. We do not care on what grounds it was turned

down by the county court judge." Counsel: "Very well, I can't press it." That is to say, that, because two years before on some facts there had been an unsuccessful application to the county court, this application was not to be heard. That extract makes it clear that the refusal to hear was not based on special facts relating to the individual case, but on a general rule adopted by the justices with reference to a class of cases. If there were any doubt it would be made clear from the letter of the clerk to the justices, which was the second matter put forward in support of this rule. Writing to the applicant's solicitor in reply to an inquiry as to a convenient date for the hearing of the application, the clerk says: "My justices have for many years decided not to entertain applications in ejectment, holding the view that as the county court has concurrent jurisdiction disputes affecting the law of landlord and tenant can be better dealt with in that court, which is presided over by a judge trained in law." It is not necessary to enlarge on the matter; it seems as clear as it can be that the justices declined to hear this application in pursuance of a general rule, and they are not entitled to do so. The rule must accordingly be made absolute.

**AVORY, J.**—I agree that the conduct of the justices in this case, however excellent and well-intentioned their motives were, amounted to a declining of jurisdiction. There may be good reasons why a landlord should seek his remedy under this statute rather than in the county court—e.g., that justices sit more frequently than the county court. In some cases it may be absolutely necessary to seek the speediest remedy; if, for instance, the tenant is guilty of wilful waste. On proof of the necessary facts it becomes the duty of the justices to issue their warrant.

**SALTER, J.**—I agree. We have nothing to do with the merits. The justices must hear the application and enforce the legal rights of the parties whatever those rights may turn out to be.

*Rule absolute.*

Solicitors: *Hedley, Norris & Co.*, for *Harris & Harris*, Sittingbourne; *Mowll & Mowll*, for *J. M. A. Poncia*, Ashford, Kent.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

# FAREY *v.* COOPER AND OTHERS

[Court of Appeal (Bankes, Atkin and Lawrence, L.JJ.), June 30, July 1, 1927]

[Reported [1927] 2 K.B. 384; 96 L.J.K.B. 1046; 137 L.T. 720; 43 T.L.R. 803]

B

*Bankruptcy—Assignment for benefit of creditors—Goodwill—Right of debtor to solicit customers of business asigned.*

By a deed of assignment the debtors, who had been carrying on business as bakers, assigned the business and goodwill thereof to the plaintiff as trustee for the benefit of their creditors, the plaintiff being empowered to carry on the C business so far as might be necessary for the winding-up of the estate. The debtors covenanted, inter alia, that they would "do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realisation of the debtors' property and the distribution of the proceeds thereof among the creditors." The plaintiff D alleged that while he was carrying on the business for the benefit of the creditors the debtors solicited orders from the customers of the business on behalf of another bakery business carried on by them and the defendant, who, it was further alleged, had instigated them to solicit the orders, and the plaintiff sought injunctions to restrain the debtors and the defendant from continuing so to act.

E **Held:** on the true construction of the assignment of the business and goodwill no obligation on the part of the debtors was to be implied that they would not in any way derogate from their grant, nor was any contractual relationship created between them and the plaintiff which would give rise to an implied obligation that they would not solicit the customers of the business, and, therefore, the plaintiff was not entitled to the injunctions which he claimed.

F *Walker* v. *Mottram* (1) (1881), 19 Ch.D. 355, and *Green & Sons (Northampton), Ltd.* v. *Morris* (2), [1914] 1 Ch. 562, applied.

**Notes.** Referred to: *R. J. Reuter Co.* v. *Mulhens* (1953), 70 R.P.C. 102.

As to the transfer of goodwill to a trustee in bankruptcy see 2 Halsbury's Laws (3rd Edn.) 425, 426, and for cases see 5 Digest 970, 971.

G Cases referred to:

(1) *Walker* v. *Mottram* (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 30 W.R. 165, C.A.; 5 Digest 970, *7949*.

(2) *Green & Sons (Northampton), Ltd.* v. *Morris*, [1914] 1 Ch. 562; 83 L.J.Ch. 559; 110 L.T. 508; 30 T.L.R. 301; 58 Sol. Jo. 398; 5 Digest, 971, *7950*.

(3) *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322; 41 L.J.Ch. 427; 25 L.T. H 894; 36 J.P. 404; 20 W.R. 309; 43 Digest 82, *866*.

(4) *Dawson* v. *Beeson* (1882), 22 Ch.D. 504; 52 L.J.Ch. 563; 48 L.T. 407; 31 W.R. 537, C.A.; 36 Digest (Repl.) 601, *1630*.

(5) *Trego* v. *Hunt*, [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80 H.L.; 43 Digest 9, *44*.

(6) *Boorne* v. *Wicker*, post p. 388; [1927] 1 Ch. 667; 96 L.J.Ch. 361; 137 L.T. I 409; sub nom. *Dorne* v. *Wicker*, 71 Sol. Jo. 310; 24 Digest (Repl.) 669, *6575*.

**Appeal** from a judgment of Finlay, J., in an action tried with a jury.

The plaintiff claimed as trustee under a deed of assignment, dated Nov. 11, 1925, and executed by the three defendants, C. T. Hill, G. A. Hill, and C. H. Hill (the debtors), who had carried on a bakery business at Harrow, under the name of Hill Bros. By the deed the debtors assigned the business and the goodwill thereof to the plaintiff as trustee, with power to carry on the business so far as

might be necessary to wind-up the estate, and they covenanted (in the terms of s. 22 (2) (3) of the Bankruptcy Act, 1914), for the purpose of assisting the trustee in realising the property to the best advantage, inter alia, that they would attend at any time as the trustee required and generally

> "do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realisation of the debtors' property and the distribution of the proceeds thereof among the creditors."

The plaintiff alleged that while he, as trustee, was carrying on the business so arranged for the benefit of the creditors, the debtors solicited orders from the customers of the business on behalf of another bakery business carried on at Harrow by them and the defendant Cooper or by the defendant Cooper alone. He also alleged that the defendant Cooper had instigated and allowed one of the debtors, C. T. Hill, to solicit customers of the bakery business formerly carried on by him and his two brothers. . . . Accordingly, the plaintiff brought this action claiming an injunction to restrain the three debtors from soliciting customers of the bakery business formerly carried on by them which they had assigned to the plaintiff as trustee for the benefit of the creditors. He also claimed an injunction to restrain the defendant Cooper from instigating the other defendants to solicit the customers of the business. The jury found that G. A. Hill and C. T. Hill had solicited customers of the business and that the defendant Cooper had instigated C. T. Hill to do so. The jury awarded damages against the defendants, and FINLAY, J., directed judgment to be entered against them for the damages awarded and granted injunctions against the debtors, G. A. Hill and C. T. Hill and the defendant Cooper. The defendant Cooper appealed.

*Serjeant Sullivan*, *K.C.* and *Elkin* for the defendant, Cooper.

*Pritt*, *K.C.* and *A. W. Roskill* (*Comyns-Carr*, *K.C.* with them) for the plaintiff trustee.

**BANKES, L.J.**—This is an appeal from the verdict and judgment in an action tried before FINLAY, J., and a number of points have been raised in support of the appeal. The action was brought by the trustee under a deed of assignment against the three assignors, and the present appellant, Wright Cooper. The case made against Cooper was that, being a baker at Harrow, he had instigated and allowed one of his co-defendants, Charles Thomas Hill, to commit a wrong. Whether it is described as a breach of his (Hill's) duty, or a derogation from his grant, or a breach of contract, does not very much matter. The wrong consisted in soliciting customers of the business formerly carried on by the three assignors as bakers and confectioners in Harrow. The action was tried by FINLAY, J., and a common jury, and among other questions the learned judge asked the jury whether the defendant Cooper did instigate or conspire with the other defendants, or any and which of them, to canvass and obtain either (a) the old customers or (b) other customers of the trustee, and the jury answered that question in the affirmative. Upon that, after discussion, the learned judge entered judgment for the plaintiff and granted an injunction to restrain Cooper from instigating or allowing Charles Thomas Hill, his servants or agents, to endeavour to induce the customers of Hill Bros., bakers and confectioners, to deal with him (Cooper). From that judgment and verdict this appeal is brought, and a number of grounds have been urged, grounds of law and grounds of fact.

With regard to the law, it was said that there is no evidence to support the jury's finding. We have heard counsel for Cooper upon that, and I do not propose to express any opinion upon that point, as we have not heard the other side, except to say that there is certainly something to be said in support of the argument. Then it was said: Assume that there was some evidence to go to the jury, the verdict and judgment ought to be set aside on the ground of misdirection and

A nondirection and that the verdict was against the weight of evidence. There is obviously a good deal to be said in support of that contention, but we have not heard the other side, and I express no opinion about that. The question of law, I think, is conclusive. The point is this. This action will not lie against Cooper for the simple reason that the acts which he is said to have instigated or allowed were not wrongful acts at all, but were acts which Charles Thomas Hill was, in the circum-
B stances, perfectly justified in doing. If he was perfectly justified in doing them, it cannot be complained of Cooper that he instigated or assisted him. I quite understand that Cooper emphatically denies that he had anything to do with what is alleged, but that question remains undecided because I propose to deal with this appeal on this underlying principle of law. Authorities which have been referred to show what the state of the law was when this deed of assignment was
C made.

The deed of assignment was made on Nov. 11, 1925, and it is in common form to a large extent. Among other things, it contains in the form of a covenant what really are extracts from the provisions of the Bankruptcy Act relating to bankruptcy, and the particular covenant which is relied upon, and the one upon which the learned judge seems to have decided the matter, was a covenant impos-
D ing a number of obligations upon the debtors for the purpose of assisting the trustee in realising their property to the best advantage. Among other provisions there is a provision that they would attend at any time as the trustee required, and generally do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realisation
E of the debtors' property and the distribution of the proceeds thereof among the creditors. On the face of it, that is an affirmative covenant: it defines what the debtors are to do by way of assisting the trustee in the realisation of their property. But it is said that upon the true construction of this covenant there is implied a negative covenant, an obligation not to do anything which will depreciate the
F value of the property, and that one of the negative acts which must be implied is the refraining from soliciting the old customers of the former business of the brothers, which has been assigned to the trustee. The learned judge decided this case, as I understand, upon the view that there was such a negative covenant implied.

I wish to say in the first instance that I think that this covenant must be
G construed having regard to what was at the time of the covenant the existing law in reference to this particular matter, and for two purposes—(i) to see whether C. T. Hill was or was not doing something that he was entitled to do, and, (ii) to see whether the mere knowledge that the brothers Hill had assigned all their property, including the goodwill of their business, to the trustee, without any knowledge that the deed contained this particular covenant, upon which everything
H apparently turns, was sufficient to create a cause of action against Cooper. I think that is a very material consideration.

With regard to the law, I wish to refer to three or four cases quite shortly which have been mentioned in order of date, the date when they were, in fact, decided, and the ground upon which, in my opinion, they appear to have been decided. The first is *Walker* v. *Mottram* (1) which was decided in 1881 by the Court of Appeal.
I That case has stood as an authority ever since, and is now completely established as a binding authority. The question which was raised in that case was whether, in a case of bankruptcy, a bankrupt whose property and the goodwill of the business had passed to a trustee in bankruptcy was under any obligation, as against a purchaser from the trustee, not to solicit the customers of the old business. It was held that he was not. The ground, as I understand it, upon which that was held was that the passing of the property by the act of bankruptcy from the bankrupt to the trustee created no obligation as between the bankrupt and the trustee not to derogate from the grant within the meaning of the rule, and that there was no

contract and no privity of contract between the bankrupt and the trustee from which any obligation not to solicit the customers of the old business could arise. I will read one or two lines from the headnote (19 Ch.D. 355): A

"The rule of *Labouchere* v. *Dawson* (3), by which, in the case of a voluntary sale, the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up bonâ fide a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser." B C

I should like to refer to a case which was decided in 1882. It is interesting as an instance in which Sir George Jessel, M.R., applied the doctrine of *Walker* v. *Mottram* (1), and for the way in which he expressed himself with reference to that decision. That was a case of partners where one partner had been expelled and his interest had been purchased by his former partner. The expelled partner then set about soliciting the customers of the former partnership, and an application was made to restrain him. Jessel, M.R., refused to make any order, and he said this (*Dawson* v. *Beeson* (4) (22 Ch.D. at p. 509)): D

"The plaintiffs say that they had a right under the articles to expel their partner. Well, they did exercise that right and expelled the defendant, and then they bought the defendant's interest in the property from the sheriff. That is not equivalent to a voluntary alienation by a vendor, it is like the case of the alienation of a debtor's property by bankruptcy. The defendant loses the right to the business, but he does so involuntarily. He is turned out against his will, and is only entitled to receive the value of his share as if dead. He is not in the same position as a partner resigning voluntarily. Looking at *Walker* v. *Mottram* (1), I think that he ought not to be restrained from carrying on the business in his own name and soliciting customers." E F

In 1895 came *Trego* v. *Hunt* (5), in which the House of Lords established the principle that where a person voluntarily disposes of the goodwill of his business he cannot afterwards canvass the customers of the old firm. There is one passage I should like to refer to in the judgment of Lord Herschell in which he describes the principle. Lord Herschell says this ([1896] A.C. at p. 21): G

"It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court equity." H

That was the position when *Green & Sons (Northampton), Ltd.* v. *Morris* (2) was decided.

I go back for a moment to *Walker* v. *Mottram* (1) to pick up another point which I think is important in reference to the present case. It is said by the appellant, Cooper, that, in considering the construction of the words in question in this deed of assignment, it must be borne in mind that they are a reproduction of provisions in the Bankruptcy Acts which were in force when *Walker* v. *Mottram* (1) was decided [see now s. 22 (2) or (3) of the Act of 1914], and that the Court of Appeal then decided that there was no such obligation arising from those statutory words as, it is now contended, exists from the contractual words in question in this assignment. It is quite true that the point was not put in exactly the same way in which I

A it has been put to-day, but, in my opinion, it is impossible to come to any other conclusion than that the Court of Appeal had in mind the equivalent provision of the Bankruptcy Act then in force at the time they came to the decision at which they arrived. The way in which this particular part of the case in *Walker* v. *Mottram* (1) was put was this. It was said that under the bankruptcy laws goodwill is expressly mentioned as a thing which passes to the trustee [see now s. 55 of the B Bankruptcy Act, 1914], and that there is a special provision in the statutes protecting the value of the goodwill in the hands of the trustee which is reproduced in this assignment in the form of an obligation to do everything that is reasonably required and to the utmost of the debtor's power aid in the realisation of their property. In these circumstances it seems to me that *Walker* v. *Mottram* (1) must be treated as a decision that the Court of Appeal did not consider that the soliciting C of the old customers was a breach of the statutory obligation that the bankrupts owed to the trustee to aid to the utmost of their power in the realisation of their property. I think that that is a very important consideration when we come to consider *Green & Sons (Northampton), Ltd.* v. *Morris* (2) and the construction that ought to be put upon this deed. In *Green & Sons (Northampton), Ltd.* v. *Morris* (2) it was expressly decided that for all practical purposes an assignment under a D deed of assignment for the benefit of creditors, although in one sense it may be said to be voluntary, yet in the eye of the law, and for this particular purpose, must be treated as involuntary and in the same position as a transaction which takes place by operation of bankruptcy law between the bankrupt to the trustee. Counsel who argued the case for the defendant there, begins by saying: "It is submitted E that there is no obligation on the former owner of a business not to solicit where the goodwill is not sold by him but by his trustee under a deed of assignment for the benefit of creditors. A bankrupt, although he files his own petition will not be restrained from soliciting (*Walker* v. *Mottram* (1)). In that case it was held that a bankrupt whose business had been sold by his trustee in liquidation could not be restrained from soliciting his former customers, and that it was immaterial F whether he had or had not joined in the conveyance to the purchaser. That decision proceeded on the principle that a debtor ought not to be prevented after the liquidation of his affairs from gaining his livelihood. The same principle, it is submitted, applies in the case where a debtor has assigned all his property for the benefit of his creditors. . . . There is no privity of contract between the assignor and the ultimate purchaser of his business. In such a case there is no implied G contract by the assignor that he will not solicit the customers of the old business." What is meant by saying "There is no privity of contract between the assignor and the ultimate purchaser of his business"? Those words must mean that there is no contractual obligation as between the assignor and the trustee, and there being no such obligation as between the assignor and the trustee, there is nothing which the trustee can pass on to the ultimate purchaser of the business. In other words H there is nothing which the trustee can pass on. Then counsel for the motion says in reply: "The assignment in this case, although for the benefit of creditors, is a voluntary one, and therefore differs from the case of a bankruptcy where the property vests by operation of law. The trustee in this case is in the position of an attorney of the debtor to sell the property." The learned judge, referring to *Walker* v. *Mottram* (1) says this ([1914] 1 Ch. at p. 567):

I

> "The liquidating debtor is a person who is compelled by circumstances to take certain steps in order that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition under the present Bankruptcy Act. I can see no rational distinction between *Walker* v. *Mottram* (1) and the present case. In one sense what the debtor does is voluntary, in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man, by divesting himself of his property under such circum-

stances as those in this case, does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property."

I think in using that language he is referring to the argument addressed to him.

I agree that it is a contentious point whether or not a man who executes an assignment such as this is, is for all purposes in the same position as a man who quite involuntarily comes within the provisions of the bankruptcy law, but *Walker* v. *Mottram* (1) was decided as long ago as 1914 and has been quite recently approved by TOMLIN, J., in *Boorne* v. *Wicker* (6). I certainly am not prepared to dissent from it. I think myself that it is the right view, and it seems to me impossible to decide this case in the way counsel for the trustee asked us to do without overruling *Green & Sons (Northampton), Ltd.* v. *Morris* (2), and that I am not prepared to do. I think that when this deed was executed the law was that a person who executed such a deed was under no obligation to refrain from soliciting the customers of the old business, and that after the decision of *Green & Sons (Northampton), Ltd.* v. *Morris* (2), if it was desired to go further and obtain a greater protection than the law as it existed afforded, some clear and precise words must be inserted in the covenant placing the assignor under an obligation to whatever extent it is desired so long as it does not infringe any other provision of the law. In the absence of any such express covenant in this case two consequences follow. First of all, it cannot be said that C. T. Hill was doing anything other than he was entitled to do, in which case it cannot possibly be said that he committed any wrong which entitled the trustee to bring an action against him ; and I also think that the trustee would fail, even assuming that a different view were taken of WARRINGTON, J.'s, decision. It seems to me that Cooper was entitled to act under the belief that WARRINGTON, J.'s, decision was the law, and all he knew was that there had been an assignment for the benefit of creditors, and he had no reason to know, or to suppose, that there was anything in that deed which took the case out of that rule. Therefore, it seems to me that whether you treat the covenant as one which does not contain a precise negative obligation, which is now contended for, or whether you accept it as containing such an obligation, but at the same time accept WARRINGTON, J.'s, decision, Cooper could say in the one case : "I have done no wrong, and it is impossible to suggest that I have," and in the other case : "Whether I did or not, I did not know it, and you must bring home to me knowledge before you can bring an action against me for instigating a man to do something which I knew was wrong." For these reasons I think this appeal succeeds, and must be allowed with costs, and the judgment against Cooper set aside and entered for him with costs here and below.

**ATKIN, L.J.**—I agree. This is a case of a deed of assignment by certain debtors who were carrying on a bakers' business in Harrow, and the plaintiff is the trustee of the deed of assignment. The action which is brought against the defendant who now appeals, Cooper, is for damages for procuring the breach of certain obligations, whether by covenant express or implied, not to solicit customers of the business, and not to solicit these customers whether they were customers of the business at the time of the assignment by the debtor or are new customers acquired by the trustee in the course of his conduct of the business under the deed of assignment. To establish a case of procuring a breach of covenant it is, of course, necessary to establish that there was such a covenant, and that the person procuring was, in fact, under an obligation to refrain from the acts. That has given rise to a very interesting question of law. As far as appears from the summing-up, the learned judge adopted a simple method of solving the question whether or not there was such an obligation by leaving it to the jury, and one must assume that the jury found that such an obligation existed. But we are told that although he in terms left it to the jury, he had, in fact, ruled upon it before and indicated his view that there was an obligation subsisting. We have now to address ourselves to the proposition. The suggestion is that the debtors, who had assigned all their property to the

A trustee, had included in that property the goodwill of the business, and that by that assignment, by express covenant, or implied covenant, they were under an obligation to abstain from soliciting the customers of that business, whether they were customers at the date of the assignment or whether they had since been acquired by the trustee.

I think a simple way of approaching this case is by inquiring in the first place B what would have been the position if, instead of it being a deed of assignment, there had been a bankruptcy petition upon which the debtors had been adjudicated, and the plaintiff was trustee in bankruptcy in whom the property of the debtors, including the goodwill of the business, was vested. It appears to me that in such a case the bankrupt is not under an obligation to the trustee to abstain from soliciting the old customers of the business, and a fortiori, from soliciting the new customers C of the business acquired after his connection with the business had come to an end. That seems to explain the decision in *Walker* v. *Mottram* (1). It is unnecessary, I think, to consider the grounds for it. No doubt it is founded upon the fact that in a case of bankruptcy there is no voluntary disposition by the debtor of his business, and, therefore, no opportunity of implying a contract between the bankrupt and the trustee. I think what also influenced the court to come to their conclusion is D the view that, whereas in the case of a voluntary disposition a man is doing something that might be said to be a breach of faith in diminishing that which he has sold—a derogation from his grant it has been called—by soliciting the old customers, in a case of bankruptcy not only does that consideration not apply, but there is a contrary view indicated, namely, that the policy of the Bankruptcy Acts enabled a bankrupt to resume his position in the world as much as possible so as to be able to E carry on his business, and, inasmuch as he, being then a bankrupt, would have very few persons to deal with except those he had known beforehand, there is nothing to prevent him from asking for the assistance of his former customers in order to enable him to rehabilitate himself in the commercial world. Therefore, if it were a bankruptcy pure and simple, it seems to me plain that the debtors would be F under no obligation to abstain from soliciting the customers of the old business.

But it is said this is a case of a deed of assignment, and the position is the same as in an ordinary case of a sale to a trustee. One answer that has to be made to that, and, indeed, it is admitted to be a forcible answer by counsel for the trustee, is that that is not enough to justify the verdict which has been obtained and the injunction which has been granted, because it is quite plain that an implied G obligation in a purchase and sale of a goodwill with nothing more is merely an obligation—enforced in the House of Lords in *Trego* v. *Hunt* (5) to abstain from soliciting those who were customers of the business at the time of the sale, and would not apply to new customers who were obtained after the sale. Inasmuch as the damages here have been assessed on the footing of soliciting new customers, and inasmuch as the injunction is also addressed to restrain Cooper from procuring H the solicitation of the new customers, the verdict would have to be set aside and the injunction discharged and a new trial would have to be ordered on that ground alone. Therefore, counsel for the trustee puts the case on a wider footing, and contends that in this case there was an express covenant which the trustee was entitled to enforce as against the debtors, a breach of which has been procured by Cooper. The covenant is a covenant that is to be found in the printed deed of I assignment,

> "That the debtors would aid to the utmost of their power the realisation of the debtors' property and the distribution of the proceeds thereof amongst the creditors,"

and it is said that that obligation imported a negative obligation not to solicit the customers of the business, either new or old. One has to consider that covenants as a whole in conjunction with the other covenants and the other stipulations, and it is, to my mind, very relevant to bear in mind, as was pointed

out to us by counsel for Cooper, that that covenant is nothing but a repetition in the deed of the words of the Bankruptcy Act—the present Act and the former Act —governing the duties of a bankrupt towards a trustee in bankruptcy. The words are to be found in s. 22 (3) of the Act of 1914, and in s. 19 of the Bankruptcy Act, 1869. Not only do these words appear, but the previous covenant in the same deed that the debtors will give such further inventory of the property and particulars of their creditors and debtors, and attend examinations, and attend meetings, and do all such acts as may be reasonably required by the trustees, are all words which are taken almost verbatim from the provisions of s. 22 (2) of the Act of 1914, and are in themselves merely a re-statement by way of contract of the obligations imposed by the statute.

To my mind, it follows that in considering such a contract in a matter in pari materia with the Bankruptcy Act it would be right to give to the words in the contract the same construction as had been given to the words in the statute, and I think it is made more obvious that that would be the right construction when one remembers that by one of the clauses of this deed it is

> "expressly agreed and declared in the administration of the joint and separate estates of the debtors under these presents the trustees shall follow and the creditors and debtors so far as circumstances admit have the benefit of and be bound by the rules, right and equities which govern or prevail in the administration in bankruptcy of the joint and separate estates of joint debtors."

Therefore, I think there is no doubt that one ought to put upon these words in a contract the construction that is put upon the same words in the Bankruptcy Act. It is quite plain from *Walker* v. *Mottram* (1) that these words in the Bankruptcy Act would not be construed to impose an obligation upon a bankrupt to restrain him from soliciting the customers of the business, whether new or old, because, if they ought to be so construed in bankruptcy it appears to me impossible that *Walker* v. *Mottram* (1) would have been decided as it was. I think, therefore, these words do not bear the meaning that has been put upon them. I should also come to the conclusion that, inasmuch as the duties of the debtors to the trustee in respect of the business are carefully defined in this express covenant, that covenant would probably exclude the existence of an implied covenant different from the express covenant, though dealing with the same subject-matter. Therefore, if it rested on contract alone, I think the position would be as I have stated, apart from other decisions; but it was decided by WARRINGTON, J., in *Green & Sons (Northampton), Ltd.* v. *Morris* (2) that the same position exists in respect to an obligation not to solicit in the case of an assignment for the benefit of creditors as exists in bankruptcy, and that the principle of *Walker* v. *Mottram* (1) ought to be applied to a debtor or a sale under a deed of arrangement such as is applied, and was applied, in the case of a sale by a trustee in bankruptcy. The reason adduced by the learned judge was that for practical purposes the position must be treated as the same and the assignment must be treated as being more or less involuntary. I think it sufficient to say that I am not prepared to dissent from the statement of the law which has existed for a considerable time and has been dealt with over and over again under deeds of assignment on the footing that that is the law. Therefore, I think that we are left in this position, that the principles of bankruptcy apply in this case.

It was said by counsel for the trustee that he could distinguish both *Walker* v. *Mottram* (1) and *Green & Sons (Northampton), Ltd.* v. *Morris* (2) on the ground that in both those cases what was in question was a sale by the trustee, and that the purchaser from the trustee had not got the same rights against the debtor as the trustee himself would have. To my mind, that is quite an impossible contention. I apprehend that the decision of *Walker* v. *Mottram* (1) is based upon the consideration that a trustee in bankruptcy himself had not got a right as against a debtor to restrain the debtor from soliciting the old customers of the

A business, because if he had such a right it seems to me conceivable that he would be capable of passing it on. It does not matter whether his right would be derived from contract, or from an obligation under the statute, or from the vesting of the property, and the obligation imposed by s. 22. It is obvious to my mind that if the trustee had such a right he would have been able to use it for the benefit of the estate, and to pass it on to a purchaser, thereby getting the greatest value for B the estate that he could, and I think that the reasoning in *Walker* v. *Mottram* (1) depends on the view that there was no such obligation as between the debtor and the trustee, and, therefore, it could not be passed on to a purchaser from the trustee. I think that is the view taken by WARRINGTON, J., in *Green & Sons (Northampton), Ltd.* v. *Morris* (2).

C The result seems to me to be that, as the debtors were under no obligation to the trustee to refrain from doing the acts complained of, the defendant, Cooper, could not possibly be made liable either for damages or to an injunction to restrain him from procuring acts which themselves were lawful in the debtors. The verdict and judgment given against Cooper, who alone is the appellant, must be set aside and the verdict and judgment entered for him.

D **LAWRENCE, L.J.**—I agree. The case made against the defendant Cooper is that he instigated the defendants Hill to commit a breach of contract. The breach alleged to have been instigated is the breach of an implied covenant on the part of the defendants Hill with the plaintiff not to canvass either the old or the new customers of Hill Bros.

E The first and vital question which arises is whether there was, in fact, any such implied covenant. As regards new customers—that is to say, customers who became customers after the execution of the deed of assignment—the rule in *Trego* v. *Hunt* (5) does not apply, but it is said that a covenant not to canvass these customers would be implied by reason of the covenant contained in the assignment to aid in the realisation of the assignor's property. That is a question F I will deal with in a moment. As regard the old customers, the rule in *Trego* v. *Hunt* (5) primâ facie might apply, but there is a decision to which we have been referred in *Green & Sons (Northampton), Ltd.* v. *Morris* (2) which determines that that rule is not to be imported in a case of an assignment for the benefit of creditors, and the question arises whether that decision is rightly arrived at. The same argument as regards the old customers is adduced—namely, that there is an G implied covenant by reason of the covenant to aid in the realisation of the assets.

The first question that must be dealt with, in my judgment, is whether *Green & Sons (Northampton), Ltd.* v. *Morris* (2) was rightly decided, and, if so, whether it covers the present case. I agree with a remark made by my Lord as regards *Green & Sons (Northampton), Ltd.* v. *Morris* (2) being good law, as it has stood for so long undisturbed and has never been doubted or questioned, and I adopt H what my colleagues have said as to the inadvisability of overruling that case at the present time. Counsel for the trustee has contended that, even if *Green & Sons (Northampton), Ltd. v. Morris* (2) stands, it is distinguishable on two grounds —first, that it was a case not between the trustee and the debtor, but between a purchaser from the trustee and the debtor. In my judgment, that is not a sound distinction. The foundation of *Walker* v. *Mottram* (1) and *Green & Sons* I *(Northampton), Ltd.* v. *Morris* (2) is that there is no implied contract by a debtor with a trustee the benefit of which the trustee can pass on to a purchaser. It is upon that foundation that the whole of both these judgments rests, and, therefore, they involve that, according to *Walker* v. *Mottram* (1) in the case of bankruptcy, and according to *Green & Sons (Northampton), Ltd.* v. *Morris* (2) in the case of an assignment for the benefit of creditors, the bankrupt himself can solicit the old customers and the new customers. The second ground upon which counsel for the trustee sought to distinguish *Green & Sons (Northampton), Ltd.* v. *Morris*

(2) was that in that case there was no such covenant as we have here that the debtors will aid the trustee in the realisation of the property.

That brings me to the final point whether a covenant ought to be implied on the part of the debtors in the present case not to canvass either old or new customers from the fact of there being a covenant by them to aid the trustee in the realisation of the property. I fully concur in the remarks made by my Lord on the point that that covenant is a mere repetition of the statutory obligation imposed by the Bankruptcy Act upon debtors, and I think it is obvious in construing that covenant that the same rule must be applied to the meaning of the covenant in this deed as was applied in *Walker* v. *Mottram* (1) as regards the statutory equivalent, namely, s. 19 of the Bankruptcy Act, 1869. But, quite apart from that, what is the property in the present case which the debtors have covenanted to help the trustees to realise? The assignment includes the goodwill of the business which they were carrying on, but having regard to the decision that goodwill consists only of the probability of the old customers resorting to the old place of business—in other words, the property assigned does not include the benefit of a covenant not to solicit either the old or the new customers—such a covenant as this cannot, in my opinion, enlarge the parcels of the deed, or enhance the value of the property which is thereby assigned, nor can it imply a negative covenant not to do something which the law allows them to do, namely to solicit old and new customers. For these reasons I think the appeal ought to be allowed with costs.

*Appeal allowed.*

Solicitors: *Geo. H. Exeter; Biddle, Thorne, Welsford & Gait.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

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## Re ELLWOOD. Ex parte RIVER DEE DRAINAGE BOARD *v.* HOOSON

[Chancery Division (Astbury and Clauson, JJ.), January 26, 1927]

[Reported [1927] 1 Ch. 455; 96 L.J.Ch. 170; 136 L.T. 696; [1927] B. & C. R. 53]

*Bankruptcy—Preferred debt—Rates—"Parochial or other local rates"—Land drainage rate—Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 33 (1) (*a*).

A drainage board constituted under the Land Drainage Act, 1918, levied a rate which was not paid, and within twelve months after the rate was levied a receiving order was made against the person liable to pay. The drainage board claimed that this rate was an "other [than parochial] local rate" within s. 33 (1) (a) of the Bankruptcy Act, 1914, and was, therefore, entitled to preferential payment.

**Held:** the ejusdem generis rule ought not to be applied so as to limit the words in s. 33 (1) (a), "other local rates," to rates of the same genus as parochial rates; that this drainage rate was a "local" rate; and that it was entitled to preferential payment.

*Statute—Construction—Ejusdem generis—Application of rule—Interpretation of general words following specific words.*

General words following specific words in a statute are primâ facie to be taken in their general sense unless the reasonable interpretation of the statute

requires them to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before. If the particular words exhaust the whole genus the general words must refer to some larger genus.

**Notes.** For the power of drainage boards to make rates, see now Land Drainage Act, 1930, s. 24.

As to preferred debts in bankruptcy, see 2 HALSBURY'S LAWS 486 et seq., and for cases, see 4 DIGEST 471 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Mannesmann Tube Co., Ltd., Von Siemans* v. *Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93; 70 L.J.Ch. 565; 84 L.T. 579; 65 J.P. 377; 8 Mans. 300; 10 Digest (Repl.) 1123, *7815*.

(2) *Anderson* v. *Anderson*, [1895] 1 Q.B. 749; 64 L.J.Q.B. 457; 72 L.T. 313; 43 W.R. 322; 11 T.L.R. 253; 14 R. 367, C.A.; 17 Digest (Repl.) 283, *905*.

(3) *Magnhild (Owners)* v. *McIntyre Bros. & Co.*, [1920] 3 K.B. 321; 89 L.J.K.B. 1110; 124 L.T. 160; 36 T.L.R. 744; 15 Asp. M.L.C. 107; 25 Com. Cas. 347; on appeal [1921] 2 K.B. 97; 90 L.J.K.B. 527; 124 L.T. 771; 37 T.L.R. 413; 26 Com. Cas. 185; 17 Digest (Repl.) 284, *908*.

(4) *Richards* v. *Kidderminster Overseers*, *Richards* v. *Kidderminster Corpn.*, [1896] 2 Ch. 212; 65 L.J.Ch. 502; 74 L.T. 483; 44 W.R. 505; 12 T.L.R. 340; 4 Mans. 169; 10 Digest (Repl.) 994, *6833*.

(5) *Re an Arranging Debtor*, [1921] 2 I.R. 1; Digest Supp.

(6) *Southend-on-Sea Estates Co., Ltd.* v. *I.R. Comrs.*, [1914] 1 K.B. 515; 83 L.J.K.B. 611; 110 L.T. 162; 30 T.L.R. 141; 58 Sol. Jo. 137, C.A.; affirmed sub nom. *I.R. Comrs.* v. *Southend-on-Sea Estates Co., Ltd.*, [1915] A.C. 428; 84 L.J.K.B. 154; 112 L.T. 89; 31 T.L.R. 30; 59 Sol. Jo. 24; H.L.; 31 Digest (Repl.) 594, *7127*.

(7) *Parker* v. *Marchant* (1842), 1 Y. & C. Ch. Cas. 290; 11 L.J.Ch. 223; 6 Jur. 292; 62 E.R. 893; on appeal (1843), 1 Ph. 356; 12 L.J.Ch. 385, L.C.; 44 Digest 594, *4188*.

(8) *A.-G. of Ontario* v. *Mercer* (1883), 8 App. Cas. 767; 52 L.J.P.C. 84; 49 L.T. 312, P.C.; 42 Digest 620, *205*.

**Appeal** from an order of the judge of Chester County Court, sitting in bankruptcy, dismissing a motion by the River Dee Drainage Board for a declaration that their claim for rates amounting to £9 15s. 6d. against the estate of the bankrupt was entitled to preferential payment under s. 33 (1) (a) of the Bankruptcy Act, 1914.

The River Dee Drainage Board was established in 1922 by an order of the Board of Agriculture and Fisheries pursuant to the Land Drainage Act, 1918. By s. 1 (4) of the Land Drainage Act, 1918, the Board had power of differential rating of part of any district and of total or partial exemption of any special class of land within the district. The district within the jurisdiction of the Board was divided into a number of areas for rating purposes. In one of these areas was included a farm of ninety-seven acres belonging to the bankrupt. On Sept. 12, 1925, the Board, in exercise of its statutory powers, levied a rate of £9 15s. 6d. upon the bankrupt, which was not paid. On May 21, 1926, within twelve months after the levying of the rate, a receiving order was made against the bankrupt, and adjudication followed. By s. 33 (1) of the Bankruptcy Act, 1914:

> "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—(a) all parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time . . ."

The county court judge, in dismissing the Board's motion, applied the ejusdem generis rule, and held that the drainage rate was not an "other local rate" within the meaning of s. 33.

*Montgomery, K.C.*, and *John Grace*, for the board, referred to *Re Mannesmann Tube Co., Ltd.* (1); *Anderson* v. *Anderson* (2); *Magnhild (Owners)* v. *McIntyre Bros. & Co.* (3); *Richards* v. *Overseers Kidderminster* (4); *Re An Arranging Debtor* (5); *I.R. Comrs.* v. *Southend-on-Sea Estates Co., Ltd.* (6). A

*E. W. Hansell* for the trustee.

**ASTBURY, J.**—The Board exercises statutory powers of levying rates in the district in which the bankrupt occupies property of ninety-seven acres, and in September, 1925, they levied a rate of £9 15s. 6d. upon the bankrupt's property which was not paid. In May, 1926, a receiving order was made against the bankrupt. By s. 33 (1) of the Bankruptcy Act, 1914, it is provided that B

> "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time . . ." C

It is not contested that this rate was due from the bankrupt and had become due within twelve months before the receiving order. The only question is whether this is an "other local rate" within the section. D

The learned county court judge delivered an elaborate judgment giving the reasons for his decision, and the question at issue is whether the ejusdem generis rule applies to this section, and, if so, does it exclude this rate? The question lies in an extremely small compass. I will not discuss the general reasons of the learned judge for applying the ejusdem generis rule, for they are not relevant to the matter which must be decided on the words of the section. It is not denied or questioned E that this is a local rate levied by an authority having a statutory power to levy. But it is argued that "other local rates" must be construed ejusdem generis with parochial rates, so as to include some other local rates and exclude others. It is very difficult to apply the ejusdem generis rule to a sentence which has only two limbs. General words may be construed ejusdem generis with a preceding category. In *Anderson* v. *Anderson* (2), RIGBY, L.J., said ([1895] 1 Q.B. at p. 755): F

> "The doctrine known as that of ejusdem generis has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I G think greater care has been taken in the application of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied; it has been on doctrine throughout. The main principle upon which you must proceed is, to give to all the words their common meaning; you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show H that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough. One need not travel beyond the case of *Parker* v. *Marchant* (7) to find great authority for that proposition—I mean not only the authority of the case itself, which is deservedly high, but other authorities which are cited in it. LORD ELDON, LORD COTTENHAM, SIR WILLIAM GRANT, SIR JOHN LEACH and KNIGHT BRUCE, V.-C., himself, all lay I down the rule to the effect that I have stated—you must give the words which you find in the instrument their general meaning, unless you can see with reasonable plainness that that was not the intention of the testator or settlor."

Counsel for the trustee in bankruptcy has attempted to bring the case within some such limitation as ejusdem generis, by pointing out that under the Land Drainage Act, 1918, and the Order under it constituting the appellant Board, the Board may in rating differentiate between parts of the district. He says quite

truly that this is quite different from the equality of parochial rating. He says also that in the same Act there are words which differentiate the Board from the ordinary local authority. I cannot for that reason bring myself to think that the words "other local rates" can be, or can be intended to be, confined to rates similar to parochial rates. We have not here a category followed by general words. I cannot see how one can have a local rate, which is different from a parochial rate, ejusdem generis with a parochial rate. Then it is said that, if it is impossible to construe the sentence according to the ejusdem generis rule, it was unnecessary to put in the word "parochial" at all. There may be tautology, but the court only has to decide whether this rate is or is not included in the words "other local rates." MAXWELL'S INTERPRETATION OF STATUTES (6th Edn.), at p. 583, puts the ejusdem generis rule rather higher than is done in certain authorities, but really only deals with the case where specified words are followed by general words that can be read with them. In *A.-G. of Ontario* v. *Mercer* (8), LORD SELBORNE says :

> "It is a sound maxim of law, that every word ought primâ facie to be construed in its primary sense, unless a secondary or more limited sense is required by the subject or the context."

I cannot find here that a secondary or more limited sense is required by the context. I may refer to a further explanation of the ejusdem generis rule in BEAL'S CARDINAL RULES OF LEGAL INTERPRETATION (3rd Edn.), at p. 355 :

> "General words in a statute are primâ facie to be taken in their usual sense. General words following specific words in a statute are primâ facie to be taken in their general sense unless the reasonable interpretation of the statute requires them to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before. If the particular words exhaust the whole genus the general words must refer to some larger genus."

In the present case parochial rates exhaust the meaning of parochial rates, and the legislature must have intended something else to be included. Unless words must be construed in some other than their natural sense I see no reason for doing so. I think that the statute pointedly intends to include rates which cannot be strictly described as parochial rates.

**CLAUSON, J.**—I agree. We have here a rate and a local rate, if I may read the words in their primary meaning. It may seem that there are here superfluous words, and that the statute might have said, "all local rates." Either the words limit the meaning of "local rates" or they do not. Assume that they do limit it, what is the limitation? Can we apply the ejusdem generis rule? We can easily ascertain a category or genus by finding a common characteristic. A category or genus of things is composed of things that have a general characteristic. If there is only one thing the rule cannot be applied. Counsel for the trustee invites us to say that the words "parochial or other local rates" are limited to such rates as are parochial or similar to them. Defining that similarity, he says that it means such rates as fall equally upon all payers in proportion to their holdings. Any such rate falls within the words, any others are without them. I cannot satisfy myself that this is a satisfactory criterion. I am driven back to construe the words in their primary or natural sense, although the meaning of the clause could have been expressed by a less number of words. This is the only way in which the clause can be construed.

*Appeal allowed.*

Solicitors : *Bell, Brodrick & Gray* for *Mason & Moore Dutton*, Chester; *Solicitor to the Board of Trade.*

[*Reported by* E. KNOWLES CORRIE, ESQ., *Barrister-at-Law.*]

A

# Re FORDER. FORDER *v.* FORDER AND OTHERS

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), April 27, 28, 1927]

[Reported [1927] 2 Ch. 291; 96 L.J.Ch. 314; 137 L.T. 538; [1927] B & C.R. 84]

B

*Bankruptcy—Forfeiture clause—Annulment of bankruptcy—Effect—Sums becoming available to bankrupt between vesting of interest and annulment—Extent of forfeiture—Repugnancy.*

By his will the testator gave to the defendant a share of residue subject to the life interest of the defendant's mother. The testator directed that if any beneficiary under the will should become bankrupt, such beneficiary should forfeit his share which should thereupon devolve as provided for in the event of his death. The testator died in 1910, and on April 16, 1914, the defendant was adjudicated bankrupt. On Dec. 14, 1925, his mother died, and on April 7, 1926, he procured the annulment of his bankruptcy. Between Dec. 14, 1925, and the date of the annulment the trustees received income in respect of the residuary estate, but no payment was made to the defendant. The accounts of the estate were made up at the end of every six months, but the defendant's mother over a substantial period had received monthly payments on account, and a co-beneficiary of the defendant, who was trustee of the will, appropriated certain sums to his own account during the period Dec. 14, 1925, to April 7, 1926, and made payments on account to a third co-beneficiary.

C

D

E

**Held:** (i) the forfeiture clause extended, not to any absolute interest of the beneficiary in possession of the capital, but only to interests in reversion, and so was not void for repugnancy; (ii) between the death of the tenant for life and the annulment of the defendant's bankruptcy the trustee had received income which could properly be treated as payable to, or retained or appropriated for, the defendant, and, therefore, the annulment was not in time to save the forfeiture; which (iii) operated to forfeit the whole share of the defendant both in capital and income and did not only effect his interest in the income.

F

**Notes.** Considered: *Re Walker, Public Trustee* v. *Walker*, [1939] 3 All E.R. 902. Referred to: *Re Longman, Westminster Bank, Ltd.* v. *Hatton*, [1955] 1 All E.R. 455.

G

As to the effect of the annulment of bankruptcy on forfeiture clauses in wills, see 2 Halsbury's Laws (3rd Edn.) 357, 415, and for cases see 5 Digest 653 et seq.

Cases referred to:

(1) *Metcalfe* v. *Metcalfe* (1889), 43 Ch.D. 633; 59 L.J.Ch. 159; 61 L.T. 767; 6 T.L.R. 92; affirmed, [1891] 3 Ch. 1; 60 L.J.Ch. 647; 65 L.T. 426; 7 T.L.R. 558, C.A.; 5 Digest 655, *5850*.

H

(2) *Re Smith, Smith* v. *Smith*, [1916] 1 Ch. 369; 85 L.J.Ch. 473; 114 L.T. 680; 60 Sol. Jo. 368; [1916] H.B.R. 66; 5 Digest 655, *5851*.

(3) *White* v. *Chitty* (1866), L.R. 1 Eq. 372; 35 L.J.Ch. 343; 13 L.T. 750; 12 Jur. N.S. 181; 14 W.R. 366; 5 Digest 664, *5898*.

(4) *Robertson* v. *Richardson* (1885), 30 Ch.D. 623; 55 L.J.Ch. 275; 33 W.R. 897; 5 Digest 665, *5905*.

I

(5) *Ancona* v. *Waddell* (1878), 10 Ch.D. 157; 48 L.J.Ch. 116; 40 L.T. 31; 27 W.R. 186; 5 Digest 669, *5935*.

(6) *Re Loftus-Otway, Otway* v. *Otway*, [1895] 2 Ch. 235; 64 L.J.Ch. 529; 72 L.T. 656; 13 R. 536; sub nom. *Re Otway, Otway* v. *Otway*, 43 W.R. 501; 39 Sol. Jo. 449; 5 Digest 666, *5916*.

(7) *Re Laye, Turnbull* v. *Laye*, [1913] 1 Ch. 298; 82 L.J.Ch. 218; 108 L.T. 324; 57 Sol. Jo. 284; 20 Mans. 124; 5 Digest 668, *5925*.

(8) *Lloyd* v. *Lloyd* (1866), L.R. 2 Eq. 722; 5 Digest 664, *5897*.
(9) *Re Parnham's Trusts* (1872), L.R. 13 Eq. 413; 41 L.J.Ch. 292; 20 W.R. 396; 5 Digest 669, *5933*.

**Originating Summons** for the determination of the question whether, having regard to the fact that the defendant Ernest Bone was adjudicated bankrupt on April 16, 1914, his share or interest in the property bequeathed to him by the will of William Drake Forder was forfeited, and, if so forfeited, whether the annulment of such bankruptcy on April 7, 1926, restored him to his original rights under the will or operated in any way to avoid such forfeiture?

William Drake Forder died on May 2, 1910, having by his will dated June 12, 1906, given his residue to his trustees, namely, the plaintiff William Howard Forder and Mrs. Bone hereafter mentioned, upon trusts under which during the life of Mrs. Bone, who died on Dec. 14, 1915, two-fifth parts of the income were payable to the plaintiff and three-fifths to Mrs. Bone, and the testator directed that upon the death of Mrs. Bone leaving her son, the defendant Ernest Bone, and her daughter, the defendant Mrs. Thomson, her surviving (an event which in fact occurred) Mrs. Bone's share should be payable to her son and daughter equally, and that upon the decease of either of them the whole of such share should be paid to the survivor, and in the case of the decease of the survivor of Mrs. Bone and her son and daughter during the lifetime of the plaintiff or of any widow of the plaintiff the whole was to go to the plaintiff or his widow as the case might be, it being the testator's wish and intention that the longest liver of the plaintiff, any widow of the plaintiff, Mrs. Bone, and her children, should take the entire income and also the capital of his estate. The will contained a forfeiture clause in the following terms:

> "I declare that if any beneficiary hereunder shall become bankrupt or assign, charge, encumber or attempt to assign, charge, encumber his or her share in the income or capital of my estate or suffer something whereby the same or some part thereof would by operation of law or otherwise if belonging absolutely to him or her become vested in some other person or persons such beneficiary shall forfeit his or her share which shall thereupon devolve as hereinbefore provided in case of his or her death."

At the date of Mrs. Bone's death the testator's estate comprised a number of freehold cottages, some business premises, some stock and shares, and a sum outstanding on mortgage. It had been the custom of the trustees to make up half-yearly accounts of income to May 2, and Nov. 2 of each year. The testator having died on May 2, 1910, the half-yearly accounts from Nov. 2, 1910, up to and including Nov. 2, 1925, were duly submitted to, and approved by, the solicitors for Mrs. Bone in her capacity both as beneficiary and as trustee. Between the time of Mrs. Bone's death on Dec. 14, 1925, and April 7, 1926, the trustees received a certain amount of income in respect of the estate, including a considerable sum of weekly rentals from the freehold cottages, the income so received being subject to deductions to be made in due course for outgoings. The defendant, Ernest Bone, was adjudicated bankrupt on April 16, 1914, as the consequence of a receiving order made on Mar 31, 1914. He, however, procured the annulment of his bankruptcy on April 7, 1926, within four months of the death of his mother, the tenant for life. The plaintiff, William Howard Forder, as the surviving executor and trustee of the will, issued this summons to determine whether Ernest Bone had forfeited any interest he was entitled to under the will by reason of his bankruptcy, or whether the annulment of the bankruptcy enabled him to retain his interest. The defendants were Mrs. W. H. Forder, the plaintiff's wife, Mrs. Thomson, the sister of Ernest Bone, and Ernest Bone.

Clauson, J., held that the annulment came in time to prevent the operation of the forfeiture clause, for, although, no doubt, an interest in the defendant Ernest Bone vested in possession on the death of Mrs. Bone prior to the annulment of the

Bankruptcy, the bankruptcy was in fact annulled before any rights arising from the existence of the bankruptcy were enforced against the property in question. No payment of income in respect of the defendant Ernest Bone's interest was in fact made between the date when the tenant for life died and the date of the annulment ; and, according to the normal course of administration, no such payment of income would have been made during that period. Accordingly, he declared that the share or interest in the property bequeathed to Ernest Bone by the testator's will was not to be treated as having been forfeited by reason of his bankruptcy.

The persons interested in the event of a forfeiture of Ernest Bone's interest appealed.

*P. M. Walters* for the plaintiff's wife.
*J. W. Manning, K.C.*, and *Wilfrid M. Hunt* for Mrs. Thomson.
*Preston, K.C.*, and *H. F. Swords*, for the plaintiff.
*G. B. Hurst, K.C.*, and *W. F. Waite* for Ernest Bone.

**LORD HANWORTH, M.R.**—This is an appeal from a decision of CLAUSON, J., who had to decide upon an originating summons taken out before him what was the true effect of the forfeiture clause which appears in the will of the testator. [HIS LORDSHIP stated the facts and the provisions of the will and continued:] Mrs. Bone died on Dec. 14, 1925, and thereupon Ernest Bone became entitled, with his sister, to the enjoyment in moieties of the estate which had previously belonged to Mrs. Bone. On April 16, 1914, Ernest Bone had become bankrupt, and we have to determine whether or not the forfeiture clause operated to deprive Ernest Bone of his interest. It is said that it did not, because on April 7, 1926, that is, four months or five months after the death of Mrs. Bone, that bankruptcy was annulled, and, inasmuch as the bankruptcy was annulled, it is to be treated as non-existent and the forfeiture clause does not operate.

The principle has been stated many times, but, perhaps, is as clearly stated as it can be in the judgment of LINDLEY, L.J., in *Metcalfe* v. *Metcalfe* (1) as being that, if there was nothing on which the forfeiture clause could operate before the bankruptcy was annulled, then the forfeiture clause must be treated as ineffective. The case has been argued before us and given rise to an interesting and helpful argument on both sides. We have to deal with the case upon further materials and further evidence beyond that which was before CLAUSON, J., and, therefore, in differing from his judgment, it must be stated quite plainly that this court is dealing with materials which were not before CLAUSON, J., and which, if they had been before him, would probably have led him to take the same view that this court is bound to take.

First of all, I ought to deal with one argument which was presented to us by counsel for Ernest Bone—that the forfeiture clause is ineffective and void for repugnancy in accordance with the decision given in *Re Smith* (2) by SARGANT, J., but it appears to us for the reasons which were given in the course of the argument, that the principle of that case does not apply, and that it is not possible to overlook the effect of the forfeiture clause on the ground of repugnancy.

It appears that over a considerable period of years—I am content to take the number of years as nine—the method which was adopted in appropriating this income was as follows. Half-yearly statements were made on May 2 and on Nov. 2 in each year ; the income was derived from property, small freehold cottages, from which weekly rents were obtained amounting to £687 14s. 6d. ; there were also quarterly rents, which amounted to £816 15s. No doubt, there were important and serious deductions to be made from that gross income. They amounted in one half-year to £162 10s. for repairs ; the rates and taxes were £375 13s., and in all, in that particular half-year the outgoings were £676 4s. 4d. Those are to be set against the weekly rents and the quarterly rents added together. There were also sums received on account of dividends and interest to an amount which is

not negligible—over £200. The system which was adopted was that a payment of £20 a month was made to Mrs. Bone in respect of her three-fifths share, and then at the end of the half-year the balance shown at that time to be due was paid over to her. She died on Dec. 14, 1925, and the accounts show that she had, in accordance with the system then in practice, received two monthly sums, a sum of £20 paid apparently in advance on Nov. 1 outside the previous account for the half-year, and a sum of £20 on Dec. 1. After Dec. 14 her interest would pass to her son and daughter, who were to share in moieties. The affidavit now before us shows that that system—that is to say, of making intermediate payments—was continued because the plaintiff and trustee, who is also a beneficiary—that is, Mr. William Howard Forder—was able in the half-year which ran from November 2, 1925, to May 1, 1926, to make payments to himself, and it appears that he received during that time three sums of £50, one sum of £80, and another of £10. What is the effect of that evidence ? It is said that we ought to consider the money which is due in respect of this interest as due only at the end of each half-year, Nov. 2 and May 2, but do the facts accord with that view ? If the system which had been in vogue for the period of nine years which I have stated was continued it would appear that if Mrs. Bone had lived she would have continued to receive her £20 a month. Is there any reason to suppose that, if no difficulty had occurred, the new beneficiaries, Ernest Bone and Mrs. Thomson, would not have received a payment month by month in respect of their share? This view is reinforced by what in fact happened in the case of the two fifth shares payable to the plaintiff, Mr. William Howard Forder, and it is plain from the fact that he received the sums to which I have referred that the estate was treated as yielding net sums payable to the beneficiaries, quite apart from the ultimate balance which they would receive as their share at the end of each half-year. To be quite precise, it would appear that Mr. William Howard Forder, when he found himself able to pay to himself the £50 and other sums, was confirming the view that there were net sums in the hands of the trustees available for immediate payment. If one analyses the payments to himself they mean that if he was able to pay to himself a sum of £50 in respect of his two-fifths share there must also have been available for payment to the two beneficiaries who succeeded to Mrs. Bone's life interest a sum of £75, or if one treats the figure received by the plaintiff as £50 only, and placed in his hands as the ripe fruit received from the estate, then he would be entitled himself to hold but £20 of that figure, and he would have to hand over £30 to the two other beneficiaries, Mr. Ernest Bone and Mrs. Thompson. In other words, for every £2 that would be received by the plaintiff himself, he would, out of the sum in his hands, have had to pay 30s. to Mr. Ernest Bone and 30s. to Mrs. Thompson. Examining, therefore, the facts which are now before us, it appears impossible to treat them otherwise than as establishing that there was ripe fruit of this estate ready to be paid and payable to the beneficiaries, Mr. Ernest Bone and Mrs. Thomson, during the time which elapsed after the death of Mrs. Bone on Dec. 14 and the making-up of the next half-yearly account on May 2, 1926. I have dealt with those facts at some length because it appears important to deal with the argument reasonably presented to us, that the point of time at which one has to look at the possible receipt of money is May 2 and not earlier, but for the reasons which I have given, upon the facts as they now appear to us, it is necessary to reject that argument and to treat this estate as producing net proceeds of ripe fruit payable both to Mr. Ernest Bone, and to Mrs. Thomson during the period which immediately followed the death of their mother, Mrs. Bone.

Applying what Lindley, L.J., said in *Metcalfe* v. *Metcalfe* (1), it appears that in examining the cases, first of all *White* v. *Chitty* (3), he refers to what was said by Page Wood, V.-C. in that case (L.R. 1 Eq. at p. 377) :

> "I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them."

Contrasting that with what was said in *Robertson* v. *Richardson* (4), where it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might but for the forfeiture clause have received the forfeiture took effect, it appears to me that that principle is the correct summary of the cases. If that be so, it would appear that from and after Dec. 14 there were sums which the trustee could have been asked to hand over to the trustee in bankruptcy of Ernest Bone, then properly constituted, before the bankruptcy was annulled on April 7, 1926, and, if that be so, there was something upon which the forfeiture clause would have operated, sums which the forfeiture clause alone also prevented the trustee in bankruptcy from receiving.

The best test as to whether the clause operates, appears to be made in the case which was before HALL, V.-C., of *Ancona* v. *Waddell* (5), where he says that one has not got to look at whether in fact the money has been paid over but whether

> "it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of, this residuary legatee."

That test appears to me to accord with the decision reached in *Metcalfe* v. *Metcalfe* (1) to be consonant with the decision in *White* v. *Chitty* (3) and also to agree with the decision of STIRLING, J., in *Re Loftus-Otway* (6). In a careful examination of the authorities he points out that it had been said in one of the cases to which he refers that the question of the actual receipt of the income ought not to make any difference ; he regards the question as put by HALL, V.-C., as the true governing principle. That principle is adopted by EVE, J., in *Re Laye* (7). In that case the trustees alleged that at the date of the receiving order they had overpaid the tenant for life, but by Jan. 3, 1911, the crucial date, they had money in hand ready for payment, and it was because of the money that came into their hands ready for payment, which, but for the forfeiture clause, would have been paid over, that he held that the forfeiture clause was operative, and the declaration in that case was made on the assumption that there was at some time between the date of the bankruptcy and the annulment some income in the hands of the trustees payable to the tenant for life.

It appears to me, therefore, after an exhaustive examination of the authorities, that the true test to apply is the test which is laid down by HALL, V.-C., in *Ancona* v. *Waddell* (5), and to ask oneself : Was there actual income of the share which could be treated as payable to or retained for, or appropriated to the benefit of Ernest Bone? On the facts as I have examined them, it appears the answer to that question must be "Yes" if there had been an application made by the trustee in bankruptcy that of the sums which had been either paid over or taken, rightly, by the plaintiff for his purposes, the trustee in bankruptcy should be entitled to a share, or that a sum corresponding to that payment to him should be handed over to him as representing the estate of Ernest Bone, there would have been no answer to such an application. If that is the true answer to be made, it appears that in this period of a half-year, although the total balance payable to the estate had not been then ascertained, it is clear that there was money in the hands of the trustee which would have been payable to the trustee in bankruptcy unless the forfeiture clause operated. Once it did operate, what was the effect ? It appears to me impossible to accept the argument that it could operate only upon income and not upon the capital. A close examination of the clause appears to me to show that the intention of the testator was to deal with the share, whether of capital or income, that should belong to the beneficiary who should either become bankrupt or should suffer something whereby some part of his share would, by operation of law or otherwise, pass to others, and, if that event happened, on the bankruptcy or on the assignment or charge, then and at once the share of the beneficiary who had become bankrupt, or had otherwise assigned, immediately devolved "as hereinbefore provided" and the forfeiture enured to prevent any portion to the share,

A including both income and capital, passing to the beneficiary who had become bankrupt, and made it devolve otherwise as provided in case of his or her death. It appears to me, therefore, that for these reasons the forfeiture clause did operate, was effective, and upon the facts, therefore, before us, we are compelled to differ from the judgment given by Clauson, J., and to hold that the forfeiture clause did operate so as to deprive Ernest Bone of his interest as a beneficiary under B the will. The appeal must be allowed with costs.

**SARGANT, L.J.**—I am of the same opinion. I will deal first with the argument whether the forfeiture clause itself was repugnant and void. For that purpose we were invited to consider the clause as being one which applied to every interest of the beneficiaries, whether in possession or in reversion, and, if that was so, of course, C the effect of the clause would be to take away by condition subsequent property which was already vested in the legatee if the legatee attempted to assign or dispose of it, or if he went bankrupt. That would be a condition entirely inconsistent with ownership ; it is impossible to give the ownership of property to a person in possession, and at the same time to direct that he shall not have the ordinary rights and incidents of ownership, that he shall not be able to dispose of it, and that it shall D not vest in his trustee in bankruptcy. Therefore, if that construction of the clause were right, counsel for Ernest Bone would be fully entitled to the result he contended for, namely, that the whole clause would be repugnant and void. In support of the result of the clause on such a construction he cited a decision of my own in *Re Smith* (2) but on looking at the clause it seems to me quite clear that the clause E does not extend to any interest that is in possession, that it only extends to interests in reversion, and so far from taking away those interests in reversion it merely has the effect that it prevents in a certain event, before those interests fall into possession, those interests coming into the ownership of the beneficiary and gives the property in those interests over to other persons. It seems to me quite clear that the clause is dealing with interests which would thereupon "devolve as herein- F before provided in case of his or her death," and, therefore, dealing with the interests which, under the prior clauses, were directed to go to other persons at a time when the interests were still interests in reversion. I will not deal with the clause in greater detail, but to my mind it is sufficiently clear on the language of the clause that it was not intended to displace existing ownership in possession by virtue of some act or other involved in the notion of ownership, but that it was G intended to prevent ownership attaching in case something should have happened previously to the property vesting in possession, and therefore the decision in *Re Smith* (2) has no relevance to the present case having regard to the terms of the clause here.

That being so, I come to the main question—the question as to the date at which an annulment of bankruptcy has to take place in order that the bankrupt H may be saved from the consequences of the bankruptcy. Here, as the Master of the Rolls has pointed out, we are in possession of more materials than those which were in the possession of Clauson, J., and, therefore, we are differing from him on a clearer statement of the facts. I will not repeat or enlarge on what was said by the Master of the Rolls with reference to those facts, but will only say it seems to me quite clear, whether because of the retention by the trustee of sums on his own I account, or by an examination of the accounts, that between Dec. 14, 1925, when the tenant for life died, and April 7, 1926, when the bankruptcy was annulled, there must obviously have been in the hands of the trustees moneys available to be paid to the beneficiaries in question. I think there can be no reasonable doubt at all of that fact, and that being so, the question is : What is the last date on which the annulment of bankruptcy will be good for the purpose of saving the interest of the bankrupt ? Is that last date the date when there was money available and ready to be paid to him, or may the last date be postponed to a later time, namely, the time when an actual payment is made of the money, or when some step has

actively been taken to enforce the right. CLAUSON, J., after an examination of the authorities, has come to the conclusion that the latter date will be in time. In my judgment, the authorities, when they are carefully examined, are not consistent with that view, and show that the latest time for the annulment of the bankruptcy is a time prior to there being in the hands of the trustees moneys available for payment, or to which the beneficiary had a right to payment.

The authorities I will deal with quite shortly. *White* v. *Chitty* (3) is a very peculiar case. There was a gift over of rents received by some other person and the tenant for life was a person in occupation of the house himself, and no occupation rent had been fixed. That is dealt with quite sufficiently, I think, by PEARSON, J., in his precise, and, I think, admirable judgment in *Robertson* v. *Richardson* (4). He said:

> "In *White* v. *Chitty* (3) the bankrupt himself had been in occupation of the house which had been devised to him for his life, and no rent could have been demanded from him until he had been charged with an occupation rent."

That case was a very peculiar one, and I do not think is any authority here in this case. Then came *Lloyd* v. *Lloyd* (8) and *Ancona* v. *Waddell* (5). In each of those cases there was this peculiarity, that the tenant for life was a tenant for life of a trust fund to be constituted out of residue, and the residue had not been ascertained so as to make a definite trust fund to the income of which the beneficiary was entitled, and it was on that ground, as is quite clearly stated in the case, that it was held that there was no sum payable to the tenant for life until the time of the annulment of the bankruptcy had passed. It is observable that in *Ancona* v. *Waddell* (5) HALL, V.-C., whose opinion on matters of this kind was of very great importance, says, as the Master of the Rolls has mentioned, that the material time was the time at which it could be said that there was any actual income of the share which could be treated as payable to, or retained for, or appropriated for the benefit of this residuary legatee. He did not think that the time could be extended until the time at which some actual payment had been made, or some other step had been made to enforce payment.

*In Robertson* v. *Richardson* (4) PEARSON, J., examined the prior authorities, and at the conclusion of his judgment he refers to:

> "The circumstance which was relied on in all the three cases to which I have referred [*White* v. *Chitty* (3), *Lloyd* v. *Lloyd* (8), and *Ancona* v. *Waddell* (5)] in order to escape from the clause of forfeiture, viz., that no right to receive the income in question had accrued to the assignee in bankruptcy."

He says that is wanting in the case before him. So that his test is: Was there a right to receive present income on the part of the beneficiary, not whether income has been paid, or whether steps had been taken to recover the income.

Then came the extremely important and leading case of *Metcalfe* v. *Metcalfe* (1) and there I find that in the judgment of all the lords justices that was the test applied. LINDLEY, L.J., says:

> "Was there ever a time after the death of the testator at which the other legatees were entitled to demand from the trustees of the will payment of the bankrupt's share?"

Then he says, referring to *Robertson* v. *Richardson* (4) and obviously approving of it, that

> "in *Robertson* v. *Richardson* (4) it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might, but for the forfeiture clause, have received, the forfeiture took effect."

BOWEN, L.J., says this doctrine has

> "never been carried further than the case in which no right to have anything paid over has accrued to the trustee in bankruptcy. It has been pointed out

A in *Robertson* v. *Richardson* (4) that in determining whether a forfeiture clause takes effect, the crucial time in the case of a gift of income is the time when the right to have the first payment of income accrues."

The same view is enunciated by FRY, L.J. He says:

"The time, therefore, at which we must regard the rights of the parties is the B time at which it first becomes the duty of the trustee of the will to make a payment."

It is quite true that in *Metcalfe* v. *Metcalfe* (1) there had been actual payments made in accordance with the view of the trustees that the forfeiture had taken place, but that is immaterial. All that that did was to show that there were payments due or receivable; they put out of question that there were payments in C fact with regard to which there was a right to receive. But what the lords justices relied upon in their judgment was merely that there was a right to receive the income, and they laid no stress whatever on the circumstance that the trustees had made payments in fact in accordance with their views that the forfeiture had taken place, and indeed it would be quite contrary to principle to hold that the rights of the beneficiaries should be determined by whether the trustees had or had D not acted on a particular view. The determining circumstance is what was the right of the parties at the crucial date. In my judgment, *Metcalfe* v. *Metcalfe* (1) renders the matter reasonably clear, and shows that the latest date for the annulment of the bankruptcy to be effective, would be a date just prior to the time when there was some payment of income that could be rightly made and rightly E received. The same view clearly was taken by EVE, J., in *Re Laye* (7), because the inquiry that he directed was based upon that view. In my judgment, therefore, the test adopted by CLAUSON, J., puts the latest time too late, and the annulment of the bankruptcy would not be effective if made after the time when there was a payment properly payable, or properly receivable and before the time when a payment was actually made, or when some step was taken to enforce payment.

F That being so, on the main question I am of opinion that the appeal ought to be allowed, and I will deal only with one subsidiary question which was suggested, namely, what was the effect of the forfeiture clause—did it operate to forfeit the whole share of the bankrupt, Mr. Ernest Bone, both in income and in capital, or had it an effect only upon his interest in the income? It is observable that the testator deals with the share of the beneficiary as one complete compendious G interest. His interest was that he was to receive on his mother's death a certain proportion of the income, that proportion would gradually increase if he survived the other cestui que trust, and ultimately, if he became the sole survivor, he would get, not only the income, but from that time forward, the capital too. That is one continuing interest, gradually increasing by steps, and, the events having occurred on which the forfeiture was to take effect for the reasons I have stated, H you have then to look at the terms of the gift over on the forfeiture for the purpose of determining what is the extent of the forfeiture. The terms of the gift over are these:

"Such beneficiary shall forfeit his or her share which shall thereupon devolve as hereinbefore provided in case of his or her death."

I Therefore, on the occurrence of the bankruptcy not annulled before the first payment was due and receivable, the result was, under the very terms of the forfeiture clause, that Ernest Bone's share was forfeited and was thereupon to devolve as provided in case of his death, and what would happen would be that he would lose the income of the share which would be divisible and would go in the first place to his sister, and afterwards go to whom it might belong under the tontine system, and, of course, he would, on his death, lose the chance of having his interest in the income to the total interest in the capital. In my view, therefore, the judgment of the learned judge cannot be sustained, and the appeal must be allowed.

**LAWRENCE, L.J.**—I agree. The first point taken by counsel for Ernest Bone is that the forfeiture clause applies not only to life interests and reversionary interest in capital, but also to the ultimate absolute interest in the capital when that interest has become absolutely vested in possession, and that consequently the whole clause is void as being repugnant. In my opinion, the point is not a good one. The terms of the gift over seem to me clearly to show that the whole forfeiture clause is limited to cases where bankruptcy has occurred, or some act or deed within the clause has been done or suffered, before the beneficiary has become entitled to an absolute interest in possession in the capital. This fact, in my judgment, distinguishes this present case from *Re Smith* (2), which was relied upon in support of the contention.

The next and main point in the case is one of some difficulty. The learned judge has held, on the facts which were before him, that the annulment of the respondent's, Ernest Bone's, bankruptcy was in time to prevent the operating of a forfeiture of his share under the will. In arriving at this conclusion the learned judge had not before him the further evidence which has been adduced on this appeal, which evidence, in my opinion, is all-important in determining whether the annulment was in time or not. I think that the learned judge was clearly right in view of the state of the authorities in ruling out that an annulment of the bankruptcy at any time, however late, would be in time to save forfeiture, on the one hand, and, on the other hand, that no annulment of the bankruptcy after the death of the tenant for life would be in time to save the forfeiture. The real difficulty in the present case lies in determining whether, on the facts as now proved, the annulment, which did not take place until after the lapse of nearly four months from the death of the tenant for life, was or was not in time to save the forfeiture.

From the fresh evidence it appears plain that the main part of the income of the estate was derived from weekly and quarterly rents, and that the income was largely in excess of what was required for repairs, rates and taxes and other outgoings ; it further appears from this evidence that it had been the custom of the trustees from time to time to make substantial payments on account of these beneficial interests in the income of the estate, and then to distribute the balance of the income half-yearly. During the four months after the interest of Ernest Bone had become vested in possession, and while his bankruptcy remained effective, the plaintiff as the sole surviving trustee of the will had, in accordance with the usual practice, made payments of income to or on behalf of the beneficiary Mrs. Thompson and also to himself. Being entitled to two-fifths of the income of the estate the effect of the payment by the plaintiff to himself of the various amounts proved to have been so paid, which payments in the absence of evidence to the contrary must, I think, be assumed to have been properly made, was, in my opinion, not only to show that the trustee had in his hands available for distribution fifty per cent. more net income than he paid to himself, but also imposed upon him an obligation if called upon by the persons entitled to the remaining three-fifths of the income immediately to pay to them equivalent proportionate amounts of such income. At the date when the plaintiff made those payments to himself the only person who in the absence of the forfeiture clause could have given a discharge for a moiety of the remaining three-fifths of the income bequeathed to Ernest Bone was his trustee in bankruptcy, and the question to be determined is whether, in view of the practice now proved to have been adopted throughout the administration of the estate to make payments on account, and in view of the fact that such payments on account were actually made to or on behalf of the other beneficiaries after the bankrupt's interest had become vested in possession and before the annulment of the bankruptcy, such annulment was made too late to save the forfeiture of the respondent's, Ernest Bone's, share in the estate.

In determining this question it is necessary to have regard to the relevant authorities. In *White* v. *Chitty* (3) the tenant for life was in occupation of the

A house in question, and no rent in respect of it had been paid or had become payable before the annulment, and, consequently, the annulment was held to be in time. In *Lloyd* v. *Lloyd* (8) the bankrupt was entitled to a life interest in a share of residue and the bankruptcy was annulled before the expiration of one year from the death of the testatrix, that is to say, before the residue had been ascertained and before any payment of income in respect of the share of residue could successfully have been claimed. It was, therefore, held that the annulment was in time. In *Re Parnham's Trusts* (9), the bankruptcy was annulled before the interest of the bankrupt had become vested in possession, and, therefore, before the trustee in bankruptcy could have claimed or was entitled to receive the income of the share, consequently the annulment was held to be in time. In *Ancona* v. *Waddell* (5) HALL, V.-C., held that the annulment of the bankruptcy took effect substantially within five months of the death of the testatrix and before, to quote his words:

> "It could be said there was any income of the share which could be treated as payable or retained or appropriated for the benefit of the residuary legatee."

Consequently he held that the annulment was in time to save the forfeiture. In *Robertson* v. *Richardson* (4) the assignment by the trustee in the liquidation of the debtor took place nearly twelve months after the debtor's interest had become vested in possession, it was held by PEARSON, J., that, although the trustee had never made any claim to the interest, yet that, as he was the person who had become entitled to receive the income after the debtor had become entitled in possession, the forfeiture clause operated. The learned judge remarked that the circumstance relied upon in *White* v. *Chitty* (3), *Lloyd* v. *Lloyd* (8), and *Ancona* v. *Waddell* (5) in order to escape from the forfeiture clause, namely, that no right to receive the income in question had accrued to the assignee in bankruptcy, was wanting in the case before him, and, accordingly, he was bound to decide that the forfeiture clause took effect and was still in operation.

In *Metcalfe* v. *Metcalfe* (1) the annulment took place more than three years after the beneficiary had become entitled in possession, and in the meantime the income had been paid to the other beneficiary on the footing that the forfeiture clause had taken effect. The Court of Appeal, affirming KEKEWICH, J., held that the annulment came too late. LINDLEY, L.J., puts the crucial test in the form of a question:

> "Was there ever a time after the death of the testator at which the other legatees were entitled to demand from the trustees of the will payment of the bankrupt's share?"

He answers that question by saying: "It is impossible to say there never was such a time." BOWEN, L.J., pointed out that the authorities had not carried the matter further than holding that an annulment would be in time to save forfeiture in cases which no right to have anything paid over had accrued to the trustee in bankruptcy, and he approves of the decision in *Robertson* v. *Richardson* (4). FRY, L.J., held that the time at which the right of the parties was to be regarded was the time at which it first becomes the duty of the trustees to make the payment. In *Re Loftus-Otway* (6) the bankruptcy petition was dismissed three months after the beneficiary had become entitled in possession. During those three months the trustees had received the income of the debtor's share, and they stated in an affidavit that at the end of the second month they would have in hand about £450 on account of such income. STIRLING, J., in those circumstances held that, as the petition had not been got rid of before the end of the second month, the forfeiture took effect. In *Re Laye* (7) a receiving order was made against the tenant for life after he had become entitled in possession and remained in operation for about two and a half months, and EVE, J., held that if any income came to the hands of the trustees during that time the life interest was determined. From the declaration made by the learned judge, and from the inquiry which he directed, which

declaration and inquiry are referred to in a note at the end of the case, it seems clear that what the learned judge decided was that the life interest would be determined if during the time when the receiving order was in operation the trustees received income which would have become payable to the tenant for life during the time if the receiving order had not been made.

It will be seen from the foregoing summary of the cases that the expressions of the learned judges differ in language, but not, in my opinion, in substance. In all the cases in which the annulment has been held to be in time to save the forfeiture, no income had been received in respect of the property or share, which income could be treated as distributable in the sense that the beneficiaries could have required payment of such income to themselves, whereas in all the cases in which the annulment has been held to have been too late, the income had been received by the trustees which during the operation of the bankruptcy had become distributable, and had been distributed. The principle to be deduced from the cases, in my opinion, is that the annulment will be in time to save forfeiture if it takes place before any income becomes payable to the beneficiary, but it will not be in time to save the forfeiture if it takes place after the trustees have received income which can properly be treated as payable to or so retained or appropriated for the beneficiary. If that be the true principle of the cases, then, in my opinion, the facts which have now been proved show fairly clearly that before the annulment the trustee in the present case had received income which was payable to and was retained for Ernest Bone and which after the payment by the plaintiff to himself ought to be treated in his hands for and appropriated to the respondent, Ernest Bone.

There remains the further question whether, assuming that the annulment was not in time to save the forfeiture of the interest of Ernest Bone in the income of one half of three-fifths of the residue which was then vested in him in possession, was it in time to save the forfeiture of his contingent reversionary interest in the rest of the income and in the capital of the residue? His counsel replied upon the decision of KEKEWICH, J., in *Metcalfe* v. *Metcalfe* (1) which was not appealed against on this point, in support of the proposition that in the present case the annulment was in time to save the forfeiture of all this defendant's contingent reversionary interests in the income and capital of the estate, even though it may not have been in time to save the forfeiture of his life interest in one half of two-thirds of the residue. In my opinion, this proposition is not well founded. On the true construction of the forfeiture clause in the present case it seems to me clear that if the annulment is not in time to save the forfeiture of the life interest which had vested in possession, the inevitable effect of the gift over is to cause the whole share of Ernest Bone, whether vested or contingent, to pass immediately to other beneficiaries, as if Ernest Bone had died on the date of the forfeiture. In my opinion, the language of the forfeiture clause leaves no room for the contention that, although the forfeiture has taken effect as to the interest in possession, yet it is saved as to the interest in reversion. The other beneficiaries' rights in the whole of the share both vested and contingent, arise at the moment when the forfeiture becomes effective. The forfeiture clause in the present case differs materially in language from that in *Metcalfe* v. *Metcalfe* (1) and possibly the decision of KEKEWICH, J., may be supported on the special wording of the clause in that case, but if not then I think that the decision on this point was wrong and ought not to be followed. In the result the appeal must be allowed.

*Appeal Allowed.*

Solicitors : *Smith, Fawdon & Low; W. J. Lake & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

# MAXWELL *v.* KEUN AND OTHERS. SAME *v.* SAME

[Court of Appeal (Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.), November 25, 1927]

[Reported [1928] 1 K.B. 645; 97 L.J.K.B. 305; 138 L.T. 310; 44 T.L.R. 100; 72 Sol. Jo. 48]

*Court of Appeal—Postponement of case in High Court—Refusal—Discretionary order made by judge—Jurisdiction of Court of Appeal to review—R.S.C., Ord.* 36, *r.* 34—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 27 (1).

A refusal by a judge of the High Court of an application under R.S.C., Ord. 36, r. 34, that the hearing of a case be postponed and fixed for a future date, and his ordering that the applicant pay the costs of the application, constitute a "judgment or order" within the meaning of s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, so as to give the Court of Appeal jurisdiction to hear an appeal from the judge's decision. An order made by a judge in the exercise of the discretion given him by R.S.C., Ord. 36, r. 34, to postpone or adjourn a trial will only be reviewed by the Court of Appeal in most extraordinary circumstances where the Court of Appeal is satisfied that the judge's order would result in injustice being done to one or other of the parties.

**Notes.** Applied: *Re Yates' Settlement Trusts, Yates* v. *Paterson*, [1954] 1 All E.R. 619. Referred to: *Kronstein* v. *Korda*, [1937] 1 All E.R. 357; *Evans* v. *Bartlam*, [1937] 2 All E.R. 646; *Bradford Third Equitable Benefit Building Society* v. *Borders* (*No. 2*), [1939] 3 All E.R. 29; *Dick* v. *Piller* [1943] 1 All E.R. 627.

As to the postponement of cases in the High Court see 26 Halsbury's Laws (2nd Edn.) 93, and for cases see Digest, Pleading and Practice, 556–558. For Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1), see 5 Halsbury's Statutes (2nd Edn.) 355.

Cases referred to:

(1) *Sackville-West* v. *A.-G.* (1910), 128 L.T. Jo. 265, C.A.; Digest Practice 558, *2168*.

(2) *Jones* v. *S. R. Anthracite Collieries, Ltd.* (1920), 90 L.J.K.B. 1315; 124 L.T. 462; 13 B.W.C.C. 346, C.A.; 34 Digest 390, *3169*.

**Appeal** from a refusal by Lord Hewart, C.J., to grant an application made by the plaintiff that a day should be fixed for the hearing of two libel actions numbered 3062 and 3063 in the special jury list, one of which was 106 out of the list and the other due for immediate hearing.

The plaintiff was an officer in the Army on duty in India. The first defendant, Odette Keun, had written two books called My Adventures in Bolshevik Russia and Prince Tariel and it was in respect of libels on him which, the plaintiff alleged, were contained in those books that he brought the two actions against her, the printers, Butler and Tanner, Ltd., and the publishers, John Lane, the Bodley Head, in the first action, and Jonathan Cape, Ltd., in the second. The books were published in 1923 and 1924, and the writs were issued in October, 1926. In November, 1927, the second action was due to come into the list for hearing. The plaintiff applied for an adjournment as it was impossible for him to return from India before the case came into court, but the Lord Chief Justice refused the application, with costs. The plaintiff appealed.

*Sir Henry Maddocks, K.C.*, and *Linton Thorp* for the plaintiff.

*Norman Birkett, K.C.*, and *Michael Hoare* for the defendant, Keun.

*St. John Field* for John Lane, the Bodley Head.

*S. O. Henn Collins* for Jonathan Cape, Ltd.

*R. P. Croom-Johnson, K.C.*, and *Michael Hoare* for Butler and Tanner, Ltd.

**LORD HANWORTH, M.R.**—This is an appeal which appears to raise a question of practice of some importance. The action which is before us, and in which an effective appeal is made to this court, is one the notation of which is 1926, M., No. 3063. It is an action brought by an officer in His Majesty's regular army and now in command of the 1st battalion of the Cheshire Regiment stationed in India. It is not in dispute that he is now in India, and that it will be impossible for him to reach this country, even if a cable were sent to him, in the lapse of less time than one month from to-day. He brought his action by writ dated Oct. 12, 1926, and he complains in that action that the first defendant published of him in December, 1923, and in January, 1924, a libel. It is said that that libel was contained in a book entitled PRINCE TARIEL, which was represented as being a true story. In that book reference was made to a certain Major Cassel, and the plaintiff's case is that he was the officer who was intended to be understood as "Major Cassel," and that any persons who read the book with any knowledge at all would clearly understand and appreciate that the reference in the book to "Major Cassel" were references to the plaintiff. There are a number of extracts set out in the pleadings, and also the book contained a picture which portrays a person who acted very cruelly to a woman, and the allegation is that by the words in the book and by the picture the defendants were understood to mean, and meant, that the plaintiff was indicated, and that he had acted in a manner unworthy of his position which he had the honour to hold. I think it is quite plain that if the plaintiff is to have an opportunity to succeed in his action it is essential that he should be present at the trial and be able personally to give evidence. I have said the writ was issued on Oct. 12, 1926, and in the course of the proceedings in that case the defendants Jonathan Cape, Ltd., became justified in serving a notice for trial, and they did so in the middle of May, 1927. As against the other defendants a notice of trial was served by the plaintiff, although it is said it was unnecessary for him to do so, on Oct. 4. After looking at the date of the proceedings in the action down to the time when the notice of trial was given to the defendants Butler and Tanner, Ltd., although greater zeal might have secured greater speed, I do not think any serious criticism is to be made as to the course of proceedings taken. It appears that that case is but seven cases out of the list of cases which are to be heard during the course of next week ; in other words, that action is likely to come on before this term closes. An application was made to the Lord Chief Justice of England on Nov. 23 that the case should stand out of the list because it would be impossible for the plaintiff to be present, and the learned judge decided to make no order. Yesterday the application was renewed and counsel for the plaintiff urged that the case should be taken out of the list so that an application could be made for a date to be fixed which would be convenient not only to the plaintiff but also to the court, because there is another action, 1926, M., No. 3062, which the plaintiff is bringing against the same first-named defendant, but in which the other defendants are John Lane the Bodley Head and Butler and Tanner, in that action sued as a firm. The Lord Chief Justice, on Nov. 24, decided not to grant the application. The result is that this action, No. 3063, is in grave peril of coming into the list for trial at a time when the plaintiff will be quite unable to be present. In my view, and upon the materials before me, it appears that there is no possibility of the plaintiff's case being established in the absence of the plaintiff himself, and judgment would have to pass subject to certain matters which might have to be discussed and adjusted.

From that decision of the Lord Chief Justice of England an appeal is brought to this court. First of all, a preliminary objection is taken to this court hearing any such appeal, on the ground that the order which was made by the Lord Chief Justice was not of the nature of an order which is subject to appeal in this court. It is said that in fact the Lord Chief Justice determined to make no order, and that s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which gives the Court of Appeal power to hear appeals from the High Court, confers

jurisdiction to hear appeals "from any judgment or order of the High Court." But the order of the Lord Chief Justice directed that the costs of the application should be paid by the plaintiff to the defendants, and, although it is not uncommon that no order should be drawn up upon that, the attachment to the order of an order as to costs makes it, in my judgment, plain that the order in fact made was one which was of a character which is embraced within s. 27 (1) of the Act of 1925.

Although such an order may be appealable, it by no means follows that such appeals ought easily to be entertained, or that there is any promise of success in bringing such a matter from the court below to the Court of Appeal. It is obvious —indeed, it is almost an essential of our system and practice—that the discretion of a judge should be not only respected, but upheld ; and in Ord. 36, r. 34—if, indeed, a rule was necessary—it is plainly said that the judge

> "may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and such place, and upon such terms, if any, as he shall think fit"

It is said, and said cogently, that, inasmuch as the Lord Chief Justice is armed with that power of discretion, the Court of Appeal ought not to interfere with the discretion exercised judicially ; that this discretion was exercised judicially ; that in a matter of what cases should be in the list to be tried by him it must surely be a matter for the judgment of the Lord Chief Justice ; and that, even if there be an appeal, this court ought to have respect for the discretion appropriately exercised. With these arguments I agree. It is obvious that there must not be any attempt, or, indeed, less than an attempt, any interference, with the discretion of the learned judge in reference to the trial. It is most important that we should uphold that discretion. Yet the case to which our attention has been called—*Sackville-West* v. *A.-G.* (1) is an example of the fact that, although it must be on very rare occasions that the discretion of a learned judge is disturbed, yet there may be such occasions. The decision in that case is a decision of the Court of Appeal, and it is a decision which which is binding upon this court. The observation is made in the judgment, which is a judgment of LORD COZENS-HARDY, MOULTON and BUCKLEY, L.JJ., to this effect :

> "Yet it would be only in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of business in his own court could succeed ; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, notwithstanding any exercise by the learned judge of the power of control which he would have over the action when it came on for trial, justice did not result, and he failed to see that such would be the effect of his decision."

I desire closely to follow and respectfully to agree with that statement of the principles on which the court ought to act, and I ask myself, in the present circumstances, what will happen if the order stands, or rather, if no order is made and the case comes on for trial this term. There is no dispute as to the facts. Counsel for the first defendant has fairly said that he accepts the facts as to the plaintiff's absence and the difficulty of his immediate return. If the case is tried this term and the plaintiff is absent, I think the result would be that the plaintiff's action would fail, at any rate the major part of it, and that that would be so in spite of any order that could possibly be made by the learned judge before whom the case came. That failure would be due to the absence of the plaintiff, and no power of any learned judge could overcome that difficulty. What would be the result? Could it be said that, in the absence of the plaintiff, justice had been done between these parties ; that, whoever may be right and whoever may be wrong in the case, the partial hearing offered by the appearance before the tribunal of the defendants would be sufficient ; and the non-appearance of the plaintiff would not affect the result of the trial in the sense of effecting an injustice?

It appears to me that this case now presented to us, after full argument by

learned counsel representing all parties and a hearing which has occupied more than two and a half hours, presents features which could not have been present to the Lord Chief Justice of England when the application was made to him. It is said that the right course is to accept the discretionary order, or absence of order, and to leave the case to come into the list this term, and that then an application should be made stating that the plaintiff is in India, that he cannot be here at the trial, and that the case should be adjourned. It is to be observed that that course is an inconvenient and expensive one, and, further, it is to be observed that it would be open to the defendants, and I think it would be the duty of the defendants, to point out, if such an application was then made before the learned judge sitting for the trial of the case, that a similar application had been, not once, but twice, before the Lord Chief Justice, and that a similar application had been made by way of appeal to the Court of Appeal, and on those three several occasions refused. I can well believe that the learned judge at the trial would say in those circumstances that he could not allow any adjournment ; there would be no new facts before him that were not known to the court at the present time. I do not think, therefore, that that course is a right or proper course. We are told that the decision of the Lord Chief Justice was influenced by the delay which had taken place. If that be so, perhaps I am wrong in not seeing upon its face much ground for attributing delay to the plaintiff. It is plain that an application at an earlier stage could have been made, but the application would in its nature have been the same, and even if it had been made a week or two, or even earlier, the same difficulty as to the plaintiff's attendance would have emerged, and also the difficulty which he is under if he is to have the right of both these cases tried when he is able to attend. I have the deepest respect for the Lord Chief Justice of England ; I have the deepest respect for his discretion ; but, applying the rule which I am bound to apply, and which has been laid down by this court, upon the facts before us it has been made plain that justice would not result if this case were left in the list, that the trial judge would not be able to alter that result, that this case ought not to be allowed to be left to the trial judge when it comes into the list, and that the only right course is to apply the rule in *Sackville-West* v. *A.G.* (1) and say that an order must now be made that this case, No. 3063, is not to be heard this term. That will be sufficient. With regard to the action No. 3062, it is unnecessary to make any order at all ; that case stands at some distance away. I have not referred to it, as it is unnecessary for the purpose. We think the application in reference to it is misconceived. Therefore, so far as the notice was given to the defendants John Lane, the Bodley Head, and Butler and Tanner sued as a firm, that appeal must be dismissed with costs in any event.

**ATKIN, L.J.**—I agree, and I should not have added anything to what has been said by the Master of the Rolls if it were not that we were differing from a decision of the Lord Chief Justice, and it is usual—indeed, proper—in those circumstances for a judge to give his own reasons for his dissent from the decision below.

In this case an application was made to postpone the hearing of a case which was in the week's list, and because it was in the week's list it was made before the Lord Chief Justice, who, in accordance with practice, was in charge of the special jury list for the week. Authority to grant or refuse such an application is given by Ord. 36, r. 34, and the Lord Chief Justice, on hearing the application, dismissed the application with costs. I need say nothing further on the first point, except to say that I am quite satisfied that that is an order of the learned judge from which an appeal lies by leave of this court.

The other point made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree that the Court of Appeal ought to be very slow, indeed, to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so ; but, on the other hand,

A if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so. I will refer to one case in addition to that which was referred to my Lord ; that is the case of *Jones* v. *S. R. Anthracite Collieries, Ltd.* (2). That was a decision of the Court of Appeal B in a workmen's compensation case. There the learned judge had refused to adjourn an application when the manager of the employers had on subpœna failed to produce certain documents which were said to be relevant. The applicant had applied for the adjournment, the county court judge had refused to grant it, and the court allowed the appeal. In that case LORD STERNDALE said this :

C "I think it is rather suggested that this court has never interfered with any judge's decision in regard to the granting of an adjournment. I cannot remember any specific instance of this court doing so, but my impression is that this court has interfered with the decision of even High Court judges in regard to 'adjournments'—although, as I say, I cannot remember any specific instance of that being done at the moment."

D In the same case SCRUTTON, L.J., said :

"I should like to say, in regard to the point as to whether the court has ever interfered with the decision of a county court judge as regards an adjournment, that my impression is the same as that of the Master of the Rolls. My impression is that this court has frequently interfered with the decisions of county court and High Court judges in regard to the question of 'adjournment,' because E the whole duty of this court, and of every court, should be to do justice between the parties without being prevented by technical objections."

I myself am certainly of that impression. I have a definite recollection of a case where it was said that this court could interfere with a decision of a judge refusing to adjourn a case, if they thought that thereby a real injustice would be done to the parties.

F That is the issue in this case, and in order to determine that question it does seem to me to be relevant to dwell for a moment or two upon what the somewhat peculiar facts are in this case. There are two cases. In both of them the plaintiff is an officer in His Majesty's Army, and is now stationed in India in command of his battalion. He complained of a libel contained in two books written by a foreign G authoress and published by different firms of publishers. In the first case, which is not the case with which we are dealing here, the libel complained of is in a book, which did not purport to be a work of fiction, and was styled MY ADVENTURES IN BOLSHEVIST RUSSIA. In it the plaintiff, who is Ernest Cassel Maxwell, and who is now a colonel, but was at one time a major in command of the Allied Police at Constantinople, is referred to by name over and over again as "Major Cassell," the head of the H British Military Police, and words are used in reference to him which are plainly defamatory, and are admitted by the defendants to be defamatory, and in respect of which their only defence is that they have paid a substantial sum into court as damages, admitting liability. That action, though the defence is, as I have said, an admission of liability and only raises the question of damages, has only been set down lately, and is now about 100 out of the list. The other action is brought I against the same authoress, who does not appear in either action, and a different firm of publishers. The plaintiff's name, as I have said, is Ernest Cassel Maxwell, and the action relates to an alleged libel contained in a work of fiction called PRINCE TARIEL, written apparently after the former book, in which work there appears a "Major Cassell," who is described as head of the Intelligence Department of the British Mission in Georgia. The plaintiff says that in that work he was referred to in reasonably plain terms as in the other work written by the same authoress who had admittedly libelled him therein and who now depicted a character under a name which is the plaintiff's second name and giving him his proper military title.

The writs in both of these actions were issued on the same day in October, 1926. The proceedings did not quite synchronise, because, whereas the undefended case proceeded very slowly with a number of interlocutory applications with reference to the statement of claim, and so forth, so that the case was only set down in October, the defended case proceeded very rapidly, and the publishers gave notice of trial themselves about ten days later, so that the action appears in the list much earlier than the other one. It is to be noticed, therefore, that that action has been brought into the list early by the action of the defendants, who gave notice of trial at a time when they knew that the plaintiff was performing his military duties in India. No application was made by the plaintiff for the postponement of the case until this week, and objection is taken that he has been guilty of such delay that he is properly punished by losing his right to protect himself from this libel or to claim damages in respect of it, because undoubtedly, if this case comes on next week in the absence of the plaintiff, it would be impossible for his advisers to proceed, and the only result would be that judgment would be given for the defendants, and the plaintiff would be deprived of his right. It appears to me, in dealing with the question of delay, it is impossible to omit to notice both actions. Here the plaintiff had brought two actions both against the same authoress, against different publishers, and against the same printers, the only difference being that in one case the printers were a firm, and in the other they were in fact a limited company. The same issue would arise as far as they were concerned ; they appear by the same advisers and by the same counsel. It appears to me obvious that the duty of the plaintiff was to try to secure that, if he had to come here in order to deal with these two actions, he should be able to make arrangements that the two actions should be heard at about the same time so that they would be covered as nearly as possible by the same period of leave. I myself have very little doubt that that is the view the authorities will take. I can hardly imagine anyone would think it was reasonable that this gentleman should apply for leave to come and fight an action in December, and that he should go back to join his regiment, and then have to apply to return to conduct a similar action in April. If he applied for leave to cover a period which would comprise the whole interval between the two actions, the obvious thing that would be said to him would be: "Why have not you taken some step to secure that the actions should be heard together?" In those circumstances, it seems to me that it was perfectly reasonable for the plaintiff to wait until both actions were at any rate set down for trial, and the second action was not set down until about October of this year. After that I have very little doubt that communications would have to be made with the plaintiff by his advisers, which might easily explain a lapse of some six weeks or so since the beginning of the term. Whether that is so or not, it appears to me impossible that the plaintiff should be punished by losing his rights altogether in a case where his advisers have been guilty of a delay of, say, five or six weeks in making this application. I do not take the view that this application could have been made in May or June or July of last term. I think it would be an extraordinarily difficult application to make until the other action was in the list.

The result seems to me to be that in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion. I am very far from being satisfied of that in this case ; on the other hand, I am quite satisfied that very substantial injustice would be done to the plaintiff by refusing the application that this case should be postponed, and that is the result of that order. It appears to me we should now make the order which, upon a fuller consideration of the materials that had been before the Lord Chief Justice, ought to be made. The result is that this case ought not to be heard this term. I think the proper course to take is that it should be taken out of the week's list and say it is not to be tried until next term. That will give an oppor-

A tunity to the parties to make the necessary application, which they can make in chambers, for a proper order dealing with the trial of this action, and of the other action, so, at any rate, to secure that the actions will come within such a reasonable period of time together as will enable them to be covered in one reasonable period of leave which the plaintiff, we are told, will be able to obtain. It is obvious that the actions cannot be heard together in the sense that the evidence in one will B be the evidence in the other. It may be thought desirable by the learned judge who tries the cases that they should be heard one after the other. In that way probably a considerable expense will be saved, certainly to the plaintiff, and possibly to some of the defendants ; but that is a matter for further application. On the footing that such an application will be made, and some reasonable order suiting the interests of all parties will be made, I think we ought to make the order proposed C by my Lord. With regard to the second action, it seems to me it was unnecessary to apply for a postponement of that case, because the action, we are told, is about 100 out of the list, and it is quite easy to make an order—in the circumstances it would not be an unusual thing to make an order—which might to some extent expedite it, but it is unnecessary to make at the present time an order to postpone the hearing of that case, and I agree with the order proposed by my Lord with D reference to that.

**LAWRENCE, L.J.**—I agree. No words of mine are really needed to emphasise the reluctance of this court to interfere with a discretionary order such as the one now under appeal. This court never interferes with the discretion of a judge below in arranging his list or in fixing the time for trying any cases before him unless his E discretion is exercised so as to result in a denial of justice.

What are the facts here? On the undoubted facts, I am convinced that if the order under appeal stands there will be a denial of justice. The plaintiff is in India with his regiment ; it is not suggested that he is unable or unwilling to come to England and be present at the trial so as to support his case in the witness-box when it comes on. Further, it is plain that if he is not present at the trial F his case must fail ; in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers committed an error of judgment in applying at the time when they did ; that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case heard. I have heard no word said on behalf of the defendants that they G will in any way be prejudiced by the case being postponed until next term ; there is no evidence whatever that they will be prejudicially affected by such a postponement. It seems to me that, in those circumstances, it would not be doing justice to the plaintiff if his case were allowed to remain in the list of cases to be heard this term. I agree with the order proposed by the Master of the Rolls.

*Appeal allowed.*

Solicitors : *Thorp, Saunders & Thorp; Trower, Still & Keeling; Field, Roscoe & Co.; Warwick, Webb, Son & Co.*, for *Collins, Mager & Hughes*, Bath.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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# BUERGER AND ANOTHER *v.* NEW YORK LIFE ASSURANCE CO.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), May 3, 4, 5, 23, 1927]

[Reported 96 L.J.K.B. 930; 137 L.T. 431; 43 T.L.R. 601]

*Insurance—Life assurance—Payment in foreign currency—Calculation of amount payable—Rate of exchange on due date.* B

During the years 1903 to 1909 the plaintiff, a Russian subject resident in Russia, effected in Russia policies of life and endowment assurance with the Russian branch of the defendants, who were a United States company. In the events which happened the amounts secured by the first two of these policies would have become payable before the issue of the writ if the policies were C still in existence and enforceable. It was not disputed that the contracts were to be governed by Russian law. In an action claiming the amount due on the policies, or, alternatively, the return of the premiums paid thereunder, the defendants relied upon a decree of the Russian government made on Nov. 18, 1919, by which all contracts made with insurance companies for life insurance were annulled and all insurance premiums were transferred to the revenue of D the Treasury. Uncontradicted evidence was given for the plaintiff that by a decree made in 1923 the People's Commissariat of Justice was charged with the interpretation of existing laws, and that the Commissariat had interpreted the decree of Nov. 18, 1919, as having no application to contracts of life assurance made by Russian subjects with companies having assets in the United States which were not liable to confiscation in Russia. E

**Held:** the plaintiff was entitled to recover on the two policies, and judgment must be entered for him for the sterling equivalent of the rouble at the date when the respective sums became due.

**Notes.** Referred to: *De Beéche* v. *South American Stores, Ltd. and Chilian Stores, Ltd.*, [1934] All E.R. Rep. 284. F

As to payment under life policies in foreign currency see 22 HALSBURY'S LAWS (3rd Edn.) 285, 286, and cases there cited. As to currency in which a rate at which a debt is payable see 23 HALSBURY'S LAWS (2nd Edn.) 173, 174, and, for cases, 35 DIGEST 169 et seq.

Cases referred to:

(1) *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] 2 Ch. 466; 93 L.J.Ch. G 263; 130 L.T. 109, C.A.; 35 Digest 169, *12*.

(2) *Anderson* v. *Equitable Assurance Society of United States* (1926), 134 L.T. 557; 42 T.L.R. 302, C.A.; 35 Digest 176, *62*.

**Appeal** by the plaintiffs from an order of GREER, J., in an action tried by him without a jury, and **cross-appeal** by the defendants. H

The plaintiffs' claim was for the amount due upon four policies of life and endowment assurance which had been issued by the defendants, or, alternatively, for the return of the premiums paid by the plaintiffs thereunder. The policies were taken out between the years 1903 and 1909 in Russia where the defendants were then carrying on business, and where the plaintiffs were then resident. All premiums due and payable to the defendants under the policies were paid to the I defendants in Russia in roubles down to the year 1913. In the events which happened the amounts secured by the first two of these policies would have become payable before the issue of the writ if the policies were still in existence and enforceable. The defendants relied upon certain decrees of the Russian government as avoiding the policies. They said that by a decree dated Dec. 1, 1918, all kinds of insurance were declared and made a monopoly of the State, that all insurance organisations in Russia, which included the defendants' branch and business therein, were ordered to be liquidated and declared to be the property

of the State, and that the business and affairs of life insurance were transferred to a State department; and that, by a further decree, dated Nov. 18, 1919, all kinds of life insurance and all contracts of life insurance were cancelled and all insurance premiums transferred to the State Treasury. By such decrees, they said, the Russian government had declared and rendered null and void the policies sued on and had determined and avoided any obligations of the defendants thereunder. The plaintiffs did not dispute the existence of the decrees referred to, but said that the decree of Nov. 18, 1919, had been authoritatively interpreted in Russia by the People's Commissariat of Justice as having no application to a case such as theirs, and that this interpretation must be accepted as the law of Russia by the courts of this country. GREER, J., held that the Commissariat had no power to "interpret" the decree, and, further, that if the plaintiffs were entitled to judgment, it should be for the sterling value of the chervonetz rouble at the rate when the respective sums became due. The plaintiffs appealed against the first part of his judgment, and there was a cross-appeal by the defendants upon the currency finding.

*Jowitt, K.C.*, and *Van den Berg* for the plaintiffs.
*Stuart Bevan, K.C.*, and *H. G. Robertson* for the defendants.

*Cur. adv. vult.*

May 23. The following judgments were read.

**BANKES, L.J.**—In this action the plaintiffs' claim is to establish their right to recover the amounts alleged to be due on four policies of insurance taken out by the male plaintiff between the years 1903 and 1909. The writ in the action was issued on Feb. 15, 1926. In the events which have happened, the amounts secured by the first two of these policies would have become payable before the issue of the writ if the policies were still in existence and enforceable. As the defendants object to this court's expressing any opinion with regard to the last two of these policies on the ground that in no circumstances would the amounts secured by them have been payable at the time when the writ was issued, I confine my judgment to the first two policies. These two policies were taken out in Russia in the years 1903 and 1905 by the male plaintiff, who was then resident in Russia. It is not disputed that the contracts so created are to be governed by Russian law. The difficulty in the present case, as in previous cases in this court, is to determine what the Russian law applicable to the case is. That law has to be proved as a question of fact. In previous cases the court has been confronted by the evidence of a number of experts in Russian law who have flatly contradicted each other as to what the law applicable to the particular case was. The peculiarity of the present case is that only one witness was called. He was called for the plaintiffs. The defendants had experts in Russian law in court, but they were not called to throw any doubt upon the correctness of the evidence of the plaintiffs' witness.

There are two points in this case: (i) Whether the policies were or were not subsisting and enforceable contracts at the date of the writ ; (ii) if they were, what is the sum, expressed in British currency, for which judgment should be entered for the plaintiffs. On both points the witness's evidence, if accepted, was in the plaintiffs' favour. The learned judge who tried the case accepted the evidence on the second point, but refused to accept it on the first point. He, therefore, gave judgment for the defendants. Both parties appeal. The question for this court is whether the learned judge's view on either point is correct.

[HIS LORDSHIP dealt with the first point, considered the Russian decrees, and continued :] Assuming it to be the law in Russia that the People's Commissariat of Justice has jurisdiction to "interpret" the law, it seems to me to follow that it is also within their jurisdiction to say what comes within the term "interpretation" as used in the administration of Russian law, and that a court in this country cannot, by putting its own construction upon the term "interpretation" as it understands it, make a law for Russia which the Russian judicial system does not recognise. For these reasons I am unable to agree with the judgment of GREER, J., on this

point, and particularly I am unable to agree with that part of his judgment which suggests that the evidence of Mr. Krougliakoff [an expert witness on Russian law] did not go the length of saying that an interpretation by the Commissariat of Justice constituted part of the law of the Soviet Republic. I do not so read his evidence. Upon the second point, I see no reason to differ from the conclusion arrived at by GREER, J. But for the evidence of Mr. Krougliakoff, I confess that I should have felt faced, upon the facts, with a practically insoluble problem. The witness, however, has propounded a solution as being the Russian law on the subject, and GREER, J., has accepted his evidence. I do not think it necessary to add anything on this part of the case to the judgment of the learned judge. In the result the appeal will be allowed, and the cross-appeal dismissed in each case, with costs. Judgment will be entered for the plaintiffs on the two first policies for amounts calculated in accordance with the decision of the learned judge.

**SCRUTTON, L.J.,** said that he agreed with GREER, J., on the first point and continued: The question is in what currency is a valid claim for so many roubles under a contract made before the war to be satisfied, when the currency has depreciated enormously, and changes said to be stabilisation have been made in it, either by creating a coin with a new name, such as "belga" in Belgium, or "schilling" in Austria, having the same nominal value as the old Belgian franc, or Austrian krone, but alleged to be worth many of those old coins, or by creating a coin with the same name as the old coin, but said to represent a number of the old coins? We have some guidance from decisions of this court in *Re Chesterman's Trusts*, *Mott* v. *Browning* (1), and *Anderson* v. *Equitable Assurance Society of United States* (2), that where the pre-war contract was to pay marks, at the time when paper was interchangeable with gold, but above a certain amount only payable in gold, and war legislation abolished their gold value, and the war enormously depreciated their exchange value in paper, the debtor could still satisfy the debt when payable in England by paying an amount of sterling, representing the exchange value at the time, of the contract number of paper marks, though the result was of infinitely less value than the contract amount of pre-war marks. These decisions, however, do not cover the case of a change in currency.

The facts in Russia are as follows, and that they are difficult to interpret is shown by Mr. Krougliakoff's answer to the question: "In August of 1923, and thereafter, what was the rouble? (Answer), That is a very difficult question to answer." The two material policies are a policy of 5,000 roubles dated Aug. 4, 1903, repayable Aug. 1, 1923, with a yearly premium of 255 roubles, and a policy dated Feb. 10, 1905, payable Feb. 7, 1925, with a yearly premium of 256 roubles. At the dates of the policies there were gold coins of 15 roubles (Imperial), 10 roubles (popularly, though not by law, called chervontzy) 7½ and 5 roubles, smaller silver and copper values, and paper notes ; paper was freely interchangeable with gold, and the ratio to sterling was fairly steady, 9.45 roubles to the £ sterling. At the outbreak of war the interchangeability with gold was abolished, and the paper rouble depreciated in sterling value. In 1916 it was about 15 roubles to the £ ; in 1917 as high as 40 roubles to the £. It was at this stage that the plaintiffs were anxious to pay their premium in paper roubles, as "they did not want to lose on the exchange." After the revolution there were in circulation pre-war paper roubles, Kerensky roubles and Bolshevist or Soviet roubles. There was no exchange with Europe, and the currency was very much depreciated. On Nov. 3, 1921, came the first Soviet currency law establishing "State currency notes of the 1922 model," one of such roubles of 1922 being equivalent to 10,000 roubles of all the old issues. It is difficult to be sure what a Russian court would have done with a claim for a pre-war obligation of 10,000 roubles, for all courts were forbidden to entertain such a claim. But it seems pretty clear that if the New York Life deposit in Russia had included 100,000 paper pre-war roubles that deposit would only have been worth 10 roubles of 1922, and when all the old issues were called in on Oct. 31, 1922, the

A deposit could only be exchanged for 10 roubles of 1922. I do not think that at this stage any pre-war creditor for 100 roubles could have demanded 100 roubles of the 1922 pattern. He would have been referred to the law of November, 1921. The administrative decree of April 6, 1922 (which as applied (s. 7) to payments by private undertakings and persons was only repeating the provision of the law of November, 1921, as a ratio), would also seem to point this way.

B The currency continued to depreciate, and on Oct. 24, 1922, another law authorised notes of the 1923 model, one rouble of which was to be equal to 100 roubles of the 1922 model, or one million of roubles of the model which had been taken out of circulation. The New York Life Assurance Co.'s suppositious deposit would now be reduced to one-tenth of a 1923 rouble, and again I do not think that a pre-war creditor for 100 roubles could have demanded 100 roubles of 1923. At the

C same time, in October, 1922, the State Bank was authorised to issue notes based on chervontzy, the chervonetz being taken as equal to the same weight and fineness of gold as the pre-war ten-rouble piece. These were to be backed by one-fourth of their value in gold, but were not interchangeable with gold. All private gold had long ago been confiscated, its possession being illegal. The 1923 rouble continued

D in force side by side with the chervonetz bank-note, but at a rate of interchange fixed each month by the government. It appears to me that the debtor owing roubles would have a right to pay in either currency, in chervonetz notes or in roubles in 1923, and would have a right to choose the most favourable to himself. As I have said, I do not think that the debtor who had promised to pay pre-war roubles, or promised before the war to pay roubles, could be required to pay roubles of 1923;

E but still less could he be required to pay chervontzy, which seem to me to be new legal coins, though bearing the old popular, not legal, name of a ten-rouble piece. I do not see how such a debtor could ask for more than an equivalent number of roubles of 1923 ; I do not think, as above explained, that he could even ask for them. Lastly, from Feb. 15, 1924, no new 1923 rouble notes were printed, and by a decree of March 25, 1924, they were to be withdrawn at the rate of one rouble

F in gold to 50,000 roubles in 1923 notes. The New York Life Assurance Co.'s deposit would now have got a ridiculously small sum, 1/500,000ths of a 1923 rouble, or 1/500,000,000,000th of a new chervonetz. But the plaintiffs contend, and the judge has found, that the New York Life Insurance Co. must pay the amount of the claim in chervonezy, which now have the same value in gold as the pre-war rouble had in 1903 and 1905.

G The amount to be paid in England under the English judgment must be ascertained by turning the amount which would be payable by Russian law in roubles at the date of the same becoming due into English money, at the rate of exchange of the date of payment. It appears to me, though it is not necessary to decide it, in view of the earlier part of my judgment, that at that date the chervonetz and the pre-war rouble were different currency of different values, and that the plaintiffs

H were not entitled to turn pre-war roubles into chervontzy, which by Russian law were only exchangeable for a great many pre-war roubles, on the basis that a post-war chervonetz was equivalent to a pre-war rouble. In my opinion, it was a different coin. But as I have held that the contract of insurance was entirely annulled and unenforceable, this part of my judgment is not effective. I appreciate that both the plaintiffs and the defendants have suffered great losses by the Russian

I legislation, but I do not see that either can recoup his losses at the expense of the other. They are common sufferers. The effective judgment of GREER, J., must, in my opinion, be affirmed, though I differ from him in his alternative view as to currency.

**ATKIN, L.J.,** agreed with BANKES, L.J., on the first point, and continued: The question of the currency appears to me to be more difficult, and I have had considerable doubt about it. Nevertheless, I have come to the conclusion that the judge's decision on this point must be upheld. This question, like the former, is

one of Russian law, and I think Mr. Krougliakoff's evidence, again uncontradicted, is that the Russian law maintained throughout the pre-war rouble based on gold and has now reverted to it. In these circumstances, I think that the learned judge was justified in coming to the conclusion that the plaintiffs were entitled, if at all, to judgment for the amount of sterling based upon the exchange with the Russian gold rouble at the material date. I think, therefore, that judgment should be entered for the plaintiffs for the appropriate sum on the first two policies, but that no declaration should be made on the remaining policies.

*Appeal allowed: cross-appeal dismissed.*

Solicitors: *Cosmo, Cran & Co.; Ashurst, Morris, Crisp & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

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## COLLAROY CO., LTD. *v.* GIFFARD AND ANOTHER

[Chancery Division (Astbury, J.), November 18, 22, 23, 1927]

[Reported [1928] Ch. 144; 97 L.J. Ch. 69; 138 L.T. 321; [1927] B. & C.R. 217]

*Company—Winding-up—Surplus assets—Rights of preference shares—"Priority both as regards dividends and capital"—Construction of memorandum and articles of association.*

The annexation to preference shares in a company of rights to receive back their capital on a winding-up in priority to the ordinary shares primâ facie does not exclude the preference shareholders from participating in an ultimate surplus, but the rights of the preference shareholders depend on the construction of the memorandum and articles of association which form the contract between them and the company. On the true construction of that contract it must be determined whether the preferential rights are given merely by way of priority or whether they are given by way of delimitation.

By the memorandum and articles of association of a company it was provided that the preference shares should "confer the right to a fixed cumulative dividend," at a certain rate, "and shall rank, both as regards dividends and capital, in priority to the ordinary shares." By the articles it was provided in the same terms as to the dividends, and that the preference shares should "confer the right in a winding-up to repayment of capital in priority to the ordinary shares."

**Held:** that here the full rights of the holders of preference shares, both as to dividends and capital, were delimited by the contract between them and the company, and they were entitled to no further rights; and, therefore, in the event of a winding-up they were not entitled to share in any surplus assets.

*Re Espuela Land and Cattle Co.* (1), [1909] 2 Ch. 187, *Re Fraser and Chalmers, Ltd.* (2), [1919] 2 Ch. 114, *Anglo-French Music Co.* v. *Nicoll* (3), [1921] 1 Ch. 386, distinguished.

*Re National Telephone Co.* (4), [1919] 2 Ch. 187 and *Will* v. *United Lankat Plantations Co., Ltd.* (5), [1914] A.C. 11, applied.

**Notes.** Not followed: *Re John Dry Steam Tugs, Ltd.*, [1932] All E.R. Rep. 586. Doubted: *Re William Metcalfe & Sons, Ltd.*, [1933] Ch. 142; *Scottish Insurance*

*Corpn., Ltd.* v. *Wilsons and Clyde Coal Co.*, [1949] 1 All E.R. 1068. Referred to: *Re Isle of Thanet Electric Supply Co.*, [1949] 2 All E.R. 1060.

As to distribution among contributories in a winding-up see 6 HALSBURY'S LAWS (3rd Edn.) 678–682, and for cases see 10 DIGEST (Repl.) 1065 et seq.

Cases referred to:

(1) *Re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187; 78 L.J.Ch. 729; 101 L.T. 13; 16 Mans. 251; 10 Digest (Repl.) 1069, *7410*.

(2) *Re Fraser and Chalmers, Ltd.*, [1919] 2 Ch. 114; 88 L.J.Ch. 343; 121 L.T. 232; 35 T.L.R. 484; 63 Sol. Jo. 590; [1918–19] B. & B.R. 186; 10 Digest (Repl.) 1072, *7424*.

(3) *Anglo-French Music Co.* v. *Nicoll*, [1921] 1 Ch. 386; 90 L.J.Ch. 183; 124 L.T. 592; 10 Digest (Repl.) 1010, *6948*.

(4) *Re National Telephone Co.*, [1914] 1 Ch. 755; 83 L.J.Ch. 552; 109 L.T. 389; 29 T.L.R. 682; 58 Sol. Jo. 12; 21 Mans. 217; 10 Digest (Repl.) 1069, *7413*.

(5) *Will* v. *United Lankat Plantations Co., Ltd.*, [1912] 2 Ch. 571; 81 L.J.Ch. 718; 107 L.T. 360; 28 T.L.R. 506; 56 Sol. Jo. 648; 19 Mans. 298, C.A.; affirmed [1914] A.C. 11; 83 L.J.Ch. 195; 109 L.T. 754; 30 T.L.R. 37; 58 Sol. Jo. 29; 21 Mans. 24, H.L.; 9 Digest (Repl.) 639, *4258*.

(6) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

(7) *J. I. Thornycroft & Co., Ltd.* v. *Thornycroft* (1927), 44 T.L.R. 9; 9 Digest (Repl.) 639, *4254*.

(8) *Re London India Rubber Co.* (1868), L.R. 5 Eq. 519; 37 L.J.Ch. 235; 17 L.T. 530; 16 W.R. 334; 10 Digest (Repl.) 1010, *6947*.

**Adjourned Summons** issued by the Collaroy Co., Ltd., for a decision as to the rights of the holders of preference shares in the company and the holders of ordinary shares in the surplus assets in the event of a winding-up.

The company was registered on Mar. 8, 1898, with the objects, inter alia, of carrying on the business of a sheep and cattle farmer and grazier or any other farming or agricultural business in New South Wales or elsewhere in the Dominion of Australia. The capital of the company was £300,000 divided into 10,000 preference shares of £10 each and 20,000 ordinary shares of £10 each, of which 6,670 preference shares and 13,340 ordinary shares had been issued and were fully paid up. By cl. 5 of the memorandum of association the rights of the holders of preference shares were defined as follows:

> "Such preference shares shall confer the right to a fixed cumulative dividend at the rate of £5 per cent. per annum on the capital paid up thereon, and shall rank both as regards dividends and capital in priority to the ordinary shares. Upon any increase of capital the company is to have power to issue any new shares with any preferential, defined, qualified or special rights, privileges or conditions attached thereto."

Article 11 of the articles of association was as follows:

> "The initial capital shall be divided into 10,000 preference shares of £10 each and 20,000 ordinary shares of £10 each, and the preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of £5 per cent. per annum, and the right in a winding-up to repayment of capital in priority to the ordinary shares."

By art. 152:

> "If the company shall be wound-up and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed, so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the

shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The company acquired a large area of land in New South Wales and conducted farming operations thereon. From time to time considerable portions of the land had been sold, and the company was now about to sell the remainder of the land. Such sales were almost invariably made on the terms that the purchase-money should be paid by instalments covering a considerable period. It would, therefore, be several years before the company would receive the whole of the purchase-money due, so that its affairs could be finally wound-up. It was, however, considered certain that in due course the company would be possessed of liquid assets which, after payment of all liabilities, would be far more than sufficient to repay the whole of the capital credited as paid up on both the preference and ordinary shares. It became, therefore, essential to determine what were the true rights of the preference and ordinary shareholders respectively in the surplus assets, and the company issued this summons making a representative of the preference shareholders and a representative of the ordinary shareholders defendants.

*Bischoff* for the company.

*Lionel Cohen*, for the preference shareholders, referred to *Re Espuela Land and Cattle Co.* (1), *Re Fraser and Chalmers, Ltd.* (2), *Anglo-French Music Co.* v. *Nicoll* (3), *Re National Telephone Co.* (4), *Birch* v. *Cropper* (6), and *Will* v. *United Lankat Plantations Co., Ltd.* (5).

*J. H. Stamp*, for the ordinary shareholders, also cited *J. I. Thorneycroft & Co.* v. *Thornycroft* (7).

*Cohen*, in reply, referred to *Re London India Rubber Co.* (8).

**ASTBURY, J.**—This is a summons for the purpose of obtaining a decision whether, on the true construction of cl. 5 of the memorandum of association of the plaintiff company, the holders of the preference shares in that company, in the event of a liquidation, will be entitled to participate rateably with the holders of the ordinary shares in any distribution of surplus assets remaining after payment of all the liabilities of the company and repayment of the whole of its paid-up capital. As far as is material to this matter, cl. 5 provides that the preference shares shall have the right to a fixed cumulative preferential dividend at the rate of 5 per cent. and shall rank, both as regards dividend and capital, in priority to the ordinary shares. Counsel, who has argued this case on behalf of the ordinary shareholders, has discussed the effect of various decisions during the last few years upon the sort of question that is raised by this summons, and counsel for the preference shareholders has given me the benefit of his argument on their behalf. There is no difference of opinion that the question to be decided upon this summons depends entirely upon the true construction of the memorandum and articles qua the rights of the preference shareholders; and, if I may venture to put the point very shortly, it is whether the provision in the contract—that is, in the memorandum and articles—with regard to the rights of the preference shareholders is one which confers upon them certain priorities only, leaving them their rights, in so far as not expressly dealt with, as shareholders, or, on the other hand, whether the provisions of the contract contain the whole of the rights conferred upon the preference shares.

I shall have to consider as best I can a number of decisions which directly bear upon the point of this case; but, before doing so, I wish to state in the form of a proposition what is not questioned, as I understand it, by either party. The proposition is that the annexation to preference shares in a company of rights to receive back their capital on a winding-up in priority primâ facie does not exclude the preference shareholders from participation in an ultimate surplus if such is obtained. This proposition was affirmed, as I understand it, by SWINFEN EADY, J., in *Re Espuela Land and Cattle Co.* (1), by myself in *Re Fraser and Chalmers* (2), and by

EVE, J., in *Anglo-French Music Co.* v. *Nicoll* (3). It was, perhaps, doubted by SARGANT, J., in *Re National Telephone Co.* (4). The proposition of counsel for the ordinary shareholders, founded upon the one that I have just stated, is that such a provision may be expressed in such a manner and with such a context that, according to its true construction, it excludes preference shareholders from such a participation; and the direct question which I have to decide is whether, on the contract in the present case, the preference shareholders are so excluded. The proposition of the counsel, as I have just stated it, is not, I think, doubted in any authority; the question is whether it applies in the present case.

In *Birch* v. *Cropper* (6) the resolution relating to the preference shares was confined to dividend rights, and there was no provision there as to what should happen in a winding-up; the real controversy in that case was whether the assets of the company were distributable in proportion to the paid-up or the nominal capital. The wording of the contract there is found in the report, and, although the decision has no direct relevance to the matter in dispute on the present summons, a number of passages in the speeches in the House of Lords have been relied on. LORD HERSCHELL said:

> "The Companies Act affords very little assistance in terms towards a decision of the question. It provides that, in the case of a voluntary winding-up, the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

Speaking of the preference shareholders, the learned Lord said:

> "They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits."

LORD MACNAGHTEN said:

> "Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all. When the company is wound-up, new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributors amongst themselves. . . . The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture holders liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the

company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company. I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets,' as if they were an accretion or addition to the capital of the company, capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund —which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company."

I have read that because certain passages of these speeches are relied upon in later cases.

There are four cases in which the rights of preference shareholders to participate in what is there described as "surplus assets in a winding-up," that is, assets after paying debts and liabilities and returning the whole of the capital, have been discussed. One is the *Espuela Case* (1), the next is the *National Telephone Case* (4), the next is *Re Fraser and Chalmers, Ltd.* (2), and the last is the *Anglo-French Music Co. Case* (3); but in *Will* v. *United Lankat Plantations Co.* (5), although the decision was limited to dividend rights, there is a quantity of valuable information as to the rights of preference shareholders generally. In the *Espuela Case* (1) SWINFEN EADY, J., decided that, having regard to what I will throughout describe as "the contract," that is, the provisions of the memorandum and articles, the preference shareholders were entitled in the winding-up, after the share capital had been repaid, to share rateably in the distribution of the assets which remained after that repayment, but having regard to the difference of opinion which has been expressed in certain cases, and having regard to the extremely able arguments to which I have had the benefit of listening in the present case, I think it is necessary to consider very closely the exact terms of the contract in each of these cases, and I propose to do that, having regard to the proposition which both parties assent to —that the annexation to preference shares of a right to receive back their capital in a winding-up in priority to the ordinary shares, primâ facie does not in itself exclude the preference shares from participation in the ultimate surplus, if there be one.

In the *Espuela Case* (1) the memorandum provided that the preference shares should carry a cumulative preferential dividend of 10 per cent. on the amount for the time being paid up thereon, and that they should also have a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company on a winding-up. The articles provided that the preference shares should be entitled to a preferential dividend out of the divisible profits in each year of 10 per cent., and provided that, in case the company should at any time be wound-up, the preference shareholders should be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment should be made in respect of the ordinary shares. That contract was consistent with its providing only for preference and not for delimitation of right. The memorandum that I have read gave a preferential right and the articles provided that the preference shares on a winding-up should be paid in priority to and before any payment should be made in respect of the ordinary shares. SWINFEN EADY, J., after having read the contract, said:

"There remains the question how the assets which remain after paying preference capital, interest thereon and ordinary capital are to be distributed. . . . Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that, where priority of repayment on a winding-up is secured to the preference capital, the preference shareholder is entitled to that

repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preference shareholders they take the fixed amount and nothing more, however large the revenue of the company may be."

The learned judge proceeded:

"This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue, first in paying a fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the two."

He gives an instance of that. Nobody quarrels with that. The question is merely one of construction. There is no rule of law which prevents the contract defining the rights of the preference shareholders; and the learned judge construed the contract in that case, as it seems to me, if I may respectfully say so, he was entitled to do, as not depriving the preference shareholders of their rights as shareholders in the surplus assets which remained over from the winding-up after the repayment of capital. Counsel for the ordinary shareholders has contended, and I think rightly, that a fixed return of capital to the shareholders in a winding-up is just as artificial as a provision for a fixed dividend; and he says that, if one is exhaustive, there is no primâ facie reason why the other should not be similarly regarded.

The next case is the *Lankat Case* (5). There, the company having been established, the following resolutions were passed at an extraordinary general meeting in 1891:

"(1) That the capital of the company be increased to £450,000 by the creation of 50,000 new shares of £1 each; (2) that the new shares be called preference shares, and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such preference shares rank, both as regards capital and dividend, in priority to the other shares."

In July, 1909, new articles of association were approved of, one of them being that,

"In the event of the winding-up of the company the surplus assets shall be applied first in payment to the holders of the preference shares of the amounts paid up on such shares, together with a sum equivalent to any arrears of dividends, whether declared or undeclared, down to the commencement of the winding-up; secondly, in payment to the holders of the ordinary shares of the amounts paid up on such shares, and, subject thereto, shall be divided among the members in accordance with the amounts for the time being paid on the shares held by them respectively, other than amounts paid in advance of calls."

I do not know that it is necessary to discuss how it was, and why it was, that the question of the rights of the preference shareholders in a winding-up was not dealt with. It did not arise in the sense that there was a winding-up, because the company was a going concern, and I believe is so still; but the relevance of the provision as to capital was not directly discussed. It may be that it was uncertain at that time whether the new articles in 1909 had affected or destroyed the provisions of the resolution as to the rights in a winding-up; but the decision was limited to the dividend rights. COZENS-HARDY, M.R., in the Court of Appeal, said:

"Now what is the ordinary primâ facie meaning of preference shares having a fixed dividend, fixed in this sense, that it does not vary with the profits of the year, but is a fixed dividend of 10 per cent. per annum? It seems to me

that the ordinary meaning is that that resolution defines and limits the dividend which a preference shareholder can take." A

The learned judge approves of a passage in PALMER'S COMPANY PRECEDENTS (11th Edn., Part I, p. 814), to this effect:

"It is generally assumed that, where the preference shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividend, and probably this assumption is well founded." B

FARWELL, L.J., agreed with the Master of the Rolls, but there is a passage in his judgment which it is suggested went perhaps too far. The passage is:

"To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern. As to what may happen in a winding-up I express no opinion." C

If I may very respectfully say so, it appears to me plain that different considerations may, and to some extent do, affect the question of capital preference and the question of dividend preference. The question whether the considerations affecting them are, as the learned judge said, entirely different, is a matter of some difficulty. D

That case went to the House of Lords, and the decision of the Court of Appeal was affirmed. VISCOUNT HALDANE said:

"This appeal raises a question of very great interest from a business point of view, but it is difficult to see how it can be said to raise any question of general legal principle. The point in dispute is one of construction. Your Lordships will observe that the second resolution gave the authority to make the bargain and defined the terms which it was to contain. A shareholder comes to the company and says: 'I wish to contract with you for a share in your capital and so to become a shareholder.' He advances his money and the terms are contained in the bargain that is made between him and the company on the issue of the shares to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of 10 per cent. on the amount paid up on his share, and that his preference share is to rank, both as regards capital and dividend, in priority to other shares. My Lords, I should have thought that if we were dealing with an ordinary case of two individuals coming together, and, if a document were produced saying, 'You are to have a cumulative preferential dividend of 10 per cent.' or whatever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point. You do not look outside a document of this kind in order to see what the bargain is: you look for it as contained within the four corners of the document. . . . When you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue." E F G H

The matter ended there, but it is contended in the present case that VISCOUNT HALDANE'S view as to the whole bargain being primâ facie contained in the document, applies just as much to the bargain as to the return of capital on a winding-up as to the amount of the dividend and the character of the dividend to be paid by the company as a going concern. I

The next case is *Re National Telephone Co.* (4), which SARGANT, J., decided on the terms of the particular bargain which was contained in the company's memorandum and articles; but he probably leaned to the view that where you have in the contract a statement as to the rights of the preference shareholders, both as to dividend and in the winding-up, primâ facie that is the whole and the only bargain between them; and he decided on the contract before him that the preference shares took only the rights expressly given to them.

A The next case is one with which it will be difficult for me to deal because it is a decision of my own. In *Re Fraser and Chalmers, Ltd.* (2), I held that a provision merely giving preference shareholders priority for the repayment of their capital on a winding-up, did not negative their right as corporators to participate in the ultimate surplus assets. As far as the contract in that case was concerned, I am of opinion that my decision was right; and counsel for the ordinary shareholders, in B his extremely able and lucid argument, has been good enough to say that he does not quarrel with it. The contract there is set out in the report, and the relevant parts of it are that the preference shares should have the special rights and privileges therein set out. The first was the right to a fixed cumulative preferential dividend of 7½ per cent.; secondly, when the profits of the company in any year should be more than sufficient to pay the preferential dividend, and also a dividend C at the same rate on the ordinary shares, the holders of the preference shares should be entitled to participate in any further dividend which might be paid in any such year. In other words, these were fixed preferential participating preference shares. Then the contract provided that, in the event of the winding-up of the company, the holders of the preference shares should have a preferential right as regard repay- D ment of capital and otherwise, and should be entitled to have the surplus assets applied, first in paying off the capital paid up on the preference shares, and, secondly, in paying off the arrears of preferential dividends, if any, before any return or payment of capital should be made to the holders of the other shares. In that case the rights of the preference shareholder to profits during the time that the company was a going concern were, subject to their preference, the same as those E of the ordinary shareholders; and in such circumstances there is a probability that their interest in the winding-up should have some sort of relation to their interest in the company while it was a going concern, provided two things exist: (i) that the preferential right should be *a* right and not *the* right of the preference shares, and (ii) that they should have their capital repaid before the repayment of capital was made to the ordinary shareholders. That, I thought, meant that in a winding-up, F if the assets were sufficient, there were to be two classes of repayment of capital as such—one to preference shares and one to ordinary shares; and I held, and I think rightly held, that, on the true construction of that contract, there was no taking away from the preference shareholders their right, as shareholders, to participate in the final surplus in the winding-up, assuming it had not been taken away, which I thought it had not. I wish to cite the portions of the judgment G which I still think are accurate. I said:

> "All shareholders are entitled to equal treatment, unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares."

That, I think, is right. Then I said:

H > "The dividend clause provides for the exhaustion of an annual distributable sum, whereas the capital clause merely provides for the order in which certain of the company's obligations are to be met in a winding-up."

That, I think, is right. A little lower down I say,

> "No reference is made to any remaining assets after the capital is repaid to all the shareholders, and no provision is made depriving the preference share- I holders of their rights as corporators with regard thereto."

That, I think, is right; and the next sentence I also think is right as applied to to the contract in that case:

> "It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding-up in a particular order, a fund remaining after doing so, which is not expressly, nor by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some, to the exclusion of other, shareholders."

I think that sentence would have been improved if, instead of the words "by implication," I had used the words "on the true construction." Later I said: A

> "This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only."

That is a quotation from the judgment of SWINFEN EADY, J., in the *Espuela Case* (1). B Then I turn to *Re National Telephone Co.'s Case* (4), and I cite a passage from SARGANT, J., to this effect:

> "I should have thought that, as a matter of ordinary construction, not only from the business point of view, but from the legal point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding-up would have operated as an exclusion of any further or other rights"; C

and that, I said, depended, in my view, upon the language used, as indeed I think it does. It is to be observed that in that passage from SARGANT, J., where he uses the words "the express mention of the rights," if he meant to refer to the "right" instead of the "rights," the statement is in fact a truism. Then I cited another D passage from SARGANT, J.:

> "Similarly here I should have thought, in a matter which is specially dealt with by the terms of the issue of the shares, that those terms of issue would have fully defined the terms of issue and would not have been a mere modification of certain anterior or antecedent rights which might be supposed to appertain to the shares as shares." E

I thought that the same observation applied to that statement, and, of course, again, that statement is necessarily right if the terms of the contract in question cover it. A little lower down I say:

> "Speaking for myself I think SWINFEN EADY, J. [in the *Espuela Case* (1)] intended, and rightly, to lay down that, in the absence of provision to the contrary, the shareholders' rights are equal." F

That, again, I agree with. I refer to a further statement by SARGANT, J., in *Re National Telephone Co.* (4), in which he says:

> "Looking at the way in which SWINFEN EADY, J., dealt with the question of the rights of winding-up, as being analogous to the similar rights to dividend G while the company is a going concern [I am not sure that that does not require a little qualification] and looking at the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Co., Ltd.* (5), it appears to me that the weight of authority is in favour of the view that, either with regard to dividend, or with regard to the rights in a winding-up, the express gifts or attachment of preferential rights to preference shares, on their H creation, is primâ facie a definition of the whole of their rights in that respect, and negatives any further or other rights to which, but for the specified rights, they would have been entitled."

In the report I am made to dissent from that, and I have now come to the conclusion, and I desire to express it plainly, that I think I was wrong in so dissenting. I The passage that I have just referred to from SARGANT, J.'s, judgment, is, I think, right, because it states that

> "The express gift or attachment of preferential rights to preference shares on their creation is primâ facie a definition of the whole of their rights in that respect . . ."

I should like to add with regard to that sentence that in ordinary practice in these cases there must be a context. SARGANT, J., is dealing with a primâ facie effect,

A but in practice there must be, and always is, a context; and in the abstract it seemed to me in *Re Fraser and Chalmers, Ltd.* (2) difficult to discuss that which must necessarily depend upon the exact language and context of the contract in each case. If the language used is capable of being construed as an exhaustive delimitation of the whole right, then, in my opinion, SARGANT, J., was right, if I may respectfully say so.

B With regard to the present case, as far as the decision was concerned I do not think it conflicts with any proposition which has been advocated by counsel for the ordinary shareholders, and I think it is also true to say that every fact upon which he bases his argument in the present case was absent from the contract in *Re Fraser and Chalmers, Ltd.* (2). In the present case he says there is a fixed formula extending to dividend and to capital; secondly, that there is an unqualified direction C as to the preference shares ranking in priority over the ordinary shares, which is inconsistent with their ranking pari passu with them; thirdly, that there is in the present case an absence of anything implying that after paying their capital to the preference shares, there is to be any further return of capital eo nomine; fourthly, that in the present case there is a logical consistency between the rights while the company is a going concern and the rights in a winding-up, of the preference share- D holders; and, fifthly, that there is in the present case an absence of anything showing that in winding-up there is to be an artificial distinction between that part of the assets required to refund capital and the surplus. I hope I have stated those five points sufficiently accurately, and if I have, it is significant that each one of them which may be said to be present in this case was absent in the contract E in *Re Fraser and Chalmers, Ltd.* (2).

The last case is a decision of EVE, J., in the *Anglo-French Music Co.* v. *Nicoll* (3). The learned judge in that case held, on the true construction of the contract which was there dealt with, that the giving of a preference to the preference shareholders did not exhaust their rights, and that they were entitled as in the *Espuela Case* (1) and *Re Fraser and Chalmers, Ltd.* (2), to rank pari passu with the ordinary F shareholders in a winding-up in respect of the ultimate surplus. The contract there was as follows:

> "The capital of the company is £5,000 divided into 1,000 ordinary shares of £1 each, and 4,000 cumulative preference shares of £1 each. The said preference shares shall entitle the holders thereof respectively to a fixed cumulative dividend at the rate of £7 per cent. per annum on the amount for the time being G paid up thereon, and to the repayment of capital before any dividend is paid or capital is repaid to the holders of the said ordinary shares."

Again, these shares were participating preference shares, and there was a definite reference in the contract to the repayment of capital to the ordinary shares, after the preference shares had had their capital repaid to them, and on that account it H seems to me that the learned judge is quite entitled to hold that on its true construction the preferential rights were given by way of priority, and not by way of delimitation. In my opinion, there is nothing in the decision in that case which compels me to construe the present bargain in the same way as EVE, J., construed the bargain in the case before him.

That being so, it remains for me to construe, as best I can, the bargain in the I present case in conformity with what I believe is the true effect of the decisions to which I have referred. Counsel for the preference shareholders agrees that the question is one of construction. He also agrees with the propositions put forward by counsel by the ordinary shareholders, which I have endeavoured to state, but he says, joining issue with his opponent, that on the true construction of this present contract the words are words of priority only and are unsuitable as words of exhaustive delimitation. He says that the words "rank in priority" in the memorandum are not suitable as an expression intended to exclude from further shareholding interest after the priority ranking is satisfied, and I have got to do the

best I can—having regard to the arguments that I have heard and to the authorities that I have referred to—to construe the present contract. I do not think that there is any very substantial difference between the provision in the memorandum in the present case and the wording of art. 11. Here the contract in one sentence purports to define the right of the preference shareholders. The memorandum says :

> "The preference shares shall confer the right to a fixed cumulative preference dividend, and shall rank both as regards dividend and capital in priority in the ordinary shares."

The article says :

> "The preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5 per cent., and the right in a winding-up to repayment of capital in priority in the ordinary shares."

I think the construction of this contract is by no means easy, but having given the best attention I can to the authorities upon the subject I have come to the conclusion that on the true construction of the contract there is one provision and one provision only as to the preference shares—that the rights conferred upon them are referred to as their rights, and I cannot find any of the distinguishing features which I find in the *Espuela Case* (1), in *Re Fraser and Chalmers, Ltd.* (2), and in the *Anglo-French Music Co. Case* (3), which enabled the courts in those cases to construe the contracts there as being limited to priority and not to be exhaustive as to rights. In the present case I think on the authorities I ought to hold that on the true construction of the present contract there is one statement as to the rights of the preference shareholders as to dividend and capital, and that that ought to be regarded as a statement of their whole right, and not merely as a statement of their priority right, and for that reason the question on the summons must be answered accordingly.

Solicitors : *Williams & James; Wigan & Co.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

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## PUTSMAN *v.* TAYLOR

[King's Bench Division (Salter and Talbot, JJ.), December 8, 9, 20, 1926]

[Reported [1927] 1 K.B. 637; 96 L.J.K.B. 315; 136 L.T. 285; 43 T.L.R. 153]

[Court of Appeal (Bankes and Sargant, L.JJ. and Avory, J.), March 22, 1927]

[Reported [1927] 1 K.B. 741; 96 L.J.K.B. 726; 137 L.T. 291; 43 T.L.R. 392]

*Contract—Illegality—Public policy—Restraint of trade—Covenants by tailor's manager—Not to compete or work for trade rivals within half-mile radius in town area—Severability—Separate consideration and accord—Performance of covenant independent of performance of other covenants.*

The plaintiff was a tailor carrying on business in B. at three places. The defendant entered the service of the plaintiff in March, 1925, as manager and cutter, under a written contract of service providing that the employment was for twelve months certain, and after that was to be terminable by one week's

notice on either side. By cl. 11: "After the determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by [a named firm of tailors], or be employed in any capacity by any person, firm, or company carrying on a business similar to that of the employer in Snow Hill, B., or within a half-mile radius of Aston Cross, B., or Bristol Road, B." The defendant managed the plaintiff's business at Snow Hill for fifteen months, but on June 14, 1926, he left the plaintiff's service and entered that of another tailor carrying on business in Snow Hill. In an action by the plaintiff claiming an injunction against the defendant restraining him from committing a breach of cl. 11, or, alternatively, from being employed in a similar business during five years in the Snow Hill area,

**Held:** by the Divisional Court: (i) the covenant not to be employed in any one of the three areas was severable from the covenants not to be employed in any one of the other two areas; (ii) since the employment was highly confidential and for twelve months certain, and the limit in space was very narrow, the limit of five years in respect of time did not render the covenant illegal as being in restraint of trade and the plaintiff was entitled to an injunction restraining the servant from competing in the Snow Hill area.

**Held** by the Court of Appeal: both the opening words of cl. 11 providing for a limit of time and the concluding words providing for a limit of distance must be read as governing the whole clause, and, therefore, it was not necessary to go into the question of the severability of the covenants in the contract; in all the circumstances the contract taken as a whole was not an unreasonable protection to the employer of his trade interests and was not against public policy as being an unreasonable restraint of trade, and was, therefore, valid.

Per SALTER, J., in the Divisional Court: The "doctrine of severability" is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the court will enforce the promise notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid as being in undue restraint of trade or for any other reason, the court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise, to be enforceable, must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the court will enforce it. Whether it is separate or not depends on the language of the document. "Severance" is an act of the parties, not of the court.

**Notes.** Referred to: *Vincents of Reading* v. *Fogden* (1932), 48 T.L.R. 613; *Empire Meat Co.* v. *Patrick*, [1939] 2 All E.R. 85.

As to severability of promises in a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 147, 148, and as to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397. For cases, see 12 DIGEST (Repl.) 325 and 43 DIGEST 19.

Cases referred to:

(1) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

(2) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25, C.A.; 43 Digest 20, *131*.

(3) *Goldsoll* v. *Goldman*, [1914] 2 Ch. 603; 84 L.J.Ch. 63; 112 L.T. 211; affirmed [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 59 Sol. Jo. 188, C.A.; 43 Digest 48, *489*.

(4) *Nevanas & Co.* v. *Walker and Foreman*, [1914] 1 Ch. 413; 83 L.J.Ch. 380; 110 L.T. 416; 30 T.L.R. 184; 58 Sol. Jo. 235; 43 Digest 49, *506*.

(5) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L.R. 3 C.P. 235; 37 L.J.C.P. 118; 17 L.T. 650; 16 W.R. 458; 12 Digest (Repl.) 325, *2513*.

(6) *Mallan* v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

(7) *Chesman* v. *Nainby* (1727), 2 Stra. 739; 2 Ld. Raym. 1456; 93 E.R. 819; affirmed, 1 Bro. Parl. Cas. 234, H.L.; 43 Digest 28, *206*.

(8) *British Reinforced Concrete Engineering Co., Ltd.* v. *Schelff*, [1921] 2 Ch. 563; 91 L.J.Ch. 114; 126 L.T. 230; 43 Digest 35, *310*.

**Appeal** from a decision of the Divisional Court reported [1927] 1 K.B. 637.

The plaintiff claimed an injunction to restrain the defendant from committing a breach of a covenant in his contract of service, or, alternatively, to restrain the defendant for a period of five years from the determination of his service with the plaintiff, from being employed in any capacity by any person, firm, or company in a similar business to that of the plaintiff in Snow Hill, Birmingham.

The plaintiff was a tailor carrying on business in Birmingham at three places—namely, Snow Hill, Bristol Road, and Aston Cross. The defendant was formerly in the employ of Dresdens, a brother-in-law of the plaintiff, who carried on business as a tailor quite near to the plaintiff, and was a trade rival of the plaintiff. One Joe Putsman, a brother of the plaintiff, also carried on business as a tailor at 73, Snow Hill, and was a trade rival of the plaintiff. The defendant left the employ of Dresdens and entered the service of the plaintiff in March, 1925. The contract of service was in writing and was dated Mar. 21, 1925. The employment was for twelve months certain, after that to be terminable by one week's notice on either side. The plaintiff promised to employ the defendant, to pay him £4 a week and a commission, and to allow him two weeks' holiday in a year at half wages. The defendant promised to serve the plaintiff as manager and cutter at Snow Hill, "or at such other place or places where the employer's business shall be carried on and as the employer may require," to serve with diligence and fidelity, to keep his employer's secrets, to keep and render accounts, not to compete with the plaintiff or to be engaged in any other business during the service, and not to compete after the determination of the service. The provisions relating to the last-named matter were contained in cl. 11 of the contract as follows:

> "After the determination of the agreement for any cause whatsoever the manager [the defendant] shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by Dresdens, tailors, or be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in Snow Hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol Road, Birmingham."

Under this contract the defendant managed the plaintiff's business at 49, Snow Hill, for fifteen months. On Thursday, June 10, 1926, he went to the plaintiff's brother, Joe Putsman, and arranged with him to leave the plaintiff's service and enter that of Joe Putsman on the following Monday. On Saturday, June 12, the defendant paid the plaintiff £4 in lieu of notice and left his service. On Monday, June 14, he entered the service of Joe Putsman, who exhibited a photograph of the defendant in his shop window with notice that he had secured the defendant's services. The plaintiff took proceedings in the Birmingham County Court and prayed an injunction in the terms of cl. 11 of the contract of Mar. 21, 1925. He submitted that, if cl. 11 should be held to be too wide to be enforceable as a whole, he was entitled to an injunction restraining the defendant for a period of five

A years from the determination of the agreement from being employed in any capacity by any person, firm or company in a business similar to that of the plaintiff in Snow Hill, Birmingham. The county court judge rejected the claim to an injunction in the terms of the whole clause, holding that the promise not to take service for five years with any tailor in Snow Hill might properly be enforced as a separate promise if it were a valid promise, but he held that such a promise was invalid as B being an undue restraint of trade. The plaintiff appealed to the Divisional Court.

*R. A. Willes* for the plaintiff.

*C. R. Williams* for the defendant.

*Cur. adv. vult.*

Dec. 20. The following judgments were read.

C

**SALTER, J.**—This is an appeal by the plaintiff from the refusal of the county court judge to grant an injunction restraining the defendant, his former servant, from competing in business with him after the termination of the service. In view of the opinion which I have formed, it is unnecessary for me to consider the validity of cl. 11 as a whole, and it is, therefore, unnecessary to consider its meaning and D to decide, for example, whether there is any limit in space to the promises not to set up in business for himself and not to enter the employ of Dresdens. I confine my judgment to the question of severability, and the validity of the promise not to take service with any other tailor in Snow Hill for five years.

The "doctrine of severability" is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise, E and the promise is a valid promise and supported by consideration, the court will enforce the promise notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid as being in undue restraint of trade or for any other reason, the court will not invent a valid promise by the deletion, alteration, or addition of F words, and thus enforce a promise which the promisor might well have made, but did not make. The promise, to be enforceable, must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the court will enforce it. Whether it is separate or not depends on the G language of the document. "Severance," as it seems to me, is the act of the parties, not of the court.

Some of the judgments in the House of Lords in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) and the judgment of YOUNGER, L.J., in *Attwood* v. *Lamont* (2) ([1920] 3 K.B. at p. 593) appear to suggest that some of the earlier decisions on severance are no longer reliable guides. A definite test to be applied in determin- H ing, on the construction of an agreement, whether a particular promise contained in it is separately enforceable or not, is contained in the judgment of LORD STERNDALE in *Attwood* v. *Lamont* (2). In that case (the converse of the present) the agreement was that the defendant would not engage in any one of many branches of business in one place. LORD STERNDALE said ([1920] 3 K.B. at p. 577):

I "The doctrine of severability has been much criticised by LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) and by NEVILLE, J., in *Goldsoll* v. *Goldman* (3) ([1914] 2 Ch. at p. 613). These criticisms, however, were not accepted by the Court of Appeal—see KENNEDY, L.J., in *Goldsoll* v. *Goldman* (3)—or by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4). I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining."

Again ([1920] 3 K.B. at p. 578): A

> "It remains, therefore, to consider whether the covenant in this agreement can be considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent."

B

Lastly ([1920] 3 K.B. at p. 579):

> "I think it is necessary to examine the meaning of the agreement as unsevered in order to see whether it complies with the principles above stated, and then to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations."

C

Applying this test to the present case, the defendant has made many promises which are obviously separate. If cl. 11 were held to be indivisible and wholly bad, the master could enforce the promises to be diligent, to account, and not to compete during the service. Turning to cl. 11, the defendant promises, in consideration of the agreed employment, that for five years he will not (i) set up as a tailor for himself, (ii) take service with Dresdens, (iii) take service with any tailor in Snow Hill, (iv) take service with any tailor in the Bristol Road area, (v) take service with any tailor in the Aston Cross area. If the first, second, fourth, and fifth of these promises are ignored and cl. 11 is treated as though it comprised only the third, does the change give to the agreement as a whole "a meaning and object different in kind and not only in extent"? We have "to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations." In my opinion, the change is a change in extent only and not in kind, and the promise not to take service in Snow Hill is separately enforceable.

D

E

His Lordship then considered the question of the validity of the promise, and said that the onus was on the plaintiff to show that the covenant was not too wide, that he had discharged that onus, and that, accordingly, the appeal would be allowed.

F

**TALBOT, J.**—The learned county court judge held that cl. 11 of the contract of service contains a separate severable contract not to be employed for five years from the determination of the agreement in any capacity to any person, firm, or company carrying on a business similar to the plaintiff's in Snow Hill. He has held that this contract is illegal as being in restraint of trade.

The first question is whether this contract is severable as held by the learned judge. I know of no ground for saying that the law in this respect is not precisely the same as to contracts illegal as being in restraint of trade and contracts illegal in any other respect. It is thus stated by WILLES, J., in *Pickering* v. *Ilfracombe Rail. Co.* (5) (L.R. 3 C.P., at p. 250):

G

> "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

H

The contract in the present case is (among other things) not to enter employment of a particular kind in either of three defined areas. Why is not that severable into three contracts each binding the defendant not to enter such employment in one of the three? It is difficult to see how, if any such contract is severable, this is not. There is, however, direct authority on this point. In *Mallan* v. *May* (6) there was a covenant that the defendant would not practise as a dentist as principal or assistant in London or any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before a certain time. The court held that the covenant as a whole was unreasonable and illegal, but that if confined to London it was good. PARKE, B., in delivering the judgment of the court, said:

I

A "We think that the stipulation as to not practising in London is valid, and is not affected by the illegality of the other part. That point was decided in *Chesman* v. *Nainby* (7)."

*Chesman* v. *Nainby* (7) was decided in 1726 first by the Court of Common Pleas, then by the King's Bench, on error, and lastly by the House of Lords, in accordance with the unanimous opinion of all the judges. The law, therefore, as declared in B *Mallan* v. *May* (6) has been recognised for at least 200 years. The case is of the highest authority and it is directly in point. It applies to a contract exactly similar in essentials to that in question in the present case, the principle governing all contracts impugned on the ground of illegality, namely, that a man is not the less bound by a legal contract because he has at the same time made a contract C which is illegal, the only question in each case being whether the legal and the illegal can be severed.

I should feel no difficulty about this part of the case but for the judgment of YOUNGER, L.J., in *Attwood* v. *Lamont* (2) ([1920] 3 K.B. at p. 593). It seems to be there suggested that the fact that it is now settled that on the question of the validity of a contract in restraint of trade the burthen is on those who assent D and not on those who deny its validity has made inapplicable to contracts of this kind the general rule as law as to contracts alleged to be illegal and has introduced some other rule. Speaking with great respect, I cannot see how the question whether a contract is severable can be affected by the burthen of proof on the question whether the contract as severed is legal. One has first to see whether there is a severable contract, and, if there is, the plaintiff has then to E show that it is legal as not going beyond what is reasonable. The two questions appear to me to be entirely independent. The suggestion of YOUNGER, L.J., seems to be based principally on the judgment of LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co.* (1) ([1913] A.C. at p. 745). The judgment must be read in connexion with the facts of the case before the House. It cannot have been intended to overrule the authorities which (as was said by KENNEDY, L.J., in F *Goldsoll* v. *Goldman* (3) ([1915] 1 Ch. at p. 299), after referring to LORD MOULTON'S words in *Mason's Case* (1), have established that

> "if words are used in a covenant such as admit to severability by mentioning different areas, we must sever the covenant so as to limit its operation to an area which is not too large."

G In *Mason's Case* (1) there was an agreement by Mason not to be employed within three years from the termination of a service terminable by a fortnight's notice within twenty-five miles of London or twenty-five miles of any place where Mason should have been employed by the company during the agreement. The House of Lords considered that the twenty-five miles area, whether applied to London or to other places, was unreasonable and illegal, and the language of LORD MOULTON will H be seen from its terms to refer to the suggestion that it was the duty of a court to pick out from this unreasonably wide agreement something not expressed which if expressed might have been not unreasonable. This is plainly inapplicable to a contract not to trade in either of three defined areas, which is indeed on the face of it the equivalent of three contracts each referring to one of the areas, and LORD SHAW draws this very distinction ([1913] A.C. at p. 742). He says:

I

> "There is no occasion for the framing in the present instance of a limited injunction, the contract not being in separate and clearly defined divisions."

The same view of LORD MOULTON'S judgment was taken by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4). He said ([1914] 1 Ch. at p. 422):

> "Here I may clear the ground at once from a suggestion that, in view of certain remarks of LORD MOULTON in the recent case of *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1), this part of the covenant is invalidated because the

succeeding part of the covenant, namely, that prohibiting the carrying on by the manager of any trade or business similar to any trade or business carried on during the period of his employment by the company, is admittedly too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. No question of the kind was involved in the case before the House of Lords, and I think that LORD MOULTON was not intending to deal with the numerous cases of high authority in which the good part of such a covenant was held to be enforceable, notwithstanding its collocation with a bad part, but was only thinking of those cases in which some severance has been effected by the court, and the covenant has not been held bad merely because it might work unreasonably in certain exceptional circumstances not within its main and principal purpose and meaning."

This passage was approved by LORD STERNDALE, M.R., in *Attwood* v. *Lamont* (2) ([1920] 3 K.B. at p. 578), and he states the law thus ([1920] 3 K.B. at p. 577):

"It is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining."

I should add that in *British Reinforced Concrete Engineering Co., Ltd.* v. *Schelff* (8) ([1921] 2 Ch. at p. 572), a case later than *Attwood* v. *Lamont* (2), YOUNGER, L.J., appears to treat a contract as, generally speaking, severable where it relates to a distinct area. It seems to me, therefore, that we are bound to apply to this agreement the law applicable to contracts generally as it has always been understood. So applying it, I am clearly of opinion that the agreement contains a distinct and severable contract, as found by the learned judge, not to be employed in the business mentioned in Snow Hill.

It was argued for the defendant on the authority of *British Reinforced Concrete Engineering Co., Ltd.* v. *Schelff* (8) that the contract not to be employed as a servant could not be severed from the contract not to carry on business, and that the contract not to carry on business being unrestricted in point of space was illegal. In my opinion, the case relied on did not, and indeed could not, lay down any such general rule as was suggested. The contract there was very different from that in the present case, and the decision that it was not severable clearly does not make the contract now sued on not severable. Moreover, I am of opinion that on the true construction of this agreement the contract not to carry on business is limited in space to the three areas specified. No doubt, the words are capable of the other construction, but, if they are to be treated as ambiguous, it is right to give them the more limited of the possible meanings. The principle also applies that if an instrument is reasonably capable of two constructions that which does not involve illegality is to be preferred to that which does. In any case, my opinion that the learned judge was right in severing the contract as he has severed it would not be affected if I took a different view of the meaning of the earlier part of the clause than that which I have expressed.

The question then is whether the contract as so severed is valid. On this I have very little to add to the judgment which has been delivered. I think that the result of the authorities is that stated by LORD STERNDALE, M.R., in *Attwood* v. *Lamont* (2) ([1920] 3 K.B. at p. 578), namely, that though in a contract such as this the restraint can only be justified so far as it is necessary to protect the employer "against an improper use by the servant of the knowledge which he has acquired in the master's service," yet this restraint may take the form not of forbidding such improper use but of restraining the servant generally from trading in a certain area. In other words, the employer is entitled to make himself reasonably safe against abuse of his confidence without the necessity of proving definitely that the servant has actually taken, or is threatening to take, unfair

advantage of what he has learned in his service. In this case it is, in my opinion, sufficiently evident from the nature of the defendant's employment, and all the circumstances, that for the defendant to enter the service of a rival trader in the same street necessarily exposes the plaintiff to unfairness against which he is entitled to protect himself. This establishes the reasonableness and the legality of the contract, and I think that the learned county court judge was mistaken in thinking that any further evidence was necessary to support the plaintiff's case. I agree, therefore, that the plaintiff should have had judgment and that the appeal must be allowed.

The defendant appealed to the Court of Appeal.

*Bosanquet, K.C.* and *C. R. Williams* for the defendant.

*R. A. Willes* for the plaintiff.

**BANKES L.J.**—It seems to me that this appeal fails. Both the two learned judges who decided this case in the Divisional Court gave very elaborate and very careful, and I think very accurate judgments ; but it really is not necessary, in my opinion, to go into the question with which they mainly dealt, namely: What is the law at the present moment in reference to the severability of covenants in a case of this class? The reason why I think it is not necessary is because I agree with the view which was indicated by Talbot, J., as his opinion in reference to the construction of the covenant. Talbot, J., after referring to *British Reinforced Concrete Engineering Co.* v. *Schelff* (8) said ([1927] 1 K.B. at p. 647):

> "The contract there was very different from that in the present case, and the decision that it was not severable clearly does not make the contract now sued on not severable. Moreover, I am of opinion that on the true construction of this agreement the contract not to carry on business is limited in space to the three areas specified. No doubt the words are capable of the other construction, but, if they are to be treated as ambiguous, it is right to give them the more limited of the possible meanings."

He goes on to deal with the principle applicable to such a case.

It seems to me on consideration of this covenant that although whoever is responsible cannot be very proud of the drafting of it, it is reasonably plain that, attaching a reasonable and fair meaning to the words used and putting a construction upon them which does not render them, for all practical purposes, absurd, one comes to the conclusion that just as the whole of the covenant must be governed by the period of five years by which it is introduced, so also must it be governed by the area clause at the end, and one must read both the opening words, the period of five years, and the concluding words, the area words, as governing the whole clause. If that is so, it is not necessary to go into the question of severability ; the question is whether, taking the covenant as a whole, it is a reasonable protection for which the employer was entitled to stipulate. The county court judge has said that it was not. He applies a principle which, with respect to him, I do not think is applicable to this particular case, and I agree with what the learned judges in the Divisional Court said in reference to that. It seems to me that it is not possible to apply the same reasoning to a case where an experienced person is employed because of his already acquired experience—experience which his personal contact with customers must necessarily give—as that which you would in the case of a person who comes into the business quite young and inexperienced, who in the course of his employment gains business experience and knowledge, and who is not brought into touch with the customers so as to be in a position to influence them. It is not possible to apply the same test to those two classes of case. Here, the defendant is an experienced cutter, a man apparently well known in Birmingham, or, at any rate, certain districts of Birmingham. He has got a clientèle, he is well known as a man of experience and ability, and was engaged upon a contract containing a term that at the conclusion of the agreement he is not, for a period of five years and within quite a limited area from his employer's three

places of business, either himself to engage in business or to go into the business of a particular firm of tailors by whom he had previously been employed, or be employed within that area, and for that time, in any capacity with any person carrying on a business similar to the plaintiff's. It seems to me having regard to the man's experience and the necessary opportunities he had of influencing customers, that that is not at all an unreasonable provision, or one which the law ought not to recognise as being in restraint of trade.

His counsel has taken two other points. He contends that "after the determination of the agreement" shall be read as including, in the case of a breach by the employer, the ability of the employer to put himself in a position to take advantage of his own wrong. Again, I do not agree with that, and I do not think it is a possible construction of this clause in the agreement, because "the determination of the agreement," I think, means a contractual determination, a determination for any of the reasons indicated in the agreement itself, and "for any cause whatsoever" merely means for any of the causes indicated in the argeement itself. For these reasons, in my opinion, the appeal must fail.

**SARGANT, L.J.**—I am of the same opinion. As regards the construction of the covenant, I think it is to be noted that it is limited both as regards time and as regards space. As regards time, the words of limitation seem to me to be quite clearly carried on over the whole range of the covenant. That being so, ought the words as regards space to be carried back so as to apply to everything in the covenant from the beginning onwards? I do not say that the grammar is particularly excellent or the expression very good, but I think the words are quite capable of having the words as to space carried back to the beginning ; and I think that unless one does that, one gets into an almost absurd interpretation of the covenant. I think the fact that the limit as to time are to be carried forward right through forms a strong indication that the limit as to space ought to be carried right back and that both and not only one of them should apply to the whole range of the intermediate words in the covenant. If that is so, then we have a limit to Snow Hill and a limit to two areas which, if the centre of the area were a point and not merely a road, would amount to something under three-quarters of a square mile each. The fact that a road is mentioned and not a point might, of course, considerably enlarge that area, but still the area seems to me to be not at all an unreasonable one. One has to bear in mind here that the person who is being employed has a considerable connection and is employed as a manager, and as a manager he necessarily must come largely into contact with the customers, must know their names, their residences, their peculiarities as to dress, and so on, and I cannot see that any help is to be derived by the defendant from the fact that he brought a clientèle of his own to the employers, because the employers are entitled to protect themselves against their customers being taken by the defendant. If, in the course of providing against that, the words do also provide necessarily almost—because I do not see how a distinction could be drawn—against the defendant also taking the clients whom he has brought himself to the business, so much the worse for the defendant. I cannot find in any case, and I have had occasion to consider these cases a good many times, that any stress has been laid by the court upon the circumstance that the defendant was bringing into the stock of the business some connection of his own. I agree, therefore, that the appeal should be dismissed.

**AVORY, J.**—I agree.

*Appeal dismissed.*

Solicitors: *Stibbard, Gibson & Co.; Sharpe, Pritchard & Co.*, for *James, Barton & Kentish*, Birmingham.

[*Reported by* T. R. F. Butler, Esq., *and* T. W. Morgan, Esq., *Barristers-at-Law.*]

# Re TROLLOPE'S WILL TRUSTS. PUBLIC TRUSTEE v. TROLLOPE

[CHANCERY DIVISION (Tomlin, J.), February 24, 1927]

[Reported [1927] 1 Ch. 596; 96 L.J.Ch. 340; 137 L.T. 375; 71 Sol. Jo. 310]

*Administration of Estates—Powers of personal representatives—Residue remaining vested in representative as trustee after administration—Subjection of pure personalty to trusts under Law of Property Act*, 1925, (15 *Geo.* 5, *c.* 20), *s.* 28 (2)—*Income from unauthorised investments—Apportionment between tenant for life and remainderman—Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 39 (1) (*ii*).

Section 39 of the Administration of Estates Act, 1925, applies only to the duties of a personal representative either in the ordinary course of administration or as conferred on him by statute relating to estates undisposed of by will. As soon, therefore, as a personal representative has administered the estate and has assented, s. 39 ceases to apply even if the residue of the personal estate, other than leaseholds, thereafter remains vested in him as trustee.

The provision of s. 39 (1) (ii) that personal representatives shall have "all the . . . duties conferred or imposed by law upon trustees holding land upon an effectual trust for sale" applies only to duties in the strict sense, and so does not subject pure personalty held by personal representatives to the trusts arising under s. 28 (2) of the Law of Property Act, 1925.

**Held:** accordingly, that the income arising from unauthorised investments, other than land, retained by personal representatives under a power to postpone sale, must be apportioned between tenant for life and remainderman in accordance with the rule in *Howe* v. *Dartmouth* (1) (1802), 7 Ves. 137a, and not paid to the tenant for life by virtue of s. 28 (2).

*Re Brooker* (2), [1926] W.N. 93, distinguished.

**Notes.** Referred to: *Re Gough, Phillips* v. *Simpson*, [1957] 2 All E.R. 193.

As to the effect of the personal representative becoming a trustee see 16 HALSBURY'S LAWS (3rd Edn.) 143, as to his trusts and powers see ibid. 357 et seq., as to the rule in *Howe* v. *Dartmouth* see ibid. 381, and for cases see 44 DIGEST 197–211. For the Administration of Estates Act, 1925, and the Law of Property Act, 1925, see 9 and 20 HALSBURY'S STATUTES (2nd Edn.) 718 and 427 respectively.

Cases referred to:

(1) *Howe* v. *Earl of Dartmouth*, *Howe* v. *Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, *265*.

(2) *Re Brooker*, *Brooker* v. *Brooker*, [1926] W.N. 93; 70 Sol. Jo. 526; 161 L.T. Jo. 214; 44 Digest 200, *295*.

**Originating Summons** asking whether, by virtue of the Law of Property Act, 1925, s. 28 (2), and the Administration of Estates Act, 1925, s. 39 (1) (ii), the tenant for life was entitled in the circumstances to receive the whole of the income of certain retained unauthorised investments or only entitled, pending the conversion thereof, to interest on the capital value at the rate of 4 per cent. per annum.

By her will, dated June 24, 1924, Mabel Frances Trollope, after appointing her sister Blanche Trollope, her niece Kathleen May Henderson, and the Public Trustee to be her executors and trustees and making certain specific and pecuniary bequests, devised and bequeathed all her real and personal estate not thereby otherwise disposed of to her trustees upon trust for sale and conversion, and to invest the residue of the money produced by such sale and conversion after payment of funeral and testamentary expenses and debts and legacies as therein mentioned. And the testatrix directed her trustees to stand possessed of the said residue and the investments for the time being representing the same in trust to pay the income

thereof to her said sister Blanche Trollope during her life and after her death to hold both the capital and income upon the trusts therein mentioned. The testatrix also declared (cl. 8) that all money liable to be invested under her will might be invested in any stocks, funds, or securities authorised by law for trust funds, or in the purchase of inscribed stock of any British colony, or on mortgage of any leasehold houses or land in England or Wales held for any term having sixty years still to run. By cl. 9 the testatrix empowered her trustees to postpone during such period as they should think fit the sale, calling in, and conversion of the whole or any part or parts of her real or personal estate, with a provision that notwithstanding any postponement of conversion of her real estate the same was, for the purpose of transmission, to be considered as converted from the time of her death. The testatrix died on Dec. 31, 1925, and her will was proved by all the named executors on Mar. 6, 1926. At her death the testatrix possessed a number of investments which were not authorised. The trustees desired to postpone for the present the sale of some of the unauthorised investments, and took out this summons accordingly.

*Sir Arthur Underhill* for the Public Trustee.
*Buckmaster* for the tenant for life.
*Rawlence* for persons entitled in remainder.
*Harcourt Harding* for another remainderman.

**TOMLIN, J.**—In this case the testatrix died on Dec. 31, 1925, having by her will given her residuary, real, and personal estate to trustees upon trust for sale and conversion, and to hold the net residuary estate and the investments thereof in trust to pay the income thereof to her sister during her life with trusts over. And the testatrix declared that all money liable to be invested under the will might be invested

> "in any stocks funds or securities authorised by law for trust funds or in the purchase of inscribed stock of any British Colony or on mortgage of any leasehold houses or land in England or Wales held for any term having sixty years to run at the time of investment."

Then followed this proviso:

> "Provided always and I empower my trustees in their uncontrolled discretion to postpone during such period as they shall think fit the sale calling in and conversion of the whole or any part or parts of my estate real or personal but notwithstanding any such postponement on conversion of my real estate the same shall for the purpose of transmission be considered as converted from the time of my death."

The estate of the testatrix included a number of investments not authorised by the will, but the sale of which has been postponed by the trustees. The question which arises is whether the tenant for life is entitled to the income of these unauthorised investments until they are sold or whether the income should be applied in accordance with the rule in *Howe* v. *Earl of Dartmouth* (1), it being suggested that the rule has, by reason of recent legislation, been abolished. It is plain that there is nothing in the will to give the tenant for life a right to the whole income on these investments ; and unless there is a statutory abolition of this rule it must apply in this case.

The question is whether the recent property statutes have changed the law in this respect. The material statutes are the Law of Property Act, 1925, and the Administration of Estates Act, 1925. The Law of Property Act, 1925, s. 28 (2), contains a provision relating to trustees for sale of land in these terms:

> "Subject to any direction to the contrary in the disposition on trust for sale or with settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied, except so far as any part thereof may be liable

A to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and its proceeds had been duly invested."

The effect of that sub-section is that in regard to the property which is the subject-matter of the section, the rule in *Howe* v. *Earl of Dartmouth* (1) no longer applies because, subject to provision being made for outgoings, the income is to be applied as if it were income of proper investments of the proceeds of sale. Lawrence, J., in *Re Brooker* (2), in fact held, with regard to leaseholds which are included in the definition of "land" in the Law of Property Act, 1925, s. 205 (1) (ix), that

"the principle laid down in *Howe* v. *Earl of Dartmouth* (1), hitherto applied by courts of equity during the period of the postponement of the sale of leaseholds held on trust for sale, was no longer applicable in a case like the present."

Therefore, so far as leaseholds held in trust for sale are concerned, the rule in *Howe* v. *Dartmouth* (1), is gone.

The question I have to decide is whether the Administration of Estates Act, 1925, has done the same for property other than "land" within the Law of Property Act, 1925, s. 28 (2), by referential legislation which brings into operation, under the former Act, the rule applicable to land under the Law of Property Act, 1925. The relevant section is s. 39, which, so far as material, is in these terms:

"(1) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have . . . (ii) all the powers, discretions, and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overrule equitable interests and powers as if the same affected the proceeds of sale). . . ."

Sub-section (3) provides that "this section applies whether the testator or intestate died before or after the commencement of the Act"; and the section is therefore applicable to the estate of the testator. It is said that sub-s. (1) (ii) has the effect of importing, in relation to property other than land, the provisions of the Law of Property Act, 1925, relating to land held upon trust for sale, including the provision that the income of the land until sale was to be applied as if it was income arising from investments of the proceeds of sale. In other words, it is contended that the tenant for life is entitled to receive the whole of the income arising from the retained investments, and that the rule laid down in *Howe* v. *Earl of Dartmouth* (1) is excluded.

The first thing that strikes the eye in regard to s. 39, is that, as indicated by the side-note, it is a section giving powers of management. But to whom are these powers given? To the personal representative. At the outset, then, I need to know what is meant by the expression "personal representative," and for that purpose I must refer to s. 55, sub-s. (1) (xi):

" 'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court. . . ."

It is therefore plain that the expression "personal representative" does not include trustees in the ordinary sense and that nobody could suggest that, if a testator appointed A. to be his executor and gave his residue to B. upon certain trusts, s. 39 could have any application to the property in B.'s hands. In that case the rule in *Howe* v. *Earl of Dartmouth* (1) would clearly continue to apply, the statutory exclusion, if any, being confined to the period during which the property was in the

hands of the personal representative. But it is said that "personal representatives" must have a wider meaning in s. 39 because it contemplates their dealing with the deceased's property "during a minority of any beneficiary or the subsistence of any life interest or until the period of distribution arrives"; and it is said, therefore, that the section contemplates that when the personal representatives become trustees the provisions of the section are to continue to apply.

The explanation of those further words is, however, to be found in the fact that under these elaborate and complicated Acts the law of intestacy is changed and that on such an intestacy there may be someone whose interest is for life only, as, for instance, the widow of the intestate, and that under s. 33 of the Administration of Estates Act, 1925 powers resembling those of trustees are conferred on personal representatives. Sub-section (1) of that section provides that

> "on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(a) as to the real estate upon trust to sell the same ; or (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper. . . ."

Sub-section (2) provides for payment of debts and funeral and testamentary expenses and then sub-s. (3) provides that

> "During the minority of any beneficiary [which seems to contemplate one of the persons entitled on any intestacy being an infant] or the subsistence of any life interest [which seems to have regard to a person only taking a life interest under an intestacy] and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power at the discretion of the personal representatives, to change such investments for others of a like nature."

Sub-section (5) is as follows :

> "The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman."

And sub-s. (7) provides: "Where the deceased leaves a will, this section has effect subject to the provisions contained in the will." Sub-s. (7) must mean that this section applies only so far as the estate is not disposed of by a will ; but it seems clear that the effect of that section is for certain purposes in connection with intestacy to constitute the personal representative a trustee with certain powers, including, in cases when no immediate distribution is possible, a power to distribute the income, as if the rule in *Howe* v. *Earl of Dartmouth* (1) did not exist.

These provisions provide a complete explanation of the early parts of s. 39 (1). The sub-section is dealing, first, with personal representatives in their ordinary capacity when it refers to their dealing with the deceased's property "for purposes of administration." Then it deals with their position during the postponement of distribution when they are placed in the position of trustees—that is, when the personal representatives are unable to distribute by reason of the infancy of any beneficiary or "the subsistence of any life interest," as in the case of an intestate

leaving a widow "or until the period of distribution arrives," words sufficiently wide to apply to any other case in which distribution is delayed. As soon as the personal representative has administered the estate of a testator and assented, the period of distribution has arrived for the purpose of this section ; and the section has no application to a case when the residue of the personal estate other than leaseholds is held by the trustees (even though they are the same persons as the personal representatives) upon trust for sale with power to postpone conversion and then is a tenant for life. The application of s. 39 is exclusively confined to the duties of the personal representatives either in the ordinary course of administration or as conferred on him by statute under s. 33 or otherwise as relates to estates undisposed of by will.

Then remains the question whether during the period before the personal representatives have assented the rule in *Howe* v. *Earl of Dartmouth* (1) is excluded by virtue of s. 39 (1) (ii) and the Law of Property Act, 1925, s. 28 (2). In my view the word "duties" in s. 39 (1) (ii) means "duties" in a strict sense and the provision that the personal representatives are to have "all the . . . duties conferred or imposed on trustees holding land upon an effectual trust for sale" does not mean that these are thinly imported statutory trusts applying to a different subject-matter.

I therefore hold that the rule laid down in *Howe* v. *Earl of Dartmouth* (1) is applicable in regard to retained unauthorised investments whether in or after the executor's year.

Solicitors : *Charles Rogers, Sons & Abbott; Becklingsales & Naylors.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

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## WALLEMS REDERIJ A./S. *v.* W. H. MULLER & CO. BATAVIA

[KING'S BENCH DIVISION (MacKinnon, J.), March 11, 1927]

[Reported [1927] 2 K.B. 99; 96 L.J.K.B. 819; 137 L.T. 154; 43 T.L.R. 330; 71 Sol. Jo. 431; 17 Asp. M.L.C. 226; 32 Com. Cas. 219]

*Shipping—Carriage by sea—Failure of charterers to load full cargo—Measure of damages—Shipowners' duty to mitigate damages—Right to delay voyage to load other cargo.*

It is an implied term of any charterparty that if the charterer fails to fulfil his duty of shipping the cargo that he is bound to ship, the shipowner is at liberty to fill up the space so long as in doing so he acts reasonably, and he may delay the charter voyage by the period of time reasonably and necessarily occupied in taking in the substituted cargo. The shipowners' action is reasonable if it diminishes the pecuniary loss to him which results from the fault of the charterer, and so diminishes the damages for which the charterer will be liable.

Per CURIAM : a shipowner cannot recover as damages for the charterer's failure to ship cargo pecuniary loss which he could reasonably have avoided by taking other cargo in the space left vacant.

**Notes.** Referred to : *Angfartygs A/B. Halfdan* v. *Price and Pierce, Ltd.*, [1939] 1 All E.R. 322.

As to charterer's failure to ship the stipulated cargo, see 30 HALSBURY'S LAWS (2nd Edn.) 401; as to deviation, see ibid. 293–297, and for cases, see 41 DIGEST 461. A

Case referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

**Action** tried before MACKINNON, J., without a jury (Commercial list). The facts B are taken substantially from the judgment of his Lordship.

The plaintiffs, a Norwegian company, were the owners of the steamship *Storviken* and the defendants, a trading company with headquarters at Batavia, were the charterers of the whole vessel under a charterparty dated July 27, 1922. By the terms of the charterparty the charterers agreed to load not less than 6,460 tons or more than 7,140 of sugar in bags at not more than four ports in geographical C rotation on the north coast of Java, and they bound themselves to ship the same. When loaded the steamer was to proceed to Port Said for orders and thence to proceed to not more than three safe ports in the United Kingdom in geographical rotation; the rates of freight varying according to the number of ports at which the steamer would be called upon to discharge. There were also clauses under which the steamer could assist other vessels in distress or deviate for the purpose D of saving life. The vessel went to Batavia for orders and was directed to proceed to Sourabaya where the charterers loaded 5,600 tons of cargo only, as they were unable to get more. It was agreed that this was not a full and complete cargo of sugar and it was also agreed that 6,850 tons was the full carrying capacity of the vessel and therefore primâ facie there was a breach by the charterers in respect of 1,250 tons which they did not load. It was agreed that the 5,600 tons should be E discharged part at Madras, part at Aden, part at Alexandria, and part at Bristol. It was also agreed that Madras should be treated as though it were one of the safe ports in the United Kingdom, and thus the rate of freight for three ports—34s. per ton—less the expenses of earning the freight on 1,250 tons was the measure of damages for breach of the charterparty. When it became evident at Sourabaya that no more cargo could be obtained, it was agreed between the shipowners and F the charterers that the vessel be at liberty to take in other cargo at Madras and the freight so earned was to be shared between them, the charterers nevertheless remaining liable for the full dead-weight. No cargo was available at Madras and the vessel proceeded on her voyage. On arrival at Alexandria an opportunity offered to load 1,000 tons of oil cake. This was brought to the notice of the charterers, but without asking for or obtaining their assent, the shipowner loaded this cargo on G which they made a profit. The loading of this cargo occupied some three days. The shipowners now brought this action for damages for the charterers breach of the contract of carriage in not loading the 1,250 tons.

*Clement Davies*, K.C., and *Sir Robert Aske* for the shipowners.

*Somervell* for the charterers.—It is admitted that the charterers failed to load H 1,250 tons of cargo. But on the authorities delay was deviation; a delay had occurred at Alexandria without the assent of the charterers and therefore the shipowners were deprived of their rights to dead-freight.

**MACKINNON, J.,** stated the facts and continued: The charterers set up an entirely novel defence, namely, that the action of the shipowners in loading 1,000 I tons of cargo at Alexandria involved a delay of the ship for the period of loading; that that delay constituted a deviation, that is to say, a breach of their obligation to fulfil the charterparty voyage with reasonable dispatch; and that by reason of that deviation or radical breach of the charterparty the shipowners are deprived of the benefits of the terms of the charterparty, and, among other things, are deprived of their right of action which had already accrued to recover damages for the charterer's failure to load the 1,250 tons. So far as I know it is a novel form of defence—and at first sight it sounds a somewhat bold attempt—but it has been

A argued with great ability and complete logic by counsel for the charterers. He did not shrink from carrying his contention to the point, in answer to my suggestion, of saying that supposing that proceedings in court could be ideally hastened, supposing that when the ship left Sourabaya the shipowners had sued for their then accrued claim for damages for dead-freight and the action had come on before the completion of the voyage, it would have been a defence to the charterers to say: B This action is prematurely brought, you have no cause of action because it does not follow that you will not deviate before the voyage terminates, and if you deviate you will then destroy and be deprived of your right of action. The action of the shipowners in loading the cargo at Alexandria, although they may not have intended it at the time, must be taken, I think, as an act done in mitigation of their claim for damages for getting a short cargo at Sourabaya, and there are certain cases in C which the duty of a shipowner, who has not been furnished with the contractual cargo, to mitigate damages by securing other cargo, has been spoken of. I doubt whether in a sense there is any such duty.

The real point is that in answer to a claim for damages by the shipowner for the whole freight which the charterers have not shipped, it is open to the charterers to say: D The whole freight is not really your measure of damage because the pecuniary loss would not have been imposed upon you by our action or fault since you could have mitigated the pecuniary loss by taking other cargo in the space which we left vacant. If you had taken other cargo you would have diminished your damages, perhaps wiped them out altogether, and it is only to that more limited extent, by reason of such diminution or possible diminution, you have in E fact suffered pecuniary loss. But whether this desirability or duty of taking in cargo and filling up space that is left vacant is or is not to be called a duty arising under the charterparty, obviously it is regarded as a matter which the shipowner is entitled to do, and whether he is bound by the charterparty to do it or not, he is bound in his own interest to do it because otherwise he would not be able to recover the damages he claims.

F It is not necessary in this case to decide various points that are involved in the arguments put forward for the defence. In the first place I will assume, without deciding it, that the delay at Alexandria during the three days while the other cargo was being loaded would constitute deviation and have the effects upon the rights of the parties under the charterparty that a deviation has. Secondly, I will assume, although I do not decide it, that one of the effects of such a deviation would be to destroy an existing cause of action that had accrued to the shipowner G guilty of the deviation previous to its taking place. The point on which the defence fails is whether there was a deviation at all in the circumstances. Deviation, it is logically obvious, means a departure from the agreed via by which the ship is to carry out the charter voyage. It has been extended to include not merely its proper meaning but to extend to delay in the carrying out of the voyage beyond H the agreed period of time—usually the shortest reasonable time in which the voyage can be carried out—for which the parties have stipulated the voyage shall take place. In both of these cases the deviation or delay is of course a breach of that which is expressed or implied in the contract as the route or the period of time by which or during which the voyage is to be accomplished. If, for instance, there is an express liberty to deviate to certain ports in the charterparty I then it becomes part of the agreed route, and so, as regards delay, if there is (as there is here for instance) an express liberty to tow vessels in distress, then the time occupied in towing such a vessel (which would obviously be longer than the time occupied in doing the same distance without a vessel in tow) becomes part of the agreed time within which the shipowners stipulate that they shall be allowed to perform the voyage. Besides the express directions as to route and time contained in any charterparty there may be implied stipulations. Obviously if it were not expressed there is in any charterparty an implied liberty to deviate for the purpose of saving life, and that involves the implied liberty to delay the voyage while engaged

in this task. Whether or not it is really proper to analyse this supposed duty of mitigating damages by taking other cargo when a claim for damages has arisen —whether it is strictly logical to put that as a duty imposed upon the shipowner— at any rate it is, one may call it, a moral duty, and the carrying out of such an action is for the benefit of the charterer, because it goes to mitigate the amount of damage that he otherwise would be responsible for by his failure to ship the full cargo.

Applying the principles which were laid down in *The Moorcock* (1), and cases like that, which one has to apply in order to ascertain whether there is or is not an implied term of the contract, I think that it is an implied term of this or any other charter that if the charterer fails to fulfil his duty of shipping the cargo that he is bound to ship, the shipowner is at liberty to fill up the space if he is acting reasonably in doing so; and the best test of the reasonableness of that is, if to do so will diminish his pecuniary loss from the fault of the charterer and so diminish the damages that the charterer will be liable for. If the shipowner has (as I think he has by implication) that liberty, acting reasonably, to take in other cargo to fill up the space left vacant, then there must also be an implied liberty to him to delay the charter voyage by the period of time reasonably and necessarily occupied in taking in that substituted cargo. If that be so, and I think that is the true way of looking at it, there was not by this delay in order to take in this cargo at Alexandria any deviation, in the sense of any unauthorised delay in carrying out the voyage, because it was only a delay that was impliedly authorised by this implied term of the charterparty. I hold that there was no deviation and that this defence fails.

Solicitors : *Hutchinson, Sons & Gomm; R. H. King & Co.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

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## THE TOURAINE

[Probate, Divorce and Admiralty Division (Hill, J.), November 11, 14, December 15, 1927]

[Reported [1928] P. 58; 97 L.J.P. 60; 138 L.T. 492; 44 T.L.R. 204; 17 Asp. M.L.C. 413]

*Shipping—Bill of lading—Negligence in "navigation and/or management of the vessel"—Unauthorised act of sailor—Damage to waste pipe while clearing obstruction—Need to drain water from crew's quarters.*

Cargo was damaged by water entering the strong room of the defendant's vessel in consequence of a defect in the pipe by which the waste was carried from the crew's wash-house. The defect was caused by the act of one of the sailors in forcing an iron rod into the pipe with the object of clearing away an obstruction which was preventing the waste water from running away from the wash-house, thus causing inconvenience to the crew. The sailor was not authorised to clear the obstruction in this or any way. The bills of lading under which the cargo was shipped incorporated the Australian Sea Carriage of Goods Act (which is in the same terms as the Carriage of Goods by Sea Act, 1924), by which the shipowners, by art. IV, para. 2 (a), of the schedule to the Act, were not responsible for negligence of the master or crew in "the navigation and/or management of the ship.

**Held:** the act of the sailor was an act in the management of the ship and so the owners were not responsible.

*The Rodney* (1), [1900] P. 112, applied.

*Shipping—Bill of lading—Incorporation of statutory conditions relating to negligence in navigation and management—Express exception of "faults or errors in navigation"—Effect of express exception on statutory conditions—Australian Sea Carriage of Goods Act (No. 22 of 1924), Sched., art. IV, para. 2 (a).*

The bills of lading, whilst incorporating the Sea Carriage of Goods Act, contained an exception of faults or errors in the navigation of the ship.

**Held:** by including an express exception of faults or errors in navigation the shipowners had not impliedly surrendered their right to rely on the exception of negligence in management under the statute.

Per CURIAM: the surrender of a statutory immunity must be clearly stated: it is not to be inferred from the needless repetition of another immunity.

**Notes.** The provisions of the Australian Sea Carriage of Goods Act, 1924, considered in this case are identical with the corresponding provisions of the English Carriage of Goods by Sea Act, 1924.

As to what is "navigation or management" of a ship, see 30 HALSBURY'S LAWS (2nd Edn.) 333, note (e); as to carriage under the Carriage of Goods by Sea Act, 1924, see ibid. 606–619, and for cases see 41 DIGEST 432–434. For the Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to:

(1) *The Rodney*, [1900] P. 112; 69 L.J.P. 29; 82 L.T. 27; 48 W.R. 527; 16 T.L.R. 183; 9 Asp. M.L.C. 39, D.C.; 41 Digest 431, *2711*.

(2) *The Schwan*, [1909] A.C. 450; 78 L.J.P. 112; 101 L.T. 289; 25 T.L.R. 742; 53 Sol. Jo. 696; 11 Asp. M.L.C. 286, H.L.; 41 Digest 479, *3124*.

(3) *Brown & Co.* v. *Harrison* (1927), 96 L.J.K.B. 1025; 43 T.L.R. 633; 137 L.T. 549; 17 Asp. M.L.C. 294; 32 Com. Cas. 305, C.A.; 41 Digest 433, *2720*.

**Action** for damage to cargo.

The plaintiff claimed against the defendants, owners of the Norwegian steamship *Touraine* damages for failure to deliver in good order and condition nine bales of opossum skins, of which the plaintiffs were owners and endorsees of the bills of lading, shipped on board the *Touraine* at Sydney for carriage to Hamburg. The *Touraine* left Sydney on Oct. 6, 1926, and arrived at Hamburg on or about Nov. 21, 1926. The plaintiffs alleged that the bales of skins had been carried in the strong room in the after part of the *Touraine* on the main deck, situated between the main deck and the shelter deck. The crew's quarters were situated upon the shelter deck immediately above this compartment, and a 2in. drain pipe from the sailor's wash-room which passed through the compartment in which the skins were stowed to the side of the ship was fractured and salt water had thereby found its way to the plaintiff's cargo, doing damage. The plaintiffs alleged that by reason thereof the *Touraine* was unseaworthy and not properly equipped and not fit or safe for the carriage of the opossum skins. The bills of lading contained the following clause:

"This bill of lading to be read and construed as if any clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all exemptions from liability contained in such Act."

The defendants by their defence denied that the *Touraine* was unseaworthy, and relied on the following terms of the bills of lading:—

"(c) The carrier shall not be accountable for the condition of the goods shipped under this bill of lading nor for any loss or damage thereto whether arising

from failure or breakdown of machinery insulation or other appliances refrigerating or otherwise or from any cause whatsoever whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not. . . . (e) Loss or damage resulting from any of the following causes or perils is excepted, viz.: perils of the seas or navigation of whatsoever nature or kind and howsoever caused; any accidents to or defects latent or otherwise in hull tackle boilers or machinery refrigerating or otherwise or their appurtenances (whether or not existing at the time of the goods being loaded or at the commencement of the voyage) provided reasonable means have been taken to provide against such defects and unseaworthiness and any other cause beyond the control of the carrier."

The defendants further relied on the terms of the bills of lading incorporating the Sea Carriage of Goods Act, 1924. They further relied on art. IV, rr. 1, 2, and alleged that the damage was due to some or one of the excepted perils. If the *Touraine* was unseaworthy, as alleged, such unseaworthiness was not due to want of due diligence on the part of the owners. If the pipe was factured as alleged by the plaintiffs such fracture was caused during the voyage by some member of the crew negligently poking the pipe with an iron rod in order to clear away any obstruction which blocked up the pipe after the *Touraine* had left Sydney. The bills of lading also contained the following exception:—

"The carriers are not to be responsible for faults or errors of navigation."

The Sea Carriage of Goods Act, No. 22 of 1924 (Acts of Commonwealth of Australia) contains in the schedule the following rules relating to bills of lading:—

"Art. III. Responsibilities and Liabilities.—(1) The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—(a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception carriage and preservation. 2. Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep and care for and discharge the goods carried.

Art. IV. Rights and Immunities.—(1) Neither the carrier nor the ship shall be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds . . . and all other parts of the ship in which goods are carried fit and safe for the reception carriage and preservation in accordance with the provisions of para. 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section. (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect or default of the master, mariner, pilot or or the servants of the carrier in the navigation or in the management of the ship. . . ."

*Dunlop*, K.C., and *Darby* for the plaintiffs.
*Langton*, K.C., and *Lindsay* for the defendants.

The following authorities were referred to:—*The Rodney* (1), *The Schwan* (2), and *Brown & Co.* v. *Harrison* (3).

*Cur. adv. vult.*

Dec. 15. **HILL, J.**, read the following judgment.—This is a claim made under five bills of lading of bales of opossum skins shipped in Sydney in October, 1926, for delivery at Hamburg and delivered damaged. The damage was by water, whether fresh or salt is immaterial. It was water which entered the strong room in which the skins were stowed from without. The defendants say that the damage

A was caused by negligence for which they are not responsible. That is the first question to be decided. The plaintiffs, while denying such cause, say that the cause was the unseaworthiness or unfitness of the ship. That is the second question. If the defendants fail on these points they say that (a) they are not liable at all for furs—that depends on the bill of lading read in the light of the Act—or (b) they are liable only to the limited extent per bale fixed by the Act. The Act B applicable is the Sea Carriage of Goods Act, 1924 of the Australian Commonwealth.

I have come to a clear conclusion as to how the damage was caused. The skins were the only cargo stowed in the strong room. The strong room was aft and between the main and shelter decks. Above it at its fore end on the south side was the sailors' wash-house. This wash-house was on the shelter deck. It C had a cement floor. Waste water was carried from the floor of the wash-house to the ship's side by a leaden pipe which passed through the strong room. There was a hole in the cement communicating through a hole in the shelter deck with the upper end of the pipe which was fitted by a flange to the under side of the shelter deck. At the lower end the pipe was fitted by a flange to a hole in the ship's side which was fitted with a storm valve. There were two bends D in the pipe. The upper one was a sharp bend a little below the upper end of the pipe. The pipe and also a pipe from the w.c.'s adjoining the wash-house were cased in with a wooden casing, the object of which was to protect the pipes from injury. On the floor of the strong room were scuppers leading to the bilges. The only access to the strong room was by a trunk hatchway opening on the poop deck. Before the skins were loaded there was no sign of moisture in the strong E room. During the voyage, before the ship reached Aden some scraping work was done in the trunk way, and the skins were shifted to the fore part of the strong room, and thereby brought nearer to the pipe. At this time nothing wrong was noticed. There was no water in the strong room. At Hamburg the skins were found wet and very seriously damaged. There was water on the floor of the strong room, sufficient to have shifted the dunnage wood. The scuppers were F choked and the water had to be baled out. The water had entered the strong room by a hole or crack in the lead waste pipe at the bend a little below the shelter deck. The water had come from the wash-house. It is in my judgment impossible to suppose that this hole or crack existed before the voyage began. It must have come into existence during the voyage. The wash-house was in regular use. It contained a shower bath. It also contained basins which seem not to have been G used. But the sailors brought into the house pails of fresh water and there washed themselves and sometimes their clothes. The pails were emptied on to the floor. The wood casing in the strong room was not water tight. Had the hole or crack in the pipe been in existence during the earlier part of the voyage, water must have got into the strong room and some signs of water must have been obvious when the chief officer was in that room in connection with the scraping work and H the bales were shifted. It was suggested that the hole or crack might have been there all along but plugged by refuse. I cannot believe that any refuse which could get down the pipe could have so effectually stopped an existing crack as to prevent the percolation of any water.

How was this hole or crack which came into existence during the voyage made? I find it proved that it was made by the seaman Olsen. He found the pipe choked I so that there was water on the floor of the wash-house and he used an iron rod to clear the obstruction and used it with such force as to pierce or crack the lead of the pipe in the neighbourhood of the bend. It is true that in the log the leak was stated to be due to a burst in the pipe caused by straining of the ship. But at that time the pipe had not been seen by the master or chief officer. The carpenter reported a crack and made the pipe water-tight with a stocking of marlin and red lead. It was not until after the next round voyage that the pipe was taken out and examined by the surveyors and the real nature of the damage to it ascertained.

The sailors were then questioned and the facts ascertained. Naturally until questioned they had not volunteered information which might reflect upon Olsen, and, indeed, may not have supposed that what they had seen Olsen doing had damaged the pipe.

In my judgment, on these facts it has been proved by the defendants that the cause of the damage was the negligence of the seaman in making the hole or crack in the pipe. And, in my judgment, such negligence was "neglect in the management of the ship." It was neglect, for it was negligent to use an iron rod and to use it with such force as to pierce or crack the pipe. The wash-house and the waste pipe therefrom were essential parts of the crew's accommodation and therefore of the ship. The act of clearing the pipe of an obstruction was a management of that part of the crew's accommodation and therefore of the ship. If I need authority, I have it in *The Rodney* (1). It was contended that Olsen was not doing an act of management because he was clearing the obstruction only for his own benefit. I do not agree. It was done in order to put the wash-house floor in a proper state. Counsel for the plaintiffs, contended that the defendants were not entitled to rely on an exception of negligence in management. The argument was this: The bill of lading contains a very large number of exceptions including this: "The carriers are not to be responsible for faults or errors of navigation." In accordance with s. 6 of the Act, the bill of lading also contains an express statement that it is to have effect subject to the provisions of the rules as applied by the Act. The clause is in the following terms:

> "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924 had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act."

By the rules of art. IV (2) the carrier is not responsible for damage arising or resulting from

> "(a) Act neglect or default of the master mariner pilot or the servants of the carrier in the navigation or in the management of the ship."

By art. V a carrier is at liberty to surrender any of his immunities under the rules, provided such surrender is embodied in the bill of lading. Now, says counsel for the plaintiff, by retaining the exception of faults of navigation, the carrier has impliedly surrendered the immunity in respect of faults of management. I do not accept that argument. The immunity is created by the statute and the surrender must be embodied in the bill of lading. In my opinion the surrender of a statutory immunity must be clearly stated. It is not to be inferred from the needless repetition of another immunity.

There remains the question whether the ship was unseaworthy or the strong room unfit or unsafe for the carriage of the skins, and whether the damage arose or resulted from such unseaworthiness or unfitness. The allegation in the statement of claim was that the pipe was fractured. As the case developed other charges were made and were embodied in amended particulars. The attack was still, in the main, on the pipe and I will deal with that first. There was nothing unusual in the construction of the pipe, or in the fact that it was carried through the strong room. A lead pipe is more usual for sanitary purposes and is, indeed, more costly than iron. The material of the pipe was good. The size of the pipe was sufficient. It had been fitted with a rose sunk in the cement; but the rose was broken. Mr. Camps said that it was a matter of opinion whether a rose was advisable—many ships had no rose to such a pipe; no one gave evidence to the contrary. It is obvious that, rose or no rose, some refuse from the wash-house—soap and bits of rag, and so forth—might get down the pipe and that more refuse might get

down if there was no rose. It was also possible that such refuse should accumulate at the bend and cause an obstruction to the flow of the water from the wash-house.

It is the sort of thing we are all familiar with. It happened on board the *Touraine*, and had happened before the voyage in question. But the choking of the pipe by itself would not cause water to flow into the strong room. The water would accumulate on the floor of the wash-house until it rose above the sill, and then would flow on to the deck and away to the ship's side. When the pipe choked, the seamen would be likely to do their best to clear the obstruction. They had on previous occasions cleared the obstruction by using a wire. If such an instrument were used, the pipe could not be pierced or cracked. If a stiffer instrument, such as an iron rod, were used, and used with sufficient force, the pipe might be pierced at the bend as happened when Olsen used the iron rod. But I cannot think that anyone concerned with the ship ought to have anticipated that so foolish a means to clear the pipe would be used, or that the sailors ought to have been warned not to act in such a way. The question I have to ask myself is that indicated by LORD GORELL in *The Schwan* (2), and it is this: "Was the vessel in respect of this pipe reasonably fit to be worked in the way which might ordinarily be expected?" I think it was. If so, then, in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe. [The learned judge considered various matters as to seaworthiness raised by the plaintiffs, and continued:] The result is that in my judgment the ship was not unseaworthy nor the strong room unfit or unsafe. The question of due diligence therefore does not arise.

*Judgment for the defendants.*

Solicitors: *Waltons & Co.; William A. Crump & Son.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

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## SUGAR SUPPLY COMMISSION *v.* HARTLEPOOLS SEATONIA STEAMSHIP CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), May 23, 1927]

[Reported [1927] 2 K.B. 419; 96 L.J.K.B. 959; 137 L.T. 791; 43 T.L.R. 542; 32 Com. Cas. 300; 17 Asp. M.L.C. 307]

*Shipping—Charterparty—Conclusive evidence clause—Quantity stated on bill of lading shipped "unless error or fraud can be proved"—Shortage in quantity discharged—No evidence to account for shortage—Inference of error in bill of lading.*

A charterparty contained a clause which provided that "quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved." On the ship being discharged fewer bags were turned out than the number shown by the bills of lading. The arbitrator found that all the bags loaded were discharged, and that there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose. There was no suggestion of fraud.

**Held:** "error" could not be "proved" by inferring from these facts that the number of bags stated in the bill of lading should have been the lesser

number actually turned out; to bring the case within the clause there must be proof of some definite error to account for the discrepancy; and in the absence of such proof the shipowners were bound by the quantity stated in the bills of lading and were liable to the charterers in respect of the value of the bags not delivered.

*Shipping—Bill of lading—Effectiveness to vary charterparty.*

The bill of lading provided that "the carrier shall not be concluded as to the correctness of statements herein of . . . quantity."

**Held:** as between the charterer and the shipowner the bill of lading was ineffective to vary the charterparty, it being merely a receipt for the goods, and so this provision did not affect the conclusive evidence clause of the charterparty.

**Notes.** As to conclusive evidence clauses in bills of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 376; as to inconsistency between charterparty and bill of lading, see ibid. 405, and for cases see 41 DIGEST 377–384.

**Special Case** stated by MR. CLAUGHTON SCOTT, K.C., as sole arbitrator, for the opinion of the court.

The Case was stated at the instance of the shipowners, who disputed their liability to the charterers for a discrepancy between the cargo shown in the bills of lading and that actually turned out. The facts appear in the judgment.

*G. Langton, K.C.*, and *Guy Cooper* for the shipowners.

*The Solicitor-General (Sir Thomas Inskip, K.C.)* and *W. Bowstead* for the charterers.

**MACKINNON, J.**—This case raises one of the shortest points possible, but one of characteristic difficulty.

The Royal Commission on the Sugar Supply, by a charter dated Mar. 10, 1920, chartered the steamship *Seatonia* to go to Cuba and load a cargo of sugar. It was provided by the charterparty that mates' receipts were to be signed for each parcel of sugar when on board, and the captain was to sign bills of lading in accordance therewith as required by shippers. It was then provided later on—and this is the clause on which the question in this case turns—"Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless fraud or error can be proved." At one of the ports in Cuba a parcel of sugar marked "San Lino" was shipped or tendered to the ship. The mate signed a receipt for 2,860 bags of that mark, and pursuant to the clause in the charterparty, the master signed the bill of lading dated May 15, 1920, on which the amount of sugar shipped under that bill of lading was stated in the margin to be "San Lino 2,860 bags centrifugal sugar" and a further parcel of another mark. It was provided by a clause in the body of the bill of lading "that the carrier shall not be concluded as to the correctness of statements herein of"—among other things—"quantity." When the ship arrived at Greenock her cargo was tallied on discharge and only 2,677 bags of sugar marked "San Lino" were purported to be found by the tallymen superintending the discharge. The charterers, in arbitration, claimed from the shipowners the value of 183 bags of "San Lino" sugar, the difference between 2,860, the number of bags in the bill of lading, and 2,677, the number of bags discharged.

Two points arise, first, whether the shipowners can say that the whole effect of the conclusive evidence clause in the charterparty was wiped out by the insertion in the bill of lading of the words: "The carrier shall not be concluded as to the correctness of statements herein of . . . quantity"; and, secondly, if the shipowners fail on that point, they can still say that they escape liability by reason of the provision in the charterparty in the conclusive evidence clause of the limitation "unless error or fraud can be proved."

The arbitrator who stated this Case has found, first, "That the out-turn tallies at Greenock were correct and that only 2,677 bags of sugar marked 'San Lino' were

unloaded and delivered." Secondly, "That all the bags of sugar shipped under the mark 'San Lino' were discharged and delivered." Thirdly, "That there was no evidence to show how this discrepancy between the bill of lading number and the out-turn number arose." Those first two findings involve necessarily a conclusion that the figure of 2,860 inserted in the bill of lading was inaccurate or erroneous, because in fact only 2,677 bags can have been shipped, and the figure in the bill of lading ought to have been 2,677 and not 2,860. But he has further found that there was no evidence to show how this discrepancy between the bill of lading number and the true figure of 2,677 arose. The question on those facts is whether the shipowners are liable upon this claim for the shortage of 183 bags.

As to the first points raised by the shipowners I think there is no difficulty whatever. This is a claim by the charterers against the shipowners, and the contention of the shipowners must amount to a suggestion that the charterers and shipowners by mutual agreement varied the terms of the charterparty when they signed the bill of lading, so as to substitute the words put in the bill of lading about the carrier not to be concluded by the statements herein as to quantity for the conclusive evidence clause in the charterparty. In my opinion, that contention is not sound. The shippers, the agents of the charterers, and the master would have no authority to vary the charterparty, and it is very old law that variations between the charterparty and the bill of lading, as between the charterer and the shipowner, are to be accounted of no effect at all, the bill of lading being merely a receipt for the goods, and any form of printed words in the bill of lading would be equally immaterial.

The real question in this case arises under the conclusive evidence claim in the charterparty. That clause is: "Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped. Pausing there, that means clearly that the number of bags stated in the bills of lading shall be conclusive on the shipowner of the number of bags shipped. Then there is added a qualification, "unless error or fraud can be proved." In one sense, as I have already said, the findings of the arbitrator taken together clearly involve a finding, although he has not expressly so found, that the figure of 2,860 in this bill of lading was erroneous; it ought to have been 2,677. That has been proved, because the arbitrator has been driven to that conclusion and has found it as a fact. It has been proved to him by a necessary inference from two other facts that have been proved, namely, that no bags were in any way lost or disposed of after shipment, and that only 2,677 bags were landed. Counsel for the shipowners contends that in those circumstances error has been proved within the meaning of this clause. It is quite obvious that, if that contention be accepted, the whole of this clause might just as well never have been inserted in the charterparty at all; but I do not say that that is necessarily any solid ground for arguing that a clause in a charterparty must have a particular meaning, because frequently words are used as to which such a result could be suggested. There is another aspect of it that is very significant. If counsel for the shipowners' argument about this clause is correct, not merely is the whole clause rendered valueless to the charterer who is making this stipulation about the quantity in the bill of lading being conclusive evidence, but some words in the qualification itself are otiose and clearly unnecessary. If his contention were correct it would apply if any mistake were proved by any satisfactory means whatever; it would not matter whether the mistake arose by carelessness or negligence or fraud. In my opinion, however, the words "unless error or fraud can be proved" afford a strong reason for thinking that something else is contemplated than a mere difference between the figure in the bill of lading and the true figure. Counsel for the charterers suggests further that, reading the conclusive evidence clause from the beginning to the end one must give effect to it unless error or fraud can be proved, and that it is not enough to get rid of the effect of that clause by saying that one must infer from the facts that there has been a mistake.

This is an extremely difficult question, but on the whole I agree with the view of

the learned arbitrator. It is for the shipowner, who is relying on the latter part of the conclusive evidence clause, to satisfy the arbitrator and this court that he comes within the condition or limitation on which he relies. I do not think it is enough for him merely to give evidence from which one can infer, or say that it is a necessary inference, that a mistake has been made as regard the figure put in the bill of lading. I agree with the learned arbitrator in thinking that what is intended by the clause is actual proof of the error, as, for example, by comparison between the mate's receipts and the bill of lading, or some other document, so that the source of the discrepancy between the two can be pointed out. Nothing of the sort was proved in this case because, as the learned arbitrator has found, there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose. In those circumstances I think that the award of the learned arbitrator was right and should be upheld.

*Award upheld.*

Solicitors: *The Solicitor to the Board of Trade; Middleton, Lewis & Clarke*, for *Middleton & Co.*, West Hartlepool.

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

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## Re UNITED GENERAL COMMERCIAL INSURANCE CORPORATION, LTD.

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), January 12, 1927]

[Reported [1927] 2 Ch. 51; 96 L.J.Ch. 231; 136 L.T. 653; 71 Sol. Jo. 141]

*Insurance—Employers' liability—Business outside United Kingdom—Contract of insurance made and policy issued in United Kingdom—Office of assured abroad—Insurance against liability to foreign workmen employed abroad—Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*d*), 33 (1) (*i*).

Insurance business is transacted and carried on where the contracts of insurance are made and the policies of insurance are issued, not where the risks are situated. Accordingly, where an employer with an office in Paris insured his liability to pay compensation to his workpeople working in France and Belgium with an English insurance company, the insurance being effected by agents in London and the policies issued in London,

**Held:** the insurance company, in transacting this business, had not carried on employer's liability insurance business outside the United Kingdom, and so a claim by the assured in the liquidation of the company against the employers' liability fund of, and the £20,000 deposited by, the company pursuant to s. 2 of the Assurance Companies Act, 1909, was not barred by s. 33 (1) (i) of the Act.

*Re Padstow Total Loss and Collision Assurance Association, Ex parte Bryant* (1) (1882), 20 Ch. D. 137, 143, 144, applied.

**Notes.** The exemption contained in s. 33 (1) (i) of the Assurance Companies Act, 1909, is applied to the Assurance Companies Act, 1946, by s. 7 (2) and Sch. 3 of that Act.

Referred to: *First Russian Insurance Co.*, [1928] Ch. 922.

As to the Assurance Companies Acts, see 22 Halsbury's Laws (3rd Edn.) 418–443, and for cases see 10 Digest (Repl.) 1147 et seq. For the Assurance Companies Acts, 1909 to 1946, see 3 Halsbury's Statutes (2nd Edn.) 372 et seq.

Case referred to:

(1) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch.D. 137; 45 L.T. 774; 30 W.R. 326; 51 L.J.Ch. 344, C.A.; 10 Digest (Repl.) 1178, *8211*.

**Appeal** by an insured employer as a claimant in the liquidation of his insurers, the United General Commercial Insurance Corporation, Ltd., against an order, made by Eve, J., in the corporation's winding-up, affirming the rejection of the claimant's proof against the corporation's deposit of £20,000 (made under the Assurance Companies Act, 1909, s. 2) in respect of claims arising under ten policies of employers' liability insurance. The facts appear in the judgment of Lord Hanworth, M.R.

Eve, J., on Oct. 26, 1926, affirmed the liquidator's rejection of the claim on the ground that the corporation, in accepting the risks and issuing the policies relied on, was carrying on employers' liability insurance business outside the United Kingdom and that, accordingly, under s. 33 (1) (i) of the Assurance Companies Act, 1909, such business could not be treated as part of the employers' liability insurance business carried on by the corporation for the purposes of the Act.

The Assurance Companies Act, 1909, s. 33 (1) (i) provides that "if the company carries on employers' liability insurance business outside the United Kingdom, that business shall not be treated as part of the employers' liability insurance business carried on by the company for the purposes of this Act."

*Stuart Bevan*, *K.C.*, and *Cecil Turner* for the claimant.
*S. L. Porter*, *K.C.*, and *W. F. Swords* for the liquidator.

**LORD HANWORTH, M.R.**—This is an appeal for an order dated Oct. 26, 1926, by Eve, J., in the winding-up of the above corporation, whereby he refused an application made by summons before him to review the rejection of the proof of Messrs. F. N. Pickett et fils. This latter name is the trading name used by Francis Norman Pickett, who is a British subject, carrying on business in London at 22, Queen Anne's Gate, as an engineer, in respect of business carried on by him in France and Belgium. It appears that shortly after the Armistice, Nov. 11, 1918, which brought the hostilities in the First Great War to a close, Mr. Pickett entered into contracts with the British, French, and Belgian Governments for the purchase of ammunition dumps lying in France and Belgium, and engaged in breaking down ammunition at those dumps, as a commercial proposition. For the purpose of dealing with certain of the dumps, Mr. Pickett secured offices at the Hotel de Paris at Wimereux in France, and adopted the trading name above mentioned; but he remained the sole proprietor of the business.

The workpeople engaged at the dumps were mostly French and Belgian subjects, with Englishmen in charge of them. The work involved somewhat hazardous risks, and in order to cover his liability to pay compensation to the workpeople employed by him for accidents arising out of their employment Mr. Pickett insured with Lloyd's underwriters through the agency of Messrs. L. Aldridge & Co., Ltd. On Dec. 9, 1919, the United General Commercial Insurance Corporation was incorporated, and thereafter the risks were transferred, through the same agency, to the corporation, who issued ten policies in all to cover them. The policies were for a definite period, and were successively renewed. Those under which the claim in question is made are policies covering the period from Nov. 1, 1920, to July 4, 1921, and claims in respect of accidents covered by the policies to the amount of £9,132 have arisen. On June 19, 1923, a compulsory order to wind up the corporation was made and on Nov. 29, 1923, Sir William McLintock, K.B.E., was appointed liquidator. On Sept. 8, 1925, Messrs. F. N. Pickett et fils lodged a

proof in respect of the above claims. In due course the liquidator issued a notice requiring creditors who had claims against the deposit of £20,000 made in accordance with s. 2 of the Assurance Companies Act, 1909, to give notice thereof to him in writing, and accordingly Mr. Pickett made a claim that the amount of his claim and proof was payable pari passu with other proper claims under other policies of employers' liability insurance, out of the deposit. A

That claim was not admitted by the liquidator. Thereupon a summons to review the decision of the liquidator was taken out by Mr. Pickett in February, 1926, and, as already indicated, his summons was dismissed with costs by EVE, J., on Oct. 26, 1926. The ground of the rejection of the proof of the claims was that the corporation, in accepting the risks and issuing the policies relied upon, was carrying on employers' liability insurance business outside the United Kingdom, and therefore that such business, in accordance with the terms of s. 33 (1) (i) of the Act of 1909, " shall not be treated as part of the employers' liability insurance business carried on by the company for the purposes of the Act." EVE, J., upheld that contention. B C

It is, therefore, necessary to examine closely the nature and quality of the business in which the corporation engaged with Mr. Pickett. The application for the policies was made to the head office of the corporation in London. The policies were issued at the head office in London, and each bore the stamp required under the Stamp Act, and were signed by directors in London. They were obtained through the agency of Messrs. L. Aldridge & Co., Ltd., a company with its registered office in London. Notices of the claims were sent to the London office in accordance with one of the conditions appearing upon the policies issued which provides: "Every notice or communication to be given or made under this policy shall be delivered in writing at the head office of the corporation"—that is, at Old Jewry in the city of London. The premiums were to be paid in sterling in London. Shortly put, the contract of insurance is thus a contract made in London and by condition 8 is subject to British law. If and so far as any communication or investigation or inquiry originated, or was made in France or Belgium, it was made to or by an agent acting for principals in London, and not for or under any office or company or person abroad who had any authority to act, except such as was given from London. The places where the risks might arise were situated in France or Belgium ; but so far as the contract was constituted between the assured and the insurers it was in London. It is not irrelevant to note that if an insurance office carries on business abroad—in France or Belgium—it must fulfil the regulations of the laws of those countries. These regulations require (a) the registration of the insurance company in France or Belgium, (b) the making of a deposit, and (c) the appointment of an administrateur delegue approved by an official of the Government. Otherwise the insurance company is not recognised by the French or Belgian courts. No such steps had been taken when the policies in question were issued, although later the corporation became authorised to carry on business in France. The act of issuing the policies is, in my judgment, the "carrying on" or "transacting" business (see per LORD JESSEL, M.R., in *Padstow Total Loss and Collision Association Assurance* (1)). It may be that colloquially, the office might describe the business entered into in reference to risks abroad, as foreign business as contradistinguished from home business ; but that does not alter the essential nature of the business which is entered into and transacted by the contracts made, which were London contracts. Any negotiation in reference to them as to their terms or conditions or as to losses claimed for under them must be determined at the head office. D E F G H I

By s. 1 (d) of the Act of 1909, employers' liability insurance business is defined as

> "the issue of or the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment."

A It will be noticed that under this definition no emphasis is laid on the locality of the employment ; but it is the issue of or undertaking of liability under policies that is primarily indicated as connoting the business of employers' liability insurance. This definition, for such it amounts to, must be borne in mind when s. 33 (1) (i) is considered. It is difficult to suggest that there is any difference in meaning between "transacting" and "carrying on" business, and the words of the B last paragraph of s. 1 are as follows :

> "A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purpose of this provision be deemed to be a company transacting business within the United Kingdom."

C Although these words are to be taken, subject as respects any class of assurance business, to the special provisions of the Act relating to business of that class—in other words, in the present case, subject to s. 33 (1).

On the facts, therefore, of the present case at the time when the policies were issued and current, it does not appear that the corporation were carrying on employers' liability insurance business outside the United Kingdom so as to bring D into effect s. 33 (1) (i) of the Act. I regret to find that my conclusion differs from that of Eve, J. Although I share the same view that he expresses as to the similarity, in effect, of the terms "transact" and "carry on," I take a different view of the nature of the business of the insurance company. To my mind emphasis must be laid on the making and terms of the contract under which the relation between the insured and the corporation was established ; the locality where the E loss arises does not dominate the business which had its origin in London, and the purposes of which was to give the security of, or indemnity under, an English contract, in respect of claims which might arise elsewhere. For these reasons the appeal will be allowed with costs here and below, and the liquidator will be ordered to admit the proof of Messrs. F. N. Pickett et fils for the amount of their claims.

F **SARGANT, L.J.**—The sole question is whether the business represented by the nine policies of insurance issued to the applicant under his foreign trade style of Pickett et fils was business within s. 33 (1) (i) of the Assurance Companies Act, 1909. That is to say, did the corporation in the course of transacting this business carry on employers' liability insurance business outside the United Kingdom? Eve, J., has answered this question in the affirmative, and accordingly has declined G to declare that the claims under these policies are payable pari passu with other claims under other policies of employers' liability insurance, out of the deposit made by the corporation in respect of employers' liability insurance business.

It is clear that the corporation did not at the time of the issue of these policies, or indeed at any time, carry on any general employers' liability insurance business outside the United Kingdom. One, and only one, such policy, in addition to those H now in question, is alleged by the liquidator to have been issued by the corporation ; and he does not in any way differentiate the circumstances under which this additional policy was issued from those present here. It is true that, so far as the constitution of the corporation was concerned, the corporation had power to carry on this class of business abroad, and that the directors at one time contemplated starting a branch office in France, but this intention was never carried out, nor, I indeed, were steps taken to comply with the requirements of the French law in the matter. The liquidator has referred in para. 10 of his affidavit to certain other policies issued by the corporation to the applicants and others in France ; but these were policies of marine, fire, accident, and general insurance, and have obviously no bearing at all on the present question. The policies themselves were issued from the head office of the corporation in London in pursuance of cover notes previously forwarded by the agents of the corporation in London, Messrs. L. Aldridge & Co., Ltd. The premiums were stated in English money, and were apparently paid in London, the terms of the contract were expressed in English and

included a clause under which all differences would be determined in accordance with English law. The only suggestion that the business in connection with these policies was business carried on outside the United Kingdom is derived from the facts that the name of the assured is Picket et fils (which was, however, the applicant's trade name in connection with the dumps in question), and that the risks against which the assured was indemnified were risks of having to pay compensation for injury to workmen employed in France or Belgium in accordance with the laws of those countries.

I cannot attach any real importance to the description in the policies of the applicant by his trade name in France and Belgium ; nor did the learned judge apparently do so. His decision is founded solely on the fact that the risks insured against were in relation to work-people outside the United Kingdom, and that, to use his own words, "business which affects workpeople outside the United Kingdom" is business transacted abroad within the meaning of the Act. This view is not, in my judgment, satisfactory. The definition of employers' liability business in s. 1 (d) of the Act is quite general in its terms, has no special reference to the liability of employers under the English statutes on the subject, and is, in my view, as applicable to claims by workmen against employers under foreign legislation as under our domestic legislation. It is common knowledge that English insurance companies undertake risks whether in connection with life assurance, fire insurance, or accident insurance (all of which forms of insurance are also defined in s. 1) with foreigners as well as with our own subjects ; and I see no reason to think that the operation of s. 1 (d) or (b) or (c) applies to such insurance so as to make it insurance business carried on outside the United Kingdom. No doubt it is often convenient, when such business with foreigners becomes or is likely to become extensive, to facilitate such transactions by establishing foreign agencies ; and then the companies would, in respect of the business transacted through such agencies, be rightly held to be transacting or carrying on business outside the United Kingdom. But this has no relation to the nationality of the assured or to the locality of the risks insured against, but simply depends on the locality where the transactions of insurance are effected. For instance, contracts of assurance with Englishmen in relation to their lives or any property or business of theirs in the United Kingdom would, I think, constitute a carrying on of business outside the United Kingdom if effected through any branch office outside the United Kingdom of an English insurance company.

Nor, when the provisions under s. 33 of the Act which specially relate to employers' liability insurance business are carefully examined, do I find any such distinction indicated as is drawn by the learned judge. The terms of s. 33 (1) (i) in their natural meaning refer to the place where the business of insurance is carried on, not to the place where risks are run and the liability insured against originates. I can find no suggestion in the section or in the schedules to the Act that premiums paid to an English office are to be apportioned and carried to different liability funds according to the locality of the risks run; but on the view taken by the learned judge such an apportionment would be necessary in the case, for instance, of policies insuring employers against claims by English or foreign sailors, where the policies issued were not as in s. 33 (1) (b) incidental only to marine policies. And, while there is no difficulty in giving effect to s. 33 (1) (i) if what is referred to is the place where a company may actually carry on business, I see great difficulty in an interpretation involving a separation of employers' liability funds which depends on the locality where the risks insured against are run. In my judgment the applicant is entitled to rank against the employers' liability fund of the corporation, including the deposit in court, pari passu with the other holders of policies insuring against employers' liability risks.

**LAWRENCE, L.J.**—I agree with EVE, J., that the words "carries on" in s. 33 (1) (i) of the Assurance Companies Act, 1909, are for all practical purposes equivalent

A to the word "transacts"; but I respectfully differ from the conclusion reached by the learned judge that the business in respect of which the claim in this case has arisen was business carried on or transacted outside the United Kingdom.

The dominant object of the Act is the protection of all persons who effect, in the United Kingdom, insurances falling within one or other of the classes specified in s. 1. For the purpose of carrying out that object the Act imposes stringent B conditions on all assurance companies (wherever established) which carry on or transact assurance business within the United Kingdom. The Act does not appear to be concerned with the place where the persons affecting the insurance may happen to reside nor with the place where the risk insured against may happen to be insured, but to be concerned only with the question whether the insurance is effected within the United Kingdom or outside the United Kingdom, and in the C former case provides that the company or body of persons transacting the assurance must comply with the provisions of the Act. In the circumstances of the present case I have come to the clear conclusion that the business is respect of the policies in question was transacted in the United Kingdom as part of the employers' liability insurance business carried on by the company at its head office in London, and that therefore the provisions of the Act apply to such business. The expression D "employers' liability insurance business" is defined in s. 1 (d) as consisting of "the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damage to workmen in their employment." It follows that the place where the policies are issued or the liability under the policies is undertaken is the place where such business is carried on or transacted. Section 33 (1) (i) does not purport to deal with the place where the workman's E claim against the employer may arise, but is concerned solely with the place where the corporation transacts the insurance business and takes out of the operation of the Act all such insurance business as the corporation may transact outside the United Kingdom. It is not suggested that the business in the present case was transacted by any agency or branch which the corporation had established in France F or Belgium, and in fact the corporation had established no such agency or branch. I confess that I find it difficult to conceive how in practice the corporation could carry on or transact employers' liability insurance business in France or Belgium without having a place of business in and complying with the law of those countries, except (if it be legally possible) by adopting the unusual course of employing a travelling agent clothed with authority to issue or accept liability under policies on behalf of the company. Be that as it may, however, it is beyond dispute that G the policies in question in this case (which are executed in England) were issued and the liability thereunder was undertaken by the head office of the corporation in London. In these circumstances it seems to me plain that the business relating to these policies was transacted by the corporation in London, although the risk insured against was the liability of the employer to pay compensation or damages H to workmen in his employment abroad. I agree that the appeal should be allowed.

Solicitors: *Simmons & Simmons; Downing, Middleton & Lewis.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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# RADCLIFFE *v.* BUCKWELL

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), April 28, 1927]

[Reported [1927] 2 K.B. 273; 96 L.J.K.B. 965; 137 L.T. 593; 43 T.L.R. 514; 28 Cox, C.C. 373; 17 Asp. M.L.C. 303] B

*Shipping—Load line—Submersion at arrival port—No submersion at port of loading—Cargo partly on deck—Saturation by heavy weather—Addition to weight—Merchant Shipping Act*, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 442 (1).

A British ship loaded at a Finnish port a cargo of sawn boards, part being carried on deck. When the ship left port, the centre of the disc indicating the load line was not submerged, but she encountered heavy weather and the timber on deck became saturated so that when she reached the Humber the centre of the disc was submerged by reason of the saturation having increased the weight of the timber. C

**Held:** the master of the ship had "[allowed] the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load line" and so was guilty of an offence against s. 442 (i) (a) of the Merchant Shipping Act, 1894. D

Per SHEARMAN, J.: The master of a ship allows her to be so loaded as to submerge the centre of the disc whenever he allows an act of loading which may reasonably be expected to cause such submersion at any time during the voyage and it in fact does so. E

**Notes.** Sections 437–445 of the Merchant Shipping Act, 1894, have been repealed and replaced by the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44 (1) of which provides that "a British load line ship registered in the United Kingdom shall not be so loaded as to submerge in salt water, when the ship has no list, the appropriate load line on each side of the ship." Section 44 (4) gives the master a defence if he can "prove that the contravention was due solely F to deviation or delay . . . caused solely by stress of weather or other circumstances which the master owner or charterer could not have prevented or forestalled." The principle in this case would therefore seem equally applicable to the 1932 Act. As to safety and load line requirements see 30 HALSBURY'S LAWS (2nd Edn.) 255, and for cases see 41 DIGEST 297. For the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, see 23 HALSBURY'S STATUTES (2nd Edn.) 903. G

**Case Stated** by the stipendiary magistrate for Kingston-upon-Hull.

The appellant, the master of the British ship *Olavus*, was charged with unlawfully allowing the ship on Sept. 22, 1926, at the Victoria Docks, Hull, to be so loaded as to submerge in salt water the centre of the disc indicating the load line, contrary to s. 442 of the Merchant Shipping Act, 1894. On Sept. 14, 1926, the *Olavus* completed loading a cargo of sawn boards at a Finnish port. The total cargo was 695 standards, of which 194 standards were carried on deck. The cargo at the time of loading was very dry and it was loaded in fine weather. The hatches were properly secured. The ship left port with the centre of the disc not submerged and almost at once encountered a gale of hurricane force. The master had to heave to for a whole day, the ship listed to starboard, and a quantity of water was shipped. When the Kiel Canal was reached the ship was deep, but the master did not do anything to lighten her, as he had faith in her ability to reach Hull and there were no facilities for discharging at Kiel. Heavy weather was again encountered in the North Sea. On entering the Humber the ship had a list, and was found in the dock to have the centre of the disc submerged eight and a quarter inches, after making the proper allowances for water in the bilges and the specific gravity of the water. The submersion indicated an excess of 134 tons over the proper load. All the timber on the fore deck and 20 per cent. of that on the after deck was found to be saturated. H I

That below deck was dry except just below the hatches. Ninety-seven standards of timber, weighing when dry 247½ tons, were found to be so saturated as to account for the 134 tons excess weight. The magistrate was of the opinion that the master had allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load line, and accordingly convicted him and fined him £50 and £5 5s. costs, or sixty days' imprisonment.

*Clement Davies*, K.C., and *Cyril Miller* for the appellant.

*The Attorney-General* (*Sir Douglas Hogg*, K.C.) and *W. Bowstead* for the respondent.

**LORD HEWART, C.J.**—The argument for the appellant is that the ship was not overloaded within the meaning of s. 442 (1) of the Merchant Shipping Act, 1894, at the Victoria Dock, Hull, which, it is to be observed, was not the place where the process of putting the timber on board was carried out. That process was carried out on Sept. 14, 1926, in Finland. Section 442 is one of a group of sections of the Merchant Shipping Act, 1894, dealing with the safety of those who go down to the sea in ships, and is not the least important of those sections. It provides:

> "(1) If—(a) any owner or master of a British ship fails without reasonable cause to cause his ship to be marked as by this Part of the Act required, or to keep her so marked, or allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load line . . . he shall for each offence be liable to a fine not exceeding one hundred pounds. . . ."

No doubt as a mere matter of grammatical construction, the words "allows the ship to be so loaded" are ambiguous. They may refer to the actual process of loading, but they may equally refer to the condition of the loaded ship. In my opinion, they are wide enough to cover the position in this case. The very same words occur in s. 439 dealing with the detention of unsafe ships. If the contention of the appellant is correct, the moment, and the only moment, at which the question can be raised is the moment at which the process of putting the cargo on board has just been carried out. If the vessel were then overloaded she would be liable under s. 439 to be detained. But if she received a considerable addition from the sky or the waves to her cargo on the voyage and was driven to take refuge in another port, being then in a condition which would have made her an unsafe ship at the port of loading, still, if the appellant is right, she would not be an unsafe ship there, and could not be detained. With all respect to the counsel who put forward that argument, it seems to me the reductio ad absurdum of the matter. I think that the words mean the same in both sections and cover a case where a master is charged with allowing the mark to be submerged at the port of arrival. In my opinion the magistrate was right. I think he might well hold that it was the duty of a reasonably careful master in all the circumstances to take into consideration at the time of actual loading the likelihood of bad weather and its probable effect upon a heavy deck cargo of sawn boards.

**AVORY, J.**—I am of the same opinion. The words of s. 442 (1), "allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line," ought, in my view, to be construed to mean, "permits the ship to be overloaded at the particular place where he is charged with the offence." I see no reason for attributing to those words in s. 442 (1) a different meaning from that which they bear in s. 439. If this ship had been found at an intermediate port in the condition in which she was found at Hull, there can be no doubt that she would have been liable to be detained as an unsafe ship.

**SHEARMAN, J.**—I agree. In my opinion the master of a ship allows her to be so loaded as to submerge the centre of the disc whenever he allows an act of loading

which may reasonably be expected to cause such submersion at any time during the voyage and it in fact does so. A

*Appeal dismissed.*

Solicitors: *Pritchard & Sons*, for *Andrew M. Jackson & Co.*, Hull; *Solicitor to the Board of Trade.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*] B

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C

## BOORNE *v.* WICKER

[Chancery Division (Tomlin, J.), February 22, 1927]

[Reported [1927] 1 Ch. 667; 96 L.J.Ch. 361; 137 L.T. 409; 71 Sol. Jo. 310] D

*Executor—Sale of business—Goodwill—Right of executor to solicit customers of business.*

Under a deed of partnership it was provided that, on the death of one partner, the surviving partner should acquire the deceased partner's share of the capital property and assets of the partnership business, or, alternatively, that the surviving partner might elect to have the whole of the partnership assets realised and divided. The defendant had been employed in the partnership business until after the death of one of the partners and he had been appointed an executor of that partner's will. The plaintiff, the surviving partner, dismissed him without previous notice. There had never been any written agreement as to his employment, and there was no condition expressed or implied that, on the termination of his services, he should be restricted from canvassing customers of the partnership business. Disputes arose between the plaintiff and the deceased partner's executors, and in an action by the plaintiff against the executors for specific performance of the agreement in the partnership deed an order by consent was made whereby a person was to be appointed to ascertain the share of the deceased partner of the profits and income of the partnership up to the date of his death, and to make a proper and ample valuation of the whole capital property and assets belonging to the partnership at the date of the partner's death. The defendant having obtained other employment, proceeded to canvas some of the customers of the partnership business. E F G

**Held:** the rule in *Trego* v. *Hunt* (1) that the vendor of the goodwill of a business was not entitled to solicit its customers extended to an executor of a vendor carrying out a contract for the sale of the goodwill, and the plaintiff, as surviving partner, was entitled to an injunction restraining the defendant as executor of the deceased partner from soliciting customers of the partnership business. H

**Notes.** Distinguished: *Re Thomson, Thomson* v. *Allen;* [1930] 1 Ch. 203. I Referred to: *Farey* v. *Cooper*, ante p. 311.

As to the granting of injunctions in relation to the dissolution of a partnership, see 24 Halsbury's Laws (2nd Edn.) 489–492; and for cases see 36 Digest (Repl.) 600–605.

Cases referred to:

(1) *Trego* v. *Hunt*, [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 36 Digest (Repl.) 564, *1231*.

(2) *Re David and Matthews' Arbitration*, [1899] 1 Ch. 378; 68 L.J.Ch. 185; 80 L.T. 75; 47 W.R. 313; 36 Digest (Repl.) 602, *1642*.

(3) *Gillingham* v. *Beddow*, [1900] 2 Ch. 242; 69 L.J.Ch. 527; 82 L.T. 791; 64 J.P. 617; 36 Digest (Repl.) 602, *1637*.

(4) *Walker* v. *Mottram* (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 30 W.R. 165, C.A.; 43 Digest 83, *872*.

(5) *Green & Sons (Northampton), Ltd.* v. *Morris*, [1914] 1 Ch. 562; 83 L.J.Ch. 559; 110 L.T. 508; 30 T.L.R. 301; 58 Sol. Jo. 398; 43 Digest 85, *896*.

(6) *Re Irish, Irish* v. *Irish* (1888), 40 Ch.D. 49; 58 L.J.Ch. 279; 60 L.T. 224; 37 W.R. 231; 5 T.L.R. 39; 39 Digest 94, *1108*.

(7) *Pearson* v. *Pearson* (1884), 27 Ch.D. 145; 54 L.J.Ch. 32; 51 L.T. 311; 32 W.R. 1006, C.A.; 43 Digest 85, *898*.

(8) *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322; 43 Digest 82, *866*.

**Motion.**

The plaintiff and one John Wicker had from 1894 carried on in partnership a business under the style of Boorne & Co., brewers, at Wallington Brewery, and since 1921 the partnership had been carried on under and subject to the terms of a deed of partnership dated May 17, 1921. On Mar. 26, 1926, John Wicker died, having by his will appointed his wife and E. M. Wicker, J. Wicker and J. B. Wicker his executors. His wife predeceased him, and probate was granted to J. Wicker and J. B. Wicker, E. M. Wicker having renounced. Clause 14 of the deed of partnership provided:

"If either party shall die during the partnership thereupon his executors or administrators shall be entitled to his half share of the profits and income of the partnership up to the date of his death to become payable three calendar months after such death and a proper and ample valuation shall be made of the whole capital property and assets belonging to the partnership on the day of the death of such deceased partner and the executors or administrators of such deceased partner shall be entitled to a sum equal to a moiety of such valuation as being the share of such deceased partner in the capital property and assets of the partnership and the surviving partner shall within twelve calendar months next after the death of the deceased partner pay the said sum to the executors or administrators of the deceased together with interest thereon in the meantime at the rate of 6 per cent. per annum unless some other arrangements shall have been made as provided by the clause next following."

Clause 15 provided:

"Upon the determination of the partnership by the death of a partner unless either of the following modes shall be mutually agreed upon between the surviving partner and the executors or administrators of the deceased partner, i.e. (a) That such executors or administrators will continue the partnership with the surviving partner . . . or (b) That the whole of the business and assets of the partnership shall be sold or transferred to a limited liability company in exchange for such shares debentures or other securities as may be mutually determined, it shall be competent for the surviving partner by notice in writing to be given by him within four calendar months after the death of the partner who may first die to the executors or administrators of such deceased partner to elect (c) That the assets of the partnership shall be realised and divided in manner provided by cl. 13 thereof."

Clause 13 provided:

"Upon the determination of the partnership otherwise than by the death of a partner a full and general account of the assets and liabilities and transactions of the partnership shall be taken and the assets and property thereof, including the goodwill of the said business shall with all convenient speed be realised and sold and the debts to the partnership got in and the proceeds shall be

applied in discharge of the liabilities of the partnership and the expenses of liquidating the same and realising the assets thereof and in the next place in payment of each partner of any profit coming to him and of his share of the capital and the surplus if any of the moneys realised as aforesaid shall be divided between the parties."

Disputes having arisen between the parties an action was commenced by the plaintiff on June 18, 1926, claiming specific performance of the agreement contained in the partnership deed for dealing with the share of a deceased partner. On Jan. 18, 1927, an order was made by consent in the following terms (so far as material):

"The plaintiff and the defendants by their counsel consenting to the judgment and agreeing that the articles of partnership dated May 17, 1921 . . . in the pleadings mentioned ought in the circumstances which have arisen to be specifically performed so far as regards paras. 14 and 15 of the said articles and that the person or persons to be appointed under the provisions hereinafter contained shall be at liberty in the event of questions being raised to make his report in such alternative form as will enable the questions to be decided by the court and further agreeing that the four calendar months referred to in para. 15 (b) of the said articles of partnership shall be taken to be extended to one month after that of the valuation to be made by the said person or persons to be appointed. This court doth order that failing agreement between the parties a proper person or persons be appointed in chambers: (i) To ascertain the share of the said John Wicker deceased of the profits and income of the partnership up to the date of his death; (ii) to make a proper and ample valuation of the whole capital property and assets belonging to the partnership on the day of the death of the said John Wicker. . . . And the parties are to be at liberty to apply."

The defendant James Bruce Wicker had been employed in the partnership business as clerk and traveller from 1905 until after John Wicker's death; but on Oct. 21, 1926, the plaintiff dismissed him without previous notice. There had never been any written agreement as to his employment, and there was no condition expressed or implied that, on the termination of his services, he should be restricted from canvassing customers of the business. The defendant, after his dismissal, obtained employment with a brewery company and proceeded to canvass some of the customers of Boorne & Co.

The plaintiff now moved in the action to restrain the defendant J. B. Wicker from canvassing or soliciting any of the customers or former customers or persons who had dealt with the business carried on at the Wallington Brewery, or from making any statements or representations in reference to the business or otherwise depreciating or interfering with the sale of the business pursuant to the judgment dated Jan. 18, 1927, or with the ascertainment of the value of the business pursuant to such judgment.

*Gavin Simonds, K.C.*, and *F. Whinney* for the plaintiff, referred to *Re David and Matthews' Arbitration* (2), *Trego* v. *Hunt* (1), *Gillingham* v. *Beddow* (3), *Walker* v. *Mottram* (4), *Green & Sons (Northampton), Ltd.* v. *Morris* (5), and *Re Irish* (6).

*Alexander Grant, K.C.*, and *F. Baden Fuller* for the defendant J. B. Wicker, referred to *Trego* v. *Hunt* (1), *Walker* v. *Mottram* (4), *Green & Sons (Northampton), Ltd.* v. *Morris* (5), and *Re Irish* (6).

**TOMLIN, J.**—This is a motion made in somewhat unusual circumstances. The plaintiff in the action and one John Wicker were partners in the business of brewers at Wallington in Surrey, under articles of partnership dated May 17, 1921. That did not represent the birthday of the business, which was an old business that had been carried on for many years. On Mar. 26, 1926, John Wicker died, and the

defendants, John Owen Wicker and James Bruce Wicker, are his personal representatives. Under the partnership articles provisions are made as to the disposition of the business on the death of any partner under which the surviving partner has a right for a certain period to elect to take over the business on terms. Otherwise, it may be that the assets have to be realised. A dispute arose between the plaintiff and the defendants, whether the plaintiff had not forfeited his right to elect owing to his failure to take the necessary steps under the partnership articles, and this action was commenced on June 18, 1926. The statement of claim, the defence and a reply were put in, but ultimately the action came before me as a short cause on motion for judgment on agreed minutes. Agreed minutes do not always produce a satisfactory order. I do not think they did in this case. But the substance of the order which was dated on Jan. 18, 1927, was this. [HIS LORDSHIP read the order.]

I may say at once that that order, in my view, is an order under which it is the duty of the person appointed in chambers to report to the court the result of the inquiries which he is directed to make; and that, on the report, the parties are free to apply, so that the matter can be ultimately disposed of in court. In other words, I think that the court is in a position to enforce specific performance of the contract contained in cl. 14 and cl. 15 of the articles of partnership, and that the defendants have submitted to have those articles given effect to by the court. That is the effect, in my judgment, of the order. I consider, therefore, that I have complete seisin of this action, and that if I find there is any party to the suit who is doing something that is contrary to the essentials of the matter—that is to say, destroying any of the property which is the subject-matter of the inquiry or valuation to be made—I have ample jurisdiction to interfere and protect the property.

This motion is made in the following circumstances. One of the defendants, James Bruce Wicker, was in the employment of the firm. He seems to have had differences with the firm, and he was dismissed—he alleges wrongfully—and proceedings are pending in the King's Bench Division for damages for wrongful dismissal. That is a matter which will be determined in due course in those proceedings. Having been discharged, wrongfully, as he says, he has joined someone else in business and has commenced to solicit the customers of the firm. He is, therefore, in this position. On the one hand, he has entered into no covenant restraining him from soliciting the customers of the business; on the other hand, he is an executor of John Wicker bound to give effect to his testator's contract, and the plaintiff alleges that, as such, he is bound not to do anything to depreciate the property which he is selling. The question is whether that is his position as the result of his being an executor of the deceased partner. I have been referred by counsel on his behalf to a number of authorities in support of the proposition that the well-known rule in *Trego* v. *Hunt* (1), preventing the vendor of a business from soliciting customers of the business, is a rule which applies only where the person alleged to be wrongfully soliciting is the vendor who voluntarily entered into the contract of sale and is putting the proceeds into his own pocket. He says that it does not apply to a man whose property has been sold compulsorily by the operation of the law, as in the case of a man who has been made bankrupt and whose trustee has sold his property. He is right; there is authority for that. He contends that it does not apply to a man who is only fulfilling, as personal representative, the contract of his testator. He agrees that it might apply where an executor himself entered into the contract or, possibly, though I am not sure that he goes as far as this, where an executor had acquired knowledge of the business which enabled him to solicit. His argument is based on the theory that this rule against solicitation by a vendor is confined strictly to the case where the man who completes the contract is the original vendor who has personal knowledge of the affairs of the business that he has sold voluntarily and has put, or is going to put, the proceeds of the sale into his own pocket.

Apart from *Trego* v. *Hunt* (1), the cases to which I have been referred seem to carry the matter very little further. *Walker* v. *Mottram* (4) is the case where a bankrupt's property was sold by his trustee in bankruptcy, and it was held that the bankrupt could not be prevented from soliciting customers. That case does not seem to me of much assistance, though there are, it is true, passages in the judgment to which counsel for the defendant referred, which, as he says, indicate that the voluntary nature of the transaction and the benefit arising from it to the vendor are essential elements in the reasons for the application of the rule in *Trego* v. *Hunt* (1). Again, in *Green & Sons* (*Northampton*), *Ltd.* v. *Morris* (5), it was held that the original owner of property assigned to a trustee for the benefit of creditors was not subject to the rule, because in that case also the sale was made against his will. *Re Irish* (6) is a case which seems to me to afford no assistance at all. The question was whether, on a sale under the court, the contract, which had already been entered into, ought to be modified by inserting covenants preventing the receiver appointed by the court from soliciting orders from, or doing business with, the present customers. It seems to me that all that case decided was that there was no general rule which applied; that the receiver was not the vendor; that it was not right to depart from the contract, and that there was no ground for imposing such a resriction on the receiver.

*Trego* v. *Hunt* (1) for the first time laid it down definitely that a vendor of a business ought to be restrained from soliciting customers of the business—overruling *Pearson* v. *Pearson* (7) and supporting the reasoning in *Labouchere* v. *Dawson* (8). But the learned Lords in that case seem to have left open the question what was the precise principle on which the rule was based, and what were the precise cases to which it applied. They held that it applied to that particular case which was the simple case of a vendor entering into a contract for sale and himself completing the sale; but if counsel for the defendant is right there are a number of cases—of which the present case is one—to which the principle does not apply.

In default of other light, I myself must choose a principle on which to base the doctrine. I think I am bound to rest on what was said by Lord Macnaghten in *Trego* v. *Hunt* (1) ([1896] A.C. at p. 25):

> "The principle on which *Labouchere* v. *Dawson* (8) rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of goodwill, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

Where a man has entered into a contract for the sale of a business which it falls to his executor to complete, in my judgment the executor who, on completion of the contract, proceeds to solicit the customers of the old firm is doing the very thing which is indicated in those words of Lord Macnaghten. He may, or may not, have actual knowledge of who the customers of the firm are, though he certainly has every opportunity of ascertaining them, but, whether or not he has actual knowledge of them, it seems to me to be against common honesty that he should be free at one and the same time to complete his testator's contract and to snatch away from the purchaser the property which he is affecting to convey to him.

In what terms the precise principle is to be framed is another matter, but I am satisfied that, in a case such as this, there is no justification for an executor at one and the same time completing the contract and destroying the subject-matter

of it. Still less does his conduct find favour in my eyes when I know that he has in fact, or may in fact, have acquired knowledge of the business by reason of the position which he himself in the past held in it. In the circumstances, I think it is right that, at any rate while the matter is under the hand of this court, and while inquiries and valuations are proceeding for the assistance of this court, the subject-matter of those inquiries and valuations should not be destroyed by the conduct of one of the defendants to the action.

I propose, therefore, on this application to grant an injunction to restrain the defendant from soliciting the customers of the firm until the report required by the order has been presented to the court, and the matter has again been brought before the judge in person or until further order. When the matter comes up for ultimate settlement, then it can be finally dealt with and the differences between the parties ultimately adjusted. The costs will be costs in the action.

Solicitors: *Gresham, Davies & Dallas; Withers & Co.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

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## R. *v.* ESSEX JUSTICES. Ex parte PERKINS

[King's Bench Division (Avory, Swift and Talbot, JJ.), April 6, 7, 1927]

[Reported [1927] 2 K.B. 475; 96 L.J.K.B. 530; 137 L.T. 455; 91 J.P. 94; 43 T.L.R. 415; 28 Cox, C.C. 405]

*Magistrates—Clerk—Member of firm of solicitors previously acting for complainant—No knowledge on part of clerk—Order of magistrates quashed.*

The applicant's wife, desiring a deed of separation, sought advice at the branch office of a solicitor, one J. The office to which she went was managed by a managing clerk, and J. himself retained no memory of the matter which was only mentioned once shortly in a report by the managing clerk to him at the firm's head office. Letters were written from the local office, threatening to issue a summons against the applicant, and ultimately he was summoned before the justices for neglecting to maintain his wife and children. Another solicitor appeared for the wife, but J. was the clerk to the justices, acted in that capacity on the hearing, and accompanied them when they retired to consider their decision. The justices adjourned the case for two months, ordering the applicant to pay his wife 30s. a month in the meantime, and at the adjourned hearing, at which J. again acted as clerk to the justices, they made a permanent order. The applicant, who had appeared before the justices in person, obtained a rule nisi for a certiorari to quash the order, on the ground that J., having acted as solicitor to the wife, took part in the hearing inasmuch as he advised the justices thereat. The applicant alleged that at the time of the hearing he was unaware that he could object.

**Held:** in the circumstances it might reasonably appear to the applicant that the tribunal was not impartial and that justice was not being done; as he was not fully cognisant of his right to object to J.'s acting as clerk he could not be said to have waived that right; and, therefore, the rule must be made absolute and the maintenance order quashed.

**Notes.** Referred to: *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *R.* v. *Salford Assessment Committee*, [1937] 2 All E.R. 98; *Cottle* v. *Cottle*, [1939] 2 All E.R.

535; *Kilduff* v. *Wilson*, *Coventry* v. *Wilson*, [1939] 1 All E.R. 429; *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar*, [1945] 2 All E.R. 131; *R.* v. *Bodmin Justices, Ex parte McEwen*, [1947] 1 All E.R. 109; *Franklin* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 289; *R.* v. *Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850.

As to disqualification of justices and justices' clerks, see 25 HALSBURY'S LAWS (3rd Edn.) 131–136, 149–150. For cases see 33 DIGEST 288 et seq., 372.

Cases referred to:

(1) *R.* v. *Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; 68 Sol. Jo. 253; 22 L.G.R. 46; sub nom. *R.* v. *Hurst, Ex parte McCarthy*, 130 L.T. 510; 40 T.L.R. 80; 27 Cox, C.C. 590, D.C.; 33 Digest 294, *97*.

(2) *Vyvyan* v. *Vyvyan* (1861), 30 Beav. 65; 7 Jur. N.S. 891; 9 W.R. 879; 54 E.R. 813; affirmed, 4 De G.F. & J. 183, L.C.; 20 Digest 523, *2483*.

**Rule nisi** for a writ of certiorari to bring up and quash, at the instance of William John Albert Perkins, a maintenance order made by the justices of the Tendring division of the county of Essex in favour of his wife, Kathleen Maria Florence Perkins.

In or about June, 1926, the applicant's wife consulted Jones & Son, solicitors, at Clacton-on-Sea, with regard to arranging a deed of separation. He received from them a number of letters; in particular on July 19 and Aug. 4, 1926, they wrote to the applicant threatening to issue a summons. The letters were all signed "Jones & Son," and the applicant replied to "Messrs. Jones & Son." On Sept. 15, 1926, the applicant was served with a summons at the instance of his wife charging him with wilfully neglecting to provide reasonable maintenance for his wife and children. On Sept. 27, 1926, he attended at the petty sessional court for the division of Tendring, appearing in person. Six justices sat. Mr. Field, a solicitor, appeared for the wife, and began the case by saying that, as the justices were aware, the case had been in the hands of other solicitors. Mr. C. Gordon Jones, who was the only member of the firm of Jones & Son, was the clerk to the magistrates, and on the occasion in question was acting as such. Ultimately, the applicant asked the Bench to adjourn the application for three months to enable him to find accommodation for his family. The Bench retired with Mr. Jones, and on returning the chairman stated that they had decided to adjourn the case for two months, the applicant to pay 30s. a week meanwhile. Owing to a misunderstanding as to the date fixed for the adjourned hearing, the applicant was not present thereat, but Mr. Jones again acted as clerk and the justices made the permanent order now sought to be quashed. In his affidavit in support of the rule the applicant said that he was not aware at the time that he could make objection to Mr. Jones' advising the magistrates or retiring with them.

The justices filed an affidavit to the effect that they were unaware that Mr. Jones or his firm had acted for the complainant; that when he retired with them he advised them—contrary to their general opinion—to grant the application for an adjournment; and that he in no way showed any feeling against the applicant; but if the applicant had given the slightest intimation that Mr. Jones or his firm had acted for the wife they would have arranged for a deputy to sit as clerk. Mr. Gordon Jones, who appeared to show cause by counsel, filed an affidavit that he was the surviving member of the firm of Jones & Son, solicitors, of Colchester, clerk to the justices of the Tendring division, and also of the Lexden and Winstree division of the county of Essex, and registrar of Haverhill County Court of Suffolk, and had offices at Colchester, Clacton-on-Sea in the Tendring division, and Haverhill. The Clacton-on-Sea office was kept mainly for the purpose of the business of the clerkship to the Tendring justices, and was under the management of his clerk, Francis Probyn Dighton. The deponent seldom attended at the Clacton office except on court days, but was available by telephone or otherwise for special

or urgent matters, and routine and minor business was dealt with by Mr. Dighton, whose duty it was to make a weekly report to the Colchester office of the business transacted at the Clacton office. In Mr. Dighton's report for June 12 there was a reference: "New matters: 57. Mrs. Perkins. Separation agreement. I am afraid the costs will be very small." No further reference to the matter occurred in any report from Mr. Dighton, and Mr. Jones, if he had thought of it at all (in fact, he did not), would have assumed that the matter had been completed or become abortive. He never heard anything further, and he made no inquiry about Mrs. Perkins or her business till after the rule nisi was granted. He had not seen or signed any of the letters written by his firm, nor did he, when the case appeared in the agenda paper of the court on Sept. 27, in any way connect it with the Mrs. Perkins whose name had been mentioned in Mr. Dighton's report in June. Mr. Dighton did not attend the court on either date, and Mr. Jones did not know that Mr. Field had not been instructed by the complainant in the ordinary way. He did not remember any mention being made of "other solicitors," and certainly did not understand that his firm was referred to. He stated that he advised the justices on Sept. 27 that the case was not sufficiently made out to justify them in making a permanent order—which they were prepared to make—and he advised them to grant the applicant's request for an adjournment. The deponent said that he was not consulted in any way when the justices made the final order which it was sought to quash.

The rule was obtained upon the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing.

*S. E. Pocock* showed cause for the clerk to the justices.
*Alexander Cairns* in support of the rule.

**AVORY, J.**—This is an application on behalf of one William John Albert Perkins to remove into this court a maintenance order made in favour of his wife, Kathleen Maria Florence Perkins, dated Nov. 22, 1926, on the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing. There is no dispute upon the material facts that before the hearing of the summons the firm, of which the clerk to the justices was a partner, had acted for the wife, and carried on a considerable correspondence with the husband upon the very subject which came before the justices, namely, the neglect of the husband to maintain his wife. On the hearing the applicant appeared in person to answer the complaint, and the justices' clerk was present taking the ordinary part which a justices' clerk takes. I certainly think we must accept a statement made by the justices' clerk that he was not in fact aware that his firm had been acting as solicitors for the wife, the fact being that the business of his office at Clacton was conducted entirely by a managing clerk who reported weekly. With the exception of one weekly report that a Mrs. Perkins had called at the office there was no mention of the name. I accept the statement of the justices' clerk that if he had ever seen that name, he had entirely forgotten it. But he did retire with the Bench after the applicant had cross-examined his wife with a view to showing that no order should be made. The applicant suggested at the end of his case that if an adjournment were granted he could make arrangements. The clerk retired with the justices, and suggested to them that there were no grounds for the making of a permanent order, and he advised that an adjournment should be granted. On the adjourned hearing the applicant, through some misunderstanding, did not attend, and the justices made a permanent order.

It may be quite true, as counsel showing cause has said, that no injustice has been done. But we must apply the principle which LORD HEWART, C.J., repeated in *R.* v. *Sussex Justices, Ex parte McCarthy* (1) ([1924] 1 K.B. at p. 258):

"It is said, and no doubt truly, that when that gentleman retired in the usual

way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance, but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

I think the Lord Chief Justice clearly meant to say "seem," not "be seen," as it appears in the reports. He continued:

"The question, therefore, is not whether in this case the deputy-clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

The only difficulty which arises in this case arises from the fact that the clerk has stated on affidavit—and I accept it—that he did not in fact know that his firm had acted; and, if we had to decide whether there was in fact bias, that would be most material, but what we have to determine is whether it would appear to one of the parties that justice was not being done. In my view, although the clerk did not know that his firm had acted, I think the necessary, or at least the reasonable, view would be that justice was not being done, inasmuch as the clerk was a member of the firm which had acted for the applicant's wife. The only other question is waiver. The applicant states in his affidavit: "During the proceedings at which I attended I felt embarrassed in my conduct of the case by reason of the feeling that, although Mr. C. Gordon Jones had formally divested himself of his capacity of solicitor for my wife and was now a part of the tribunal whose duty it was to adjudge the matter in question, or was their legal adviser, he was adverse to me. I was not aware at the time that I could make objection to his conducting the proceedings or advising the magistrates or retiring with them." The question is whether in those circumstances he can be said to have waived this objection. We must act on what was said by Lord Romilly, M.R., in *Vyvyan* v. *Vyvyan* (2) (30 Beav. at p. 74):

"Waiver or acquiescence, like election, pre-supposes that the person to be bound is fully cognisant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim."

I think it cannot be said that the applicant was fully cognisant of his rights, and, therefore, he cannot be said to have waived them. For these reasons, although no moral blame attaches to the clerk to the justices, I think that this rule must be made absolute.

**SWIFT, J.**—It is essential that justice should be so administered as to satisfy reasonable persons concerned that the tribunal is impartial. As was said by Lord Hewart, C.J., in *R.* v. *Sussex Justices, Ex parte McCarthy* (1): "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." Might a reasonable man in the position of the applicant think that there was interference? I think he might, and I agree that the order made by the justices must be moved into this court to be quashed.

**TALBOT, J.**—I agree.

Costs against the justices' clerk were asked for.

**AVORY, J.**, said: It is a little unusual for a clerk to justices to appear to show cause, but as he has done so the order must be with costs.

*Rule absolute.*

Solicitors: *Doyle, Devonshire & Co.*, for *Jones & Son*, Colchester; *Edward E. Kent.*

[*Reported by* J. FERGUSON WALKER, ESQ., *Barrister-at-Law.*]

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## COTTAGE CLUB ESTATES *v.* WOODSIDE ESTATES CO. (AMERSHAM), LTD.

[KING'S BENCH DIVISION (Wright, J.), October 28, November 3, 1927]

[Reported [1928] 2 K.B. 463; 97 L.J.K.B. 72; 139 L.T. 353; 44 T.L.R. 20; 33 Com. Cas. 97]

*Arbitration—Arbitration clause—Personal covenant—Not passed by assignment of debt under contract—Arbitration under contract—Duty of arbitrator to consider matters extraneous to contract—Consideration of assignment of contract debt—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 136 (1).

By a contract dated Dec. 15, 1925, which contained an arbitration clause, contractors undertook to erect a number of houses for building owners. Before the completion of the work the contractors assigned to a bank all moneys due or to become due under the contract, and gave notice of the assignment to the building owners. On completion of the work disputes arose regarding the final amount payable to the contractors and were referred to arbitration.

**Held:** the arbitration clause in the contract was a personal covenant and did not pass to the bank under the assignment as a "legal or other remedy" within s. 136 (1) (b) of the Law of Property Act, 1925, and so the arbitrator had jurisdiction to deal with the dispute, but in doing so it was his duty, not merely to consider the terms of the contract within the limits of the document, but also to consider the application and enforcement of its terms having regard to the assignment by which the contractors had divested themselves of the right to claim under the contract; if an award were made in favour of the contractors the building owners would have to pay the sum awarded to persons who were not their creditors and could not give them a discharge of the debt which would be a defence to a claim against the building owners by the bank; and, therefore, the award must be that the contractors were not entitled to recover anything from the building owners.

**Notes.** Considered: *Shayler* v. *Woolf*, [1946] 2 All E.R. 54.

As to the assignment of the subject-matter of an arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 10, and as to matters to be taken into consideration by the arbitrator, see ibid. 35, 36. For cases, see 7 DIGEST 430 et seq.

Cases referred to:

(1) *Tancred* v. *Delagoa Bay and East Africa Rail. Co.* (1889), 23 Q.B.D. 239; 58 L.J.Q.B. 459; 61 L.T. 229; 38 W.R. 15; 5 T.L.R. 587, D.C.; 8 Digest (Repl.) 570, *215.*

(2) *Brice* v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 7 Digest 420, *344.*

**Special Case** stated by an arbitrator.

The applicants, Cottage Club Estates, building contractors, entered into a contract dated Dec. 15, 1925, for the construction of sixteen houses, with the respondents, Woodside Estates Co. (Amersham), Ltd., as building owners. The contract contained an arbitration clause. Before the completion of the contract the contractors assigned in writing their rights to all moneys due or to become due under the contract to the Bank of Liverpool and Martin's, and served due notice of the assignment in writing upon the building owners. When the work was completed, disputes arose regarding the amount payable in final settlement, and in the arbitration which followed the contractors claimed a considerable sum of money. The building owners raised as a defence that the contractors were not entitled to claim anything by reason of the assignment. The arbitration proceeded, and at the request of the parties the arbitrator made his award in the form of a Special Case for the opinion of the court. His award was that the contractors were entitled to recover £448 17s. 5d., or, alternatively, were not entitled to anything. The question for the opinion of the court was whether the deed of assignment and notice precluded the contractors from maintaining their claim.

By Law of Property Act, 1925, s. 136 (1):

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —(a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor . . ."

*Cave, K.C.*, and *Graham Mould* for the building owners.
*Barrington Ward, K.C.*, and *H. Bensley Wells* for the contractors.

*Cur. adv. vult.*

Nov. 3. **WRIGHT, J.,** read the following judgment. This is a Special Case stated by an arbitrator under s. 7 of the Arbitration Act, 1889 [see now Arbitration Act, 1950, s. 21], and it raises a point which, so far as my experience goes, is novel. The Cottage Club Estates are builders—I shall hereafter refer to them as the contractors—and the Woodside Estates Co. (Amersham), Ltd., are building owners. I shall refer to them hereafter under that description. The two parties entered into a contract dated Dec. 15, 1925, for the construction of sixteen houses at Rickmansworth. There were two other subsidiary parties, who are not material for this purpose. The contract contained an arbitration clause. The work having been done, disputes arose as to what amount was payable in final settlement under the contract, and in the arbitration which was set on foot the contractors claimed that they were entitled to be paid a considerable sum of money. The arbitration proceeded: pleadings were put in, and in the points of defence, set-off, and counterclaim a plea was raised that the contractors were not entitled to claim from the building owners by reason of the fact that the contractors had assigned in writing their rights to all moneys due and to become due under the contract upon which the claim was founded, to the Bank of Liverpool and Martin's, and that due notice of that assignment in writing had been served upon the building owners. The arbitration proceeded, and at the request of the parties the arbitrator made his award in the form of a Special Case and stated a question for the opinion of the court, with which I now have to deal. His final award was that the contractors were entitled to recover the sum of £448 17s. 5d. against the building owners. He further directed that the contractors were entitled to recover from the building owners the taxed costs of the arbitration and the costs of this award. The award, as I have stated, is

A subject to the opinion of the court, and if the court should come to a certain conclusion then his alternative award was that the contractors were not entitled to recover anything against the building owners, and the building owners were entitled to recover from the contractors their taxed costs of the arbitration and the costs of his award. The question for the opinion of the court is stated in these terms:

B

> "The question for the opinion of the court is whether the said deed of assignment and notice preclude the [contractors] from maintaining their present claim."

There was a further point which is dealt with in the award, but the question which the arbitrator has left for the opinion of the court is what I have stated.

C The arbitrator states the contentions and finds the facts in this way. He finds that the sum of £448 17s. 5d. is due from the building owners to the contractors; he finds that the houses the subject-matter of the building agreement were completed by July 8, 1926; he finds that subsequently to such completion the deed of assignment and notice referred to in the points of defence and set-off were duly executed and given. Paragraph 9 of the Case is in these terms:

D

> "On behalf of the building owners it was contended that the said deed of assignment and notice, divested the contractors of their rights and precluded them from maintaining their claim either in whole or in part. In support of their contention the building owners quoted s. 136 (1) of the Law of Property Act, 1925, and *Tancred* v. *Delagoa Bay and East Africa Rail. Co.* (1), E and *Brice* v. *Bannister* (2). On behalf of the contractors it was contended that the said deed of assignment and notice were no defence to the claim and that this was an arbitration under a contract, and a submission and that the proper parties to such arbitration were the parties to such contract and such submission. I was of opinion that the contentions of the contractors were correct and that consequently the sum of £448 17s. 5d. is due from the F building owners to the contractors."

He then states the question for the opinion of the court.

Counsel for the building owners relied on s. 136 (1) of the Law of Property Act, 1925, and first submitted that by virtue of the provisions of that section the rights under the arbitration clause were transferred from the contractors and vested in the bank as coming within the description of "all legal and other G remedies for the same." That argument I do not think is well founded. The arbitration clause is a personal covenant, and, in my judgment, cannot be transferred; nor, indeed, was it transferred in any sense in this case. If there had been any cross-claim—and there may have been—on the part of the building owners against the contractors, the arbitration clause remains in full force and effect in reference to that claim, but I also think that the arbitration clause remains H in full force and effect as between the original parties, the building owners and the contractors, and I think they were entitled, if they were so minded, to go to arbitration, as in fact they did. I think the arbitrator appointed under the clause would be bound to entertain that claim and come to such conclusion as, on the terms of the contract and the relevant legal considerations, he thought to be just and I proper.

Counsel for the building owners, however, has further and principally relied on his main contention, which simply is that the fact of the assignment has divested the contractors of their right to claim from the building owners the moneys due under the contract; and he relies upon the express terms of s. 136 (1). He contends that the legal right to the debt or thing in action has passed away from the contractors entirely, and that they are now unable to give a good discharge for the debt if they should be paid that debt under the award or otherwise by the building owners. Counsel for the contractors has contended that his clients are right in

their submission and that the award of the arbitrator is right. He admits, and very properly admits, that the assignment in question to the bank was a legal assignment and was absolute and was a good legal assignment of an unquantified debt within the meaning of the section of the Act. He argued, however, that the arbitrator was bound, in an arbitration between these two parties, to quantify by his award the amount of that unascertained debt. He conceded that an award so made in the form in which it is made here could not receive effect except by the order of the court, and he contended that that order would not be made, because, once the award was made, the law, by virtue of the assignment, would transfer the debt to the assignee, namely, the bank. I do not think that these contentions are right. I think the arbitrator had jurisdiction, under the arbitration clause, to deal with this dispute, but in dealing with that dispute I think it was his duty, not merely to consider the terms of the contract within the limits of the document, but to consider the application and enforcement of these terms having regard to the legal position which the parties had created. In this case the contractors by their own act have divested themselves of their right to claim the debt, and that fact was before the arbitrator, and in considering the rights of the parties I think he was bound to give effect to that legal consideration. What he has done is to award that the contractors are entitled to recover the sum of £448 17s. 5d. against the building owners. If that award were to stand and to receive effect, the position would be that the building owners would have to pay that amount to persons who are not now their creditors and who could not give them a discharge for the debt; they would be liable to pay the same amount over again, or such amount as should be determined between those parties, to the bank, and could not plead fulfilment of the award as any defence to a claim on the part of the bank. It may be that if the award were to come before the court and the contractors were to seek to enforce it in its present form, the court, reading the award, would be bound to say that it was bad in its face and that the conclusion was inconsistent with the facts set out in the award and the premises; but that is the very question which I have now to consider and which I must consider. Just as I think the court would be bound to hold on a motion to set aside the award as bad on its face, I am bound to hold under the award stated in the form of a Special Case that it cannot be upheld in the form in which, subject to the case, the arbitrator has made it. Counsel for the applicants contended that the assignment was a matter entirely irrelevant to the arbitrator and outside his jurisdiction. I do not think that contention is right. An arbitrator may have to take into account, if such points are raised, while acting under an arbitration clause under a contract, matters arising under the general law, such as a statute of limitations if that defence were pleaded, and he would have to take into account matters like supervening illegality of impossibility of performance or frustration; in the same way he cannot, I think, close his eyes to the fact that the claimant, who comes to him for an award that he is entitled to recover moneys from the respondent, has in fact assigned those moneys away by valid assignment to some third party who is not before the arbitrator and who is not a party to the arbitration and is not a party to the arbitration clause.

That being so, I think the award of the arbitrator in which he finds that the contractors are entitled to recover £448 against the building owners, with the costs, cannot be upheld, and that his alternative award is the award which must receive the sanction of the court. According to that award, the decision is that the contractors are not entitled to recover anything against the building owners, and that the building owners are entitled to recover from the contractors "their taxed costs of the arbitration and the costs of this my award."

Solicitors: *Wingfields; Lea & Lea.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

# ALBEMARLE SUPPLY CO., LTD. *v.* HIND & CO.

[Court of Appeal (Lord Hanworth, M.R. Scrutton and Sargant, L.JJ.), July 15, 18, 29, 1927]

B [Reported [1928] 1 K.B. 307; 97 L.J.K.B. 25; 138 L.T. 102; 43 T.L.R. 783; 71 Sol. Jo. 777]

*Lien—Repairer's lien—Goods subject to hire-purchase agreement—Hirer forbidden to create lien—Provision not known to repairer—Loss of lien—Goods allowed to leave repairer's possession for temporary purpose—Repairer's claim for sum larger than justified—Appropriation of payments in general account.*

C Three taxicabs, which were let to B. by the A. company on a hire-purchase agreement containing a clause providing that the hirer would not create a lien upon the vehicles in respect of repairs, were garaged by B. with the defendants, who kept them in order, cleaned them and supplied them with petrol, oil, grease and tyres. Weekly accounts were rendered to B. by the defendants to D cover these items in respect of the three cabs and two other cabs kept by B. at the garage, and weekly payments were made, after a certain date on account. B. having defaulted in the payment of his instalments of purchase-money, the A. company claimed the return of the cabs, but the defendants refused to deliver them up, claiming a lien on them for the balance due to the firm on general account. In the first instance the defendants alleged that there was due to E them a sum greater than that for which their lien in fact was good. In an action of detinue by the A. company against the defendants,

**Held:** (i) the clause in the hire-purchase agreement providing that B. would not create a lien on the cabs did not disentitle the defendants from relying on their common law lien for the cost of repairs to the cabs since the limitation of authority contained in the clause had not been communicated to F them and they had no knowledge of it; (ii) the defendants' lien was not lost by their permitting the cabs to leave their garage every day for plying for hire on the streets on the understanding that they should always be regarded as being in pawn; (iii) the rule in *Clayton's Case* (1) applied to current accounts for goods supplied and work done rendered periodically with a balance carried forward, and, therefore, the payments made to the defendants by B. G must be applied in paying in chronological order the items of the general bill, irrespective of their nature, and the defendants could not re-open the account and appropriate payments so as to support their lien; (iv) although the defendants had originally insisted on larger rights than they could sustain, they had rendered accounts containing particulars from which the right amount in respect of which they claimed a lien could be calculated, and had never H waived their right to have the true sum due to them, and, therefore, they had not lost their lien on that ground.

**Notes.** Considered: *Bowmaker, Ltd.* v. *Wycombe Motors, Ltd.* [1946] 2 All E.R. 113; *Sorrell* v. *Paget*, [1949] 2 All E.R. 609. Referred to: *Near East Relief* v. *King, Chasseur & Co., Ltd.* [1930] 2 K.B. 40.

I As to legal and equitable liens, see 24 Halsbury's Laws (3rd Edn.) 143 et seq., and for cases, see 32 Digest 215 et seq.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 12 Digest (Repl.) 547, *4156*.

(2) *Cory Bros. & Co.* v. *Mecca, Turkish Steamship (Owners), The Mecca*, [1897] A.C. 286; 66 L.J.P. 86; 76 L.T. 579; 45 W.R. 667; 13 T.L.R. 339; 8 Asp. M.L.C. 266, H.L.; 12 Digest (Repl.) 540, *4098*.

(3) *Fisher* v. *Smith* (1878), 4 App. Cas. 1; 48 L.J.Q.B. 411; 39 L.T. 430; 27 W.R. 113; 4 Asp. M.L.C. 60, H.L.; 32 Digest 229, *137*. A

(4) *Weeks* v. *Goode* (1859), 6 C.B.N.S. 367; 141 E.R. 499; sub nom. *Wicks* v. *Good*, 33 L.T.O.S. 93; 32 Digest 234, *187*.

(5) *Simson* v. *Ingham* (1823), 2 B. & C. 65; 3 Dow. & Ry. K.B. 249; 1 L.J.O.S. K.B. 234; 107 E.R. 307; 12 Digest (Repl.) 537, *4072*.

(6) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest 233, *180*. B

(7) *Foster* v. *Colby* (1858), 3 H. & N. 705; 28 L.J.Ex. 81; 32 L.T.O.S. 110; 157 E.R. 651; 41 Digest 588, *4113*.

(8) *Jones* v. *Tarleton* (1842), 9 M. & W. 675; 11 L.J.Ex. 267; 6 Jur. 348; 152 E.R. 285; 32 Digest 233, *181*.

(9) *Friend* v. *Young*, [1897] 2 Ch. 421; sub nom. *Re Friend*, *Friend* v. *Friend*, 66 L.J.Ch. 737; sub nom. *Re Friend*, *Friend* v. *Young*, 77 L.T. 50; 46 W.R. 139; 41 Sol. Jo. 607; 32 Digest 393, *746*. C

(10) *Green* v. *All Motors, Ltd.*, [1917] 1 K.B. 625; 86 L.J.K.B. 590; 116 L.T. 189, C.A.; 32 Digest 248, *322*.

(11) *Seymour* v. *Pickett*, [1905] 1 K.B. 715; 74 L.J.K.B. 413; 92 L.T. 519; 21 T.L.R. 302, C.A.; 12 Digest (Repl.) 542, *4102*. D

(12) *Keene* v. *Thomas*, [1905] 1 K.B. 136; 74 L.J.K.B. 21; 92 L.T. 19; 53 W.R. 336; 21 T.L.R. 2; 48 Sol. Jo. 815, D.C.; 32 Digest 247, *321*.

(13) *Huth & Co.* v. *Lamport*, *Gibbs & Son* v. *Lamport* (1886), 16 Q.B.D. 735; 55 L.J.Q.B. 239; 54 L.T. 663; 34 W.R. 386; 2 T.L.R. 288; 5 Asp. M.L.C. 593, C.A.; 41 Digest 605, *4320*.

(14) *Dirks* v. *Richards* (1842), 4 Man. & G. 574; 5 Scott, N.R. 534; 6 Jur. 562; 134 E.R. 236; 32 Digest 234, *184*. E

(15) *Rumsey* v. *North Eastern Rail. Co.* (1863), 14 C.B.N.S. 641; 2 New Rep. 360; 32 L.J.C.P. 244; 8 L.T. 666; 10 Jur. N.S. 208; 11 W.R. 911; 143 E.R. 596; 12 Digest (Repl.) 126, *789*.

(16) *Hooper* v. *Keay* (1875), 1 Q.B.D. 178; 34 L.T. 574; 24 W.R. 485; 12 Digest (Repl.) 550, *4172*. F

(17) *City Discount Co., Ltd.* v. *McLean* (1874), L.R. 9 C.P. 692; 43 L.J.C.P. 344; 30 L.T. 883, Ex.Ch.; 12 Digest (Repl.) 552, *4185*.

(18) *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; 106 E.R. 281; 12 Digest (Repl.) 523, *3937*.

(19) *Hatton* v. *Car Maintenance Co., Ltd.*, [1915] 1 Ch. 621; 84 L.J.Ch. 847; 110 L.T. 765; 30 T.L.R. 275; 58 Sol. Jo. 361; 32 Digest 249, *332*. G

**Appeal** by plaintiffs from an order of SWIFT, J., in an action of detinue.

The facts are stated in the judgments.

*E. W. Cave, K.C.*, and *A. E. Woodgate* for the plaintiffs.

*Sullivan, K.C.*, and *Martin O'Connor* for the defendants.

H

The following cases were referred to in the argument: *Cory Bros. & Co.* v. *Mecca*, *Turkish Steamship* (*Owners*), *The Mecca* (2), *Fisher* v. *Smith* (3), *Weeks* v. *Goode* (4), *Simson* v. *Ingham* (5), *Scarfe* v. *Morgan* (6), *Foster* v. *Colby* (7), *Jones* v. *Tarleton* (8), *Friend* v. *Young* (9), *Clayton's Case* (1), *Green* v. *All Motors, Ltd.* (10).

*Cur. adv. vult.*

July 19. The following judgments were read. I

**LORD HANWORTH, M.R.**—The plaintiff company let three taxicabs to J. Botfield, severally, under three hire-purchase agreements dated respectively May 3, 1921, Sept. 13, 1922, and May 5, 1923. These agreements were all in the same form. The total purchase price of each taxicab was £785. They contained clauses providing that Botfield, the hirer, would (a) not sell, assign, pledge, mortgage, underlet, or part with the possession of the vehicle without the consent of the plaintiff company, (b) would keep the taxicab and its fittings and equipments

A in good repair, (c) would not create a lien upon it in respect of such repairs. Botfield had two other taxicabs, and he kept all these five taxicabs at the defendant's garage. The defendants looked after them, cleaned them, supplied tyres and grease, oil and petrol for them, and did all necessary repairs and charged rent for them. In April, 1925, Botfield had got into arrear with his payments under the hire-purchase agreements to the extent of £340. The plaintiffs, accordingly, gave notice B to Botfield on May 1, 1925, to determine the hire-purchase agreements and required the three cars to be delivered up to them. The defendants, when a demand for the three cabs was made upon them by the plaintiffs on May 19, 1925, claimed to resist it, and to hold the cabs under a lien for the balance of their account due to them from Botfield. That account, which had been incurred in respect of all five taxicabs amounted to the sum of £113 18s. 3d., and it was for this sum that the C defendants claimed to hold the plaintiff's cabs. On May 29, 1925, the writ in this action was issued. On June 22, 1925, an order was made for payment into court of the sum of £113 18s. 3d. and for the three taxicabs to be delivered up to the plaintiffs without prejudice to the rights of all parties. Botfield, after the action was brought, made a payment to the defendants which reduced the sum owing to them to £94 11s. 2d., and that is the sum for which they claim now to D exercise their lien upon the three cabs. The defendants stated in answer to interrogatories that there was money due on each taxicab, but that they were unable to sever the total so as to show what.

By a letter dated May 12, 1927, written on their behalf, the defendants purported to make an appropriation of the total sum of £1,127 16s. 9d. received from Botfield from May 9, 1924, down to May 7, 1926, so as to leave their charges for repairs only E still owing, on the principle declared by LORD MACNAGHTEN in *Cory Bros. & Co.* v. *Mecca, Turkish Steamship (Owners), The Mecca* (2). The system, however, on which accounts were kept and delivered, in my judgment, negatives the right to appropriate the payments made as claimed by the defendants. The accounts were delivered week by week ; and weekly payments were made by Botfield, sometimes of an amount on account merely, sometimes by payment of the sum due in the F last week. But in all cases the defendants appropriated the sums received against the total outstanding, made up of the balance previously due, and the additional amount which had accrued for the week's supplies and work done. The total outstanding after such appropriation was communicated to Botfield and such conduct prevents the defendants from now saying that the right of appropriation which they claim to exercise, remains open to them. The intention of the creditor is G to be gathered from the accounts so delivered and communicated to the debtor and the creditor has thus determined his choice: see per LORD MACNAGHTEN in *Cory Bros. & Co.* v. *Mecca* (2) and see also *Simson* v. *Ingham* (5) and *Friend* v. *Young* (9) and *Seymour* v. *Pickett* (11). The accounts, therefore, cannot, in my judgment, be opened up and readjusted so as to justify a claim of lien by the defendants for such part of the various items in the accounts as would afford the right of lien to H them—that is, the repairs. However, even though they may be described as maintenance, the items so incurred and charged were for repairs to the taxicabs, and it would seem that independently of the amounts received and appropriated there remained unpaid some items of repairs executed by the defendants which would afford them the right of lien upon each of the cabs respectively, although for a sum much smaller than the amount of £94 11s. 1d. claimed. I

The plaintiffs, however, rely upon cll. 4 and 5 of the hiring agreement as preventing Botfield from creating any lien which would prevent their right to the return of the taxicabs. The defendants knew that the cabs were held by Botfield under hire-purchase agreements, though they did not know the precise terms of the conditions contained in those agreements. That such a lien arises as a right of the repairer is clear from *Keene* v. *Thomas* (12) and *Green* v. *All Motors, Ltd.* (10), and, although the contract between the plaintiffs and Botfield contained the clauses that I have referred to, that contract did not, in my judgment, defeat the right of the

defendants which was not derived from Botfield, but was a right which arose to them against Botfield upon the execution by them of the repairs, and is not defeated by an unknown condition in the agreement between the plaintiffs and Botfield. It was argued that the lien was lost by the dispatch of the taxicabs from the garage for use in the ordinary course of their purpose. There was evidence that an agreement had been made by the defendants with Botfield in December, 1924, that the taxicabs, even if permitted to leave the garage for use, should be treated as in pawn —that is, that the lien should not be lost. In my judgment, the defendants did have a right of lien upon the three cars in their possession in May. Botfield could not have complied with the terms of his agreement to keep the cars in repair, without the lien arising to the defendants, if their account for them was unpaid.

There remains, however, the question whether the defendants have lost their lien by their demand for a sum considerably beyond the true sum for which their lien stood good. In many cases of lien it is not possible to name the exact sum due, so as to enable the owner to tender it and obtain possession of his goods. For instance in a claim for general average, as in *Huth* v. *Lamport* (13), where LORD ESHER said that a tender would have to be made of a reasonable sum to cover the approximate sum due—at the risk on either side of its proving adequate or the reverse. In the present case the plaintiffs appear to have refused to recognise any claim of lien, in reliance on the terms of their hire-purchase agreement. I do not think they were ready to make any tender to satisfy the lien. The defendants, on the other hand, insisted upon larger rights than they can sustain ; but if they have a lien it is not lost by such a demand in the circumstances of the present case. That, I think, appears from *Scarfe* v. *Morgan* (6), where it was decided that the lien for a small sum for the services of a stallion was not lost, although a demand to retain the mare was made for such a sum and for other claims arising aliunde : see also *Dirks* v. *Richards* (14). The lien was claimed upon the account for the repairs and other items—the repairs were never lost sight of or abandoned. It cannot thus be imputed against the defendants that they waived their right to have the true sum due to them tendered. They insisted upon their rights. Upon the issues thus joined and the claims set up on either side I am of opinion that the defendants were entitled to refuse delivery to the plaintiffs and that their defence succeeds. The actual amount for which the defendants are entitled to hold the cars must be determined, unless otherwise agreed between the parties, by an official referee, who will have power to deal with the costs of the inquiry before him. But the appeal fails and must be dismissed. Each side has, however, pressed for too much, and there will be no costs of the appeal.

**SCRUTTON, L.J.**—This appeal, though not involving much money, raises question of interest to those interested in taxicabs—owners who let them out on hire-purchase agreements, the hirers, and the garages which repair them.

The Albemarle Supply Co. let on hire to Botfield three taxicabs, which I will call the Albemarle cabs. Botfield had two other cabs. He garaged the five cabs with Hind & Co., who provided them with garaging, washing, oil, petrol, and tyres, and repaired them when necessary. Up to May, 1924, Botfield received weekly bills from the garage and paid them in full. From that date he began to get into arrear. The weekly accounts debited the amount in arrear brought forward, credited the amount paid, which was sometimes a lump sum, sometimes the exact amount of the current week's bill, and carried forward the balance. In May, 1925, the owners, whose hire-purchase instalments were also in arrear, terminated the hiring agreements, and sent to fetch the Albemarle cabs from the garage. Mr. Hind said Botfield owed him money ; he names an amount, £113 18s. 3d., obtained by debiting the total charges for all five cabs, £1,231 18s. 10d., and crediting all Botfield's payments, £1,108 0s. 7d. I think there is no doubt that Hind then claimed to keep the Albemarle cabs as security for the whole of Botfield's account for the five cabs. He then knew nothing about appropriation or the rule in *Clayton's Case* (1) or

A the difference between general and particular liens. He, however, gave the Albemarle company full particulars of the credit and debit items of the account, and also gave full details of the charges for each of the three Albemarle cabs. The Albemarle company who thought they had a clause in their hire-purchase agreement which would prevent Botfield from creating any lien against them, made no tender in respect of each of their three cabs, in respect of all or any of the B repairs done to it, though they had accounts which would have enabled them with considerable trouble to make an approximate tender of the amount charged for repairs to each cab. They declined to pay anything and sued Hind & Co. for detinue, Hind & Co. replied claiming a lien. On being asked for particulars they at first claimed a lien for £113 18s. 3d. for "repairs done" and materials supplied. This figure was in fact the balance of the account for all five cabs, the account C including rent, washing, oil, and petrol, which would not be the subject of a repairing lien. The cabs were released on the payment of the £113 into court. Being ordered to give further particulars of how the £113 was arrived at, they did not do so in the action, but on May 12, 1927, their solicitors wrote a long letter bringing out a balance due of £94 11s. 1d. They got this by adding to the £1,222 18s. 10d. charges a small item of 9s. and bringing out £1,223 7s. 10d. and deducting £1,127 D 16s. 9d. payments by Botfield. This sum was increased from £1,108 0s. 7d. by purporting to add £19 16s. 2d., an alleged subsequent payment by Mr. Botfield. The solicitors then proceeded to appropriate all the payments going back to May, 1924, to items for which they had no lien against the Albemarle company. This left £124 odd to spare which they appropriated to the account for repairs to the three cabs said to be £219 5s. 7d., leaving £94 11s. 1d. unpaid, for which they now claim E a lien as against the £113 18s. 3d. originally claimed and paid into court.

In this state of affairs the case came into court. The weekly accounts were produced by Botfield, but the accounts given to the Albemarle company, though very material to the question whether that company had sufficient information to require them to tender, were not produced by that company until this court was reached ; they were indeed not asked for by the defendants. The plaintiffs first line of F attack on the lien claim was a clause in their hire-purchase agreement providing :

> "The hirer shall not have or be claimed to have any authority to pledge the credit of the owners for repairs to the vehicle and to create a lien upon the same in respect of such repairs."

G This court, in *Green* v. *All Motors, Ltd.* (10), has held that the mere knowledge by the repairer that there is a hire-purchase agreement without knowledge of its exact terms relating to the car which he repairs does not deprive him of his lien. The owner leaving his cab in the hands of a man who is entitled to use it gives him an implied authority to have it repaired with the resulting lien for repairs. ROWLATT, J., had held in a previous case, and the judge below in the present case followed his H decision, that a contractual limitation of authority not communicated to the repairer does not limit the implied authority derived from the hirers being allowed to possess and use the car. I agree with this view. If a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation, of which they are ignorant, of the apparent authority. The owners can easily protect themselves by requiring information as to the garage where the cab is kept, and notifying the garage owner that I the hirer has no power to create a lien for repairs. They will thus escape the lien, though they may not get their cab repaired.

The plaintiff next contended that any lien was lost because the cabs went out of the possession of the garage each day to ply for hire. The defendant proved an agreement with Botfield at a time when the lien existed that the cabs should go out for hire each day on the terms that they should be returned to the garage each night, the lien continuing when the cabs were in possession of the garage. I do not think any plying for hire under this agreement prevented the lien if any from

continuing. And, in my view, repair of a damaged cab, though it may be described as maintenance, gave rise to a repairer's lien.

It was next said that the lien for repairs was lost inasmuch as it was originally claimed for a larger amount and a different cause than the right one. I have considered the numerous authorities cited, and, in my view, the law stands as follows. A person claiming a lien must either claim it for a definite amount or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then, in the absence of express agreement, tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (i) if he has no knowledge or means of knowledge of the right amount ; (ii) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful. The fact that the claim is made for other than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed : see *Scarfe* v. *Morgan* (6), *Dirks* v. *Richards* (14), *Huth* v. *Lamport* (13), *Rumsey* v. *North-Eastern Rail. Co.* (15). In the present case the accounts handed to the plaintiffs showed the items relating to the repairs to each cab ; the plaintiffs did not tender because they thought their agreement prevented the creation of the lien, not because they could not ascertain what repairs were done. I do not think the defendants ever pinned themselves definitely to a demand for the whole sum ; they showed the whole of their bills against Botfield, and as Mr. Hind said, "wanted to come to some arrangement." The lien not being lost, there remains the question of amount. The amount claimed was wrong on the ground on which it was originally claimed, a balance of all accounts. I do not think the defendants, after delivering accounts every week showing the balance then due, were entitled to re-open all these accounts, and appropriate payments which had been used to discharge contemporary claims to quite different items. The rule in *Clayton's Case* (1) appears to me to apply to current accounts for goods supplied and work done rendered periodically with a balance carried forward, just as it does to banking accounts. *Hooper* v. *Keay* (16) was a current account for supply of goods, and the court cite with approval and apply Bramwell, J.'s, statement in *City Discount Co., Ltd.* v. *McLean* (17) (L.R. 9 C.P. at p. 698) :

> "I quite agree with the principle of the cases cited such as *Clayton's Case* (1) and *Bodenham* v. *Purchas* (18). . . . It was reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit."

Applying this rule the defendants' attempted appropriation was too late and the ultimate balance due must be treated as applying the last items in point of time to make up its amount. The judgment for £94 11s. 1d. must, therefore, be discharged, and there must be an inquiry ordered before an official referee unless the parties agree to a special referee as to the amount of items for repairs of the three cabs included in the ultimate balance ascertained as above.

**SARGANT, L.J.**—The first question is whether the hirer, Botfield, could create as against the plaintiffs and in favour of the defendants any lien at all on the three taxicabs in question for the cost of necessary repairs. In my judgment, he could. The general relations between him and the plaintiffs were such as to render it inevitable that the cabs should be repaired from time to time, and for that purpose ordinary business requirements involved the employment of third persons to do the repairs. This being so, it followed that these third parties would obtain a lien for the cost of the repairs, which, of course, involved the improvement on each occasion of the existing condition of the cabs : *Green* v. *All Motors, Ltd.* (10). The existence in the agreement of Sept. 13, 1922, of a special clause preventing the hirer from creating any lien for repairs does not, in my judgment, operate to the

prejudice of the defendants in the absence of their knowledge of that clause. The result might be otherwise if (as is not the case) the defendants had to rely upon any authority specially given to the hirer by the agent. In that case the special authority could hardly be invoked except subject to the special limitation. I may add that the present case is quite different from *Hatton* v. *Car Maintenance Co., Ltd.* (19). There the dispute was between the owners and the hirer only, and the rights of third parties were not involved.

Next comes the question as to the extent of the lien, if any. The fact that one general account was rendered, relating to these hired cabs and two others, and including items for garage, washing, petrol, grease and so on, does not, in my opinion, operate as a waiver of the three separate liens in respect of those items which represent repairs to each of the three cabs respectively. But the facts as to the successive payments on account of the total amount from time to time owing on the general account, and as to the striking of successive weekly balances, involve the application of the rule in *Clayton's Case* (1) and deprive the defendants of the right to make any such appropriation as is contended for in their advisers' letter of May 12, 1927. In my judgment the defendants had an enforceable lien on each separate cab only to the extent of the cost of repairs to that particular cab, so far as unpaid at the date of the issue of the writ; and in ascertaining the cost so remaining unpaid the payments on account from time to time made by Botfield are to be applied in paying in chronological order the various items of the general bill irrespective of their nature.

The last question is the very important one as to the costs of the action, and it is this question which has been the principal subject of the argument before us. In my judgment, the case on this point is governed by *Scarfe* v. *Morgan* (6), and, indeed, is a stronger case in favour of the defendants. Though the defendants claimed much too large a lien, they were entitled to a lien to a smaller extent, and the plaintiffs had the materials for ascertaining the true extent of the lien, and for making a tender accordingly. It is clear that the plaintiffs were concerned, not with the question of amount, but with the question whether any lien at all could be created. They wanted to establish that their special clause got over the decision in *Green* v. *All Motors, Ltd.* (10). I agree in the judgment proposed.

Solicitors: *Amery Parkes & Co.; Edmund O'Connor & Co.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

A

# Re CHARTRES. FARMAN AND ANOTHER *v.* BARRETT

[CHANCERY DIVISION (Astbury, J.), January 21, 22, 27, February 2, 1927]

[Reported [1927] 1 Ch. 466; 96 L.J.Ch. 241; 137 L.T. 52]

*Will—Class gift—Ascertainment of class—Trust after twenty-one years for children or remoter issue of R. as he should by will appoint—Gift in default to all children of R. attaining twenty-one years—One child attaining twenty-one within the twenty-one years period—Release of power by R.*

B

A testator who died on Mar. 11, 1905, by his will directed that, after the expiration of twenty-one years from his death, two-fifths of his residuary estate should be held in trust for the children or remoter issue of his son R. as R. should by will appoint, and that in default of appointment the two-fifths should be in trust for all the children of R. who should attain twenty-one years or if daughters marry. R. had one child only, a son A., who attained twenty-one in 1916. In 1924 R. released his testamentary power of appointment. A. died in February, 1925, having by will devised his residuary estate to R. R. was still living when the period of twenty-one years from the death of the testator expired on Mar. 11, 1926.

C

D

**Held:** that the so-called rule of convenience, by which the members of a class were to be ascertained at the earliest possible moment and which would result in the class being closed when A. became 21 to the exclusion of any future children of R., was to be applied, although (i) it might act contrary to the intentions of the testator ; and (ii) the application of the rule was doubtful where there was a power of appointment over the funds in question, but, in the latter event, R. had released his power and so there was a trust after the expiration of the twenty-one years for all the children of R.

E

**Notes.** Considered: *Re Bleckly*, *Bleckly* v. *Bleckly*, [1951] 1 All E.R. 1064. As to gifts to a class see 34 HALSBURY'S LAWS (2nd Edn.) 266 et seq., and for cases see 44 DIGEST 760 et seq.

F

Cases referred to :

(1) *Davidson* v. *Dallas* (1808), 14 Ves. 576; 33 E.R. 642, L.C.; 44 Digest 1200, *10396*.

(2) *Coleman* v. *Seymour* (1749), 1 Ves. Sen. 209; 27 E.R. 987, L.C.; 44 Digest 1107, *9574*.

G

(3) *Re Paul's Settlement Trusts*, *Paul* v. *Nelson*, [1920] 1 Ch. 99; 88 L.J.Ch. 530; 121 L.T. 544; 63 Sol. Jo. 724; 44 Digest 784, *6414*.

(4) *Re White's Trusts* (1860), John. 656; 70 E.R. 582; 37 Digest 529, *1201*.

(5) *Re Master's Settlement*, *Master* v. *Master*, [1911] 1 Ch. 321; 80 L.J.Ch. 190; 103 L.T. 899; 55 Sol. Jo. 170; 37 Digest 476, *749*.

(6) *Re Stephens*, *Kilby* v. *Betts*, [1904] 1 Ch. 322; 73 L.J.Ch. 3; 91 L.T. 167; 52 W.R. 89; 48 Sol. Jo. 15; 44 Digest 773, *6309*.

H

(7) *Re Emmet's Estate*, *Emmet* v. *Emmet*, (1879), 13 Ch.D. 484; 49 L.J.Ch. 21; 42 L.T. 4; 28 W.R. 301; affirmed (1880) 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 28 W.R. 401, C.A.; 44 Digest 769, *6282*.

(8) *Andrews* v. *Partington* (1791), 3 Bro. C.C. 401; 29 E.R. 610, L.C.; 44 Digest 768, *6266*.

I

**Adjourned Summons** issued by the trustees of the will of Archibald Carew Chartres to decide whether under the will of his grandfather Richard Carew Chartres, the estate of their testator was absolutely entitled to two fifth shares of the residuary estate of Richard Carew Chartres, or whether future children—if any—of the testator's father, Richard Carew Chartres, the younger, would be entitled to share therein.

By his will, dated Feb. 13, 1925, Archibald Carew Chartres, who died on Feb. 26,

1925, devised his residuary estate to his trustees, of whom his father was one, upon trust for sale and to hold the net proceeds in trust for his father.

*Gavin Simmonds*, *K.C.*, and *Dighton Pollock*, for the plaintiffs, referred to *Davidson* v. *Dallas* (1), and *Coleman* v. *Seymour* (2) that the rule applied in a case where there was a power of appointment. They submitted that the class here was closed at the expiration of the twenty-one years as Archibald had then attained twenty-one and no other child of Richard could share.

*Stafford Crossman*, for the trustees of the will, referred to the preface to HAWKINS ON WILLS; THEOBALD ON WILLS (7th Edn.), p. 310, *Re Paul's Settlement Trusts* (3), *Re White's Trusts* (4) and submitted that any after-born children would be entitled to share in the fund.

*J. L. Stone* for Harriette Chartres, daughter of Richard Chartres the elder.

*Gavin Simonds*, *K.C.*, in reply, referred to *Re Master's Settlement* (5) where EVE, J., followed *Coleman* v. *Seymour* (2).

**ASTBURY, J.**—This is a summons in the matter of the will of Archibald Carew Chartres to determine whether upon the true construction of the will of his grandfather, Richard Carew Chartres, the elder, and in the events which have happened, the plaintiffs, as executors of Archibald Carew Chartres, the only child of the plaintiff, Richard Carew Chartres, the younger, are now entitled, subject to a mortgage and prior interests created by the will, to two equal fifth parts of the residuary estate of Richard Chartres, the younger, or whether future children—if any—of the plaintiff, Richard Carew Chartres the younger, will be entitled to share therein. The question depends upon whether what has been described as a rule of convenience—to ascertain as soon as possible the class to take under the gift of the fund in order that the beneficiaries may know what their shares are and that the executors may distribute the fund—ought to be applied in the circumstances of the present case.

By his will, dated March 21, 1904, Richard Chartres, the elder, appointed executors and trustees and devised and bequeathed the residue of his real and personal estate in trust for payment during a period of twenty-one years after his death of the income of his residuary funds as therein mentioned, and, after certain bequests, he provided in cl. 12 that from and after the expiration of such period of twenty-one years his trustees should, if then paying an income of £100 a year to his son, the plaintiff Richard Carew Chartres, the younger, continue to pay such income to him until he should assign or charge the same, and if his daughter Harriette Blanche Chartres should be then living should continue to pay to her an income of £150 a year until her death. Clause 13, upon which the question in this case mainly turns, is as follows:

> "And from and after the expiration of such period of twenty-one years, but subject to the provisions of the last preceding clause hereof, I give and bequeath the trust funds as to two-fifths thereof in trust for the child or children or remoter issue of my said son Richard Carew Chartres [the younger] . . . in such shares (if more than one) and in such manner as my said son shall by his last will appoint in default of such appointment and so far as any such appointment shall not extend in trust for all the children of my said son Richard Carew Chartres . . . who being sons attain the age of twenty-one years or being daughters attain that age or marry."

By cl. 14 the testator provided for the remaining three-fifths of his residue, giving it in trust for his daughter, Harriette Blanche Chartres, for life and after her death in trust for her children or remoter issue as she should appoint, and in default of appointment in trust for all her children, and, if there be no child of his daughter who being a son should attain twenty-one or being a daughter should attain that age or marry, upon the trusts and with and subject to the powers and provisions therein declared concerning the two fifth parts of his residue or such

of them as should then be subsisting and capable of taking effect, with a gift over which is immaterial. Richard Chartres the elder died on Mar. 11, 1905, and his will was duly proved. His widow died in January, 1909. He had two children, the plaintiff, Richard the younger, and the daughter Harriette. The plaintiff Richard has had one child only, Archibald Carew Chartres, who was born on Mar. 18, 1895. By a deed poll dated Mar. 12, 1924, the plaintiff Richard released his power of appointment over the two-fifths of the residue referred to in cl. 13 of the will. A mortgage dated Aug. 29, 1924, was then made between Archibald, the son of Richard, and an assurance company to secure the payment of £7,500 and interest. By a deed poll of Sept. 9, 1924, the plaintiff Richard released his power of appointment over the remaining three-fifths of his father's residue. Archibald made his will on Feb. 13, 1925, that is, the year after these powers were released, whereby he appointed his father Richard the younger and the plaintiff, Harold Augustus Farm, executors and trustees, and, subject to a specific bequest, devised and bequeathed the whole of his residuary estate upon trust for his father Richard absolutely. Archibald died on Feb. 26, 1925, that is, a few days after he made his will. Harriette, the daughter, was born in 1872 and has never been married, and the plaintiff Richard, the father of Archibald, now claims to be entitled, subject to the mortgage and the prior interests in the will, to the two-fifths of the residue given by cl. 13 of his father's will.

There can, of course, be little doubt that Richard the elder, as to the two-fifths of his residue, intended that it should go to all the children of Richard the younger who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, unless Richard, by exercising his testamentary power, gave his property to his children or remoter issue or some or one of them. In other words, there can be no doubt that Richard the elder intended that any child of Richard the younger who should come into existence in Richard's lifetime should take in default of appointment, though Richard by exercising that power could distribute two-fifths in the way I have mentioned; and the question which I have to decide, and which, in my judgment, is an extremely difficult one, is whether this so-called rule of convenience, in the events which happened, entitle the personal representatives of Archibald, who died having acquired a vested interest, subject to its being divested or altered in amount either by the exercise of the power to appoint to remoter issue, or in default of appointment by other children being born to Richard, is now by reason of the rule entitled to defeat what, in my opinion, was the plain intention of the testator.

The principle of this rule is that the class to take is to be ascertained as soon as possible, in order that the beneficiaries may know what their shares are, and that the fund may be distributed. The rule is, of course, obviously convenient to those who take under it to the exclusion of others who were intended to benefit, but the irony of the rule is no doubt more apparent to those who are by its application excluded from taking what the testator intended that they should take. The rule is so well established, and its ambit is so clearly laid down, that, if the present case did not raise a point of equity which I do not think has ever been directly decided, there would be little more to say. Having regard, however, to this point of equity, I will endeavour to state very shortly what this rule is in general though not in exhaustive terms. It may, I think, be divided into three heads. First, if there is an immediate gift in a will to the children of A. the rule lays down that only those children in existence at the death of the testator shall take, although his intention was obviously different. By way of exception to this first rule, if there are no children of A. in existence at the testator's death then the rule of convenience ceases to operate and all subsequently born children take in accordance with the testator's intention. The second head of the rule may, I think, be stated as follows: If the gift is in futuro, as, for instance, to A. for life with remainder to the children of B., the rule provides that only those children of B. shall take who come into existence prior to the death of A. Here again there is an exception

that if there are no children of B. alive at the death of A., then the rule ceases to operate and all subsequently born children take. The third head may be stated as follows: Where there is a gift to A. for life, and after his death to the children of B. who attain twenty-one then, if there are children of B. at the death of A. who have attained twenty-one, the rule applies and the class closes. If there are no children of B. at the death of A. who have attained twenty-one, but children of B. subsequently attain twenty-one, then the class closes when the first child so attains that age, and in all cases the rule is excluded if there is an express intention of the testator to the contrary.

I have tried to formulate the rule in this manner in order to appreciate the exact question as to its application which arises in the present case, although the language and headings in and under which I have stated the rule are not intended to be exhaustive. In the present case there is a power of appointment contained in the clause of the will in question, and the first matter to be discussed is the extent, if any, of alteration in the application of the rule which is or may be made by the existence of this power. The nearest case which counsel have been able to find on this point is a decision in *Coleman* v. *Seymour* (2). This was a case of an immediate gift as distinct from a gift in futuro.

> "A man devised to his daughter, Jane, wife of Coleman, £3,000 for the use of her younger children, to be by her distributed among them in such manner, shares and proportions, as she shall think fit; and if no appointment was made by her, then equally to be divided among her younger children; and to survive, if any of the children died under age or unmarried. The first question was, whether the legacy should be for those younger children only, which she had at that time by that husband; or whether the younger children by any future husband should also take."

LORD HARDWICKE decided that this was a vested present legacy in the children existing at the date of the will and the death of the testator, subject as to variation between them by the exercise of the power, but that the power did not extend to enable Jane to include in the class any younger children by a later marriage. In one sense LORD HARDWICKE applied this rule, but there is ground for saying that he may have come to his conclusion on a question of construction without applying the rule at all. If he came to the conclusion that, there being these younger children in existence at the date of the will and at the date of the testator's death, he—the testator—only intended by the expression "younger children," those existing children to be benefited, then there was no need to apply the rule. The Lord Chancellor, in his judgment, leaves it, perhaps, in doubt whether and to what extent he thought the will was necessary for his decision, because he says this (1 Ves. Sen. at p. 210):

> "As to any children that may be born of a second marriage, they could not be intended; for she having four children by Coleman at the making of the will, if after his death she married a second husband, having a great estate settled on the elder son of that marriage, that son within the description of a younger child would have been contrary to the intent." . . . But the words could not take in the children born subsequent to the making, or death of the testator; being a present legacy. It might be different had he given it to her for life, and afterwards to her younger children; because then it would be contingent, and a devise over; but here it is in present, and the same as if he had said, equally to be divided unless she appoints; being a vested interest and immediate gift to them, subject to the power of variation given to the mother. Nor does the clause of survivorship make any difference, being still vested; this legacy then both in the intent and words is present to them, and not to be extended to those born after his death; and it can only mean children living at the making of the will, or at furthest at the death of the testator."

That is quite consistent with the Lord Chancellor reading that the general expression "younger children" must be dealt with in accordance with the rule, and if Jane had further children the class could not be opened in consequence of the application of the rule, there being present vested gifts in the then younger children at the death of the testator. The text-books regard this case as being one in which the rule was applied, although it is not a very strong one as far as extending the rule is concerned, as it is quite consistent with the Lord Chancellor's judgment that he decided it on the construction of the gift itself without necessarily having to resort to the rule.

Before proceeding, it is interesting to try to ascertain the origin of the rule and the circumstances in which it came to be made. As far as the text-books are concerned it is, I think, throughout treated as a rule of convenience, by which a person having a vested interest at a date is entitled to be paid, and those who come into existence afterwards are excluded, in order to procure a distribution at the vested date of payment, but that does not satisfy me as to why it should ever have been made at all. If a man leaves his property to the children of A. B., why it is a rule of convenience that one of two children of A. B. shall take and the other one shall be excluded is difficult to see, especially if one considers the interest of the second child. The only explanation that I can find of the origin of this rule, and which, if it is accurate, enables one the more easily to determine upon its application in a difficult case, is a statement by BUCKLEY, J., reported in *Re Stephens, Kilby* v. *Betts* (6). The learned judge said this:

> "When the rule is adopted the solution arrived at is the result of an endeavour by the court to reconcile two apparently inconsistent directions; the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained."

That is the most intelligent reason for this rule that I have been able to discover. If it be the fact, in any case, that a testator has given two apparently inconsistent directions, the one as to when his fund shall be divided and the other as to who shall take, there seems little inconsistency or hardship in the court trying to give effect to the testator's intention to be derived, although with difficulty, from those apparently inconsistent directions, and it seems to me, with great respect to the many decisions in the past, that if you can discover from a testator's will a direction or intention that the fund in question shall be distributed at a certain time, and a direction that the class of people who shall take it are such that at that particular time of distribution they cannot be wholly ascertained, there only being some in existence, then it does not seem very difficult to appreciate the reason for cutting the knot in the way that has been done. Whether the explanation is consistent with all the decisions in which the rule has been applied I do not propose to state or inquire.

In *Re White's Trusts* (4) there is a passage of WOOD, V.-C.'s, in a case where a power exists which is in these words (John. at p. 659):

> "In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence."

This is a very striking passage because it apparently refers to a case where a testator gave property to A. B. for life with remainder to the children of C. D. as X. should appoint, and one would have thought that in that case as long as the power of appointment existed it would be impossible to apply the rule in favour of any particular children of C. D. who were in existence at the death of A. B. Speaking for myself I should have thought that, if the power had been such as I have suggested, it would have been quite impossible to apply the rule to the children of C. D. living at the death of A. B., so long as the power was in existence which might alter the people who may ultimately take. I mention that as showing

A the extraordinary force that has come to be given to this so-called rule of convenience.

The fact that the rule when applied more or less defeats the intention of the testator does not seem to be disputed. Many judges have commented upon it and some have deplored it. In *Re Emmet's Estate* (7), a testator gave the income of his property to H. E. for life and after his death he gave one-third of his property B in trust for all and every the children of G., the shares to be conveyed and paid to them at twenty-one or marriage. H. E., the tenant for life, died a bachelor. At his death G. was a widower with two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom lived to attain that age. Another child was born, and it was held by HALL, V.-C., and the Court of Appeal that the six children or their representatives were entitled and the after- C born child was excluded. That is an instance of the third head of the rule to which I referred some time ago. HALL, V.-C., says (13 Ch.D. at p. 488):

> "The rule which permits any future-born child to be let in until the time when one child attains the age at which he is entitled to call for an actual payment over of his share, may, as LORD LOUGHBOROUGH said in *Andrews* v. *Partington* D (8), occasion wonder to any person who is not trying a case according to legal decisions. . . . Whether anyone can or cannot understand the rule, it is one founded upon convenience; as it would not allow the going beyond the particular time when one of the children could say, 'actually pay me over my share.' . . . The authorities seem to me to amount to this: that where, upon looking at the whole will, the testator must be considered to have made it upon the basis or E footing of adopting or taking a certain time as the period of distribution or division, the court must, taking that period, construe the will accordingly, although possibly it is not the period for the actual distribution of the fund."

That, I think, is in exact accordance with the views expressed by BUCKLEY, J., which I have read. That case went to the Court of Appeal, and JESSEL, M.R., F said (13 Ch.D. at p. 490):

> "Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that, since when a child wants its share it is convenient that the payment of the G share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up H to the time when a share becomes payable."

Then he discusses the particular case before him.

Assuming, as I do, that this rule originated in attempting to solve two apparently inconsistent directions, one must find in order to apply it a period of distribution pointed to by the testator and a class to take at that period which may subsequently I be extended beyond its then numbers. In the present case, having regard to the fact that one is asked to depart from the intention of Richard Chartres, the elder, the clause upon which the present question turns may be looked at from many points of view. There is no doubt, I think, that this testator pointed to a period of distribution which he refers to as "from and after the expiration of twenty-one years," but it is extremely difficult to say that he takes that as a period when anybody will be entitled to call for anything provided his son, Richard the younger, was still living, because from and after the expiration of twenty-one years subject to the prior interests he gave and bequeathed this fund in trust for the child or

children and remoter issue of his son Richard as he should by will appoint. It is difficult for me, at all events, to imagine that this testator dreamt for a moment that during the lifetime of Richard one of his children should take to the exclusion of others, if any, who might be born. But the matter does not end there, because, in default of such appointment and so far as the appointment shall not extend, the testator bequeathed this fund in trust for all the children of Richard who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. When Archibald, the son of Richard, attained twenty-one, he, being at that time Richard's only child, had a vested interest in this fund subject to its being divested or its amount being varied, either by Richard appointing by will if there was any person other than himself to whom such appointment could be made, or, secondly, by there being other children born to Richard during the existence of this power. So much for the clause if nothing further had happened to this power except Richard's death leaving it unexecuted, but the real difficulty in this case arises from the fact that, notwithstanding the apparently express intention of Richard the elder in the direction which I have attempted to point out, the power given to Richard the younger is a right which he by law can release. Richard has released his power and is still living, so that under the testator's own directions the trust in default must inevitably operate. If there had been no interposed power this would then have been a perfectly simple case within the third heading of the rule that I have referred to, because it would then have been a gift on the expiration of a period, that is, a gift in futuro for all the children of Richard who, being sons, should attain twenty-one, or, being daughters should attain that age or marry, and the class would be closed upon the existence of Archibald having attained twenty-one at the end of the period of the twenty-one years. The difficulty which I feel is, the rule in question being one which, although absolutely binding upon me, is not to be extended except where necessary, especially having regard to the fact that it is a rule which defeats in most cases where it is applied the deliberate intention of the testator, whether the trust in default in cl. 13 ought not to be considered as expressly extending to all the children of Richard, that is, all his children born before the death of Richard, that is, all his children who, being sons, shall attain twenty-one, or, being daughters, shall attain that age or marry. If there is a direction which necessitates that construction then the rule ought not to be applied to it.

On the whole, although with considerable misgivings, I have come to the conclusion that, it being within the legal power or within the legal right of the donee of this power to release it, within the true intention of this clause it ought to be construed, in the events which have happened, as a trust for all the children of Richard who, being sons, shall attain twenty-one, or, being daughters, shall attain that age or marry as from the date of the release of this power. If that is the true construction then the rule applies beyond all question. I think myself on the whole that that is the construction that I am bound to adopt, and that, the fund not being distributable in accordance with the trusts in default, the rule must apply, and notwithstanding the circumstances in which the power was released, and the fact that thereby the property has come to Richard through the will of his son, I think that the question in the summons must be answered in the first alternative and that the future-born children, if any, will not be entitled to participate in this fund.

Solicitors: *Farman, Daniell & Co.; Paterson, Snow & Co.*, for *Hart, Reade & Co.*, Eastbourne.

[*Reported by* E. Knowles Corrie, Esq., *Barrister-at-Law.*]

A

# BOWKER *v.* WOODROFFE

[King's Bench Division (Lord Hewart, C.J., Avory and Shearman, JJ.), May 3, 1927]

B [Reported [1928] 1 K.B. 217; 96 L.J.K.B. 750; 137 L.T. 347; 91 J.P. 118; 43 T.L.R. 516; 25 L.G.R. 306; 28 Cox, C.C. 397]

*Food and Drugs—Analyst's certificate—Expression of opinion—No recognised standard of quality—Opinion as to what standard should be—No evidence in contradiction—Duty of court—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 6.

C The appellant, an inspector under the Sale of Food and Drugs Act, 1875, bought from the respondent a bottle labelled "Extract of Meat and Malt Wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A tonic and a food." The analyst's certificate stated that the sample contained not more than 2 per cent. of a mixture of equal parts of meat and malt extracts, that a genuine meat and D malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis, and that the sample was, therefore, deficient of at least 60 per cent. of the minimum amount of meat and malt extract and was entirely deficient of wine. There was no fixed standard of quality for extract of meat and malt wine. On an information against the respondents under s. 6 of the Sale of Food and Drugs Act, 1875, for selling, E to the prejudice of the purchaser, an article of food not of the nature, substance, and quality of the article demanded,

**Held:** where an article of food had no recognised standard of its nature or quality, the analyst was entitled to express his opinion as to what the standard should be, and, if that expression of opinion was not contradicted or qualified by evidence given on behalf of the defendant, the court must accept it, and, F therefore, the respondent must be convicted.

**Notes.** The Sale of Food and Drugs Act, 1875, has been repealed. Section 2 (1) and s. 110 (1) of the Food and Drugs Act, 1955, are equivalent to s. 6 and s. 21 of the Act of 1875.

Followed: *Broughton* v. *Whittaker*, [1944] 2 All E.R. 544. Referred to: *Gough* G v. *Rees* (1929), 46 T.L.R. 103; *Thomas* v. *Lindop*, [1950] 1 All E.R. 966.

As to sale of an article not of the nature demanded and the effect of an analyst's certificate, see 17 Halsbury's Laws (3rd Edn.) 484 et seq., 594 et seq. For cases, see 25 Digest 78, 79, 88, 89. For Food and Drugs Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 91.

H Cases referred to:

(1) *Davidson* v. *M'Leod* (1877), 5 R. (Ct. of Sess.) 1; 15 Sc.L.R. 198, J.; 25 Digest 83, *110ii*.

(2) *Morton* v. *Green* (1881), 8 R. (Ct. of Sess.) 36; 18 Sc.L.R. 570, J.; 25 Digest 131, *l*.

(3) *Smith* v. *Wisden, etc., Sussex Justices* (1901), 85 L.T. 760; 66 J.P. 150; 18 T.L.R. 92; 46 Sol. Jo. 86; 20 Cox, C.C. 135, D.C.; 25 Digest 91, *166*. I

(4) *Harrison* v. *Richards* (1881), 45 J.P. 552, D.C.; 25 Digest 78, *76*.

(5) *Robinson* v. *Newman* (1917), 86 L.J.K.B. 814; 117 L.T. 96; 81 J.P. 187; 15 L.G.R. 475; 25 Cox, C.C. 749, D.C.; 25 Digest 78, *78*.

(6) *Roberts* v. *Leeming* (1905), 69 J.P. 417; 3 L.G.R. 1031; 25 Digest 88, *150*.

(7) *Wilson and M'Phee* v. *Wilson* (1903), 6 F. (Ct. of Sess.) 10; 41 Sc.L.R. 195; 11 S.L.T. 578, J.; 25 Digest 88, *146i*.

(8) *R.* v. *Field, etc., Justices, Ex parte White* (1895), 64 L.J.M.C. 158; 11 T.L.R. 240, D.C.; 25 Digest 88, *147*.

(9) *Shortt* v. *Robinson* (1899), 68 L.J.Q.B. 352; 80 L.T. 261; 63 J.P. 295, D.C.; 25 Digest 88, *148*. A

**Case Stated** by stipendiary magistrate for Salford.

An information was preferred by the appellant, Walter Stanley Bowker, under s. 6 of the Sale of Food and Drugs Act, 1875, against the respondent, Frederick James Woodroffe, for that he on June 30, 1926, did sell to the appellant, and to his prejudice, a certain article of food, to wit, extract of meat and malt wine, which was not of the nature, substance, and quality of the article demanded. The appellant was an inspector under the Sale of Food and Drugs Act, 1875, and on June 30, 1926, he purchased from the respondent a bottle of extract of meat and malt wine for the purpose of analysis. The bottle was labelled B

"Extract of Meat and Malt Wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A tonic and a food. Non-alcoholic." C

The appellant paid 4s. 6d. for the bottle of extract of meat and malt wine, and complied with the formalities required by s. 14 of the Sale of Food and Drugs Act, 1875. The city analyst gave a certificate in the following form, so far as material: — D

I am of opinion that the said sample contained the parts as under: —

| | | |
|---|---|---|
| Water ... ... ... ... ... ... ... | 81.2 | per cent. |
| Total sugars ... ... ... ... ... ... | 16.4 | ,, |
| Other extractive matter ... ... ... ... | 2.4 | ,, |

E

No change had taken place in the article that would interfere with the analysis. A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above "other extractive matter" contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial. F

There was no fixed standard of quality for extract of meat and malt wine, but the amount of extract of meat and malt that had been put in the article supplied was very small, namely, 2.4 per cent. The value of the bottle of extract of meat and malt wine, for which 4s. 6d. was charged and paid, did not exceed 6d., which included 3d. for the bottle. G

At the hearing of the information the respondent tendered no evidence. The appellant contended that the use of the term "wine" implied the presence of the fermented juice of the grape, that in view of the certificate of the public analyst the sale in question was a sale of an article of food not of the nature, substance, and quality demanded, and that the appellant was thereby prejudiced. The respondent contended (a) that the article of food sold by him to the appellant was in accordance with the description specified on the label affixed to the bottle containing the article, and the appellant was not thereby prejudiced; (b) that the article had no recognised standard of quality and the sale in this case was not an offence within the Sale of Food and Drugs Acts; and (c) that the term "wine" did not imply the presence of the fermented juice of the grape nor even that grape juice in any form was present. The magistrate, whose attention was directed by the respondent to *Davidson* v. *M'Leod* (1), *Morton* v. *Green* (2), and *Smith* v. *Wisden* (3) was of opinion that the article of food purchased by the appellant was one for which there was no recognised standard of quality, and that he was bound by the H I

decision in *Davidson* v. *M'Leod* (1), and on that ground he dismissed the information.

*Eastham*, K.C., and *E. L. Fleming* for the appellant.
*Wingate-Saul*, K.C., and *Percy Macbeth* for the respondent.

**LORD HEWART, C.J.**—This is a Case stated and re-stated by the learned stipendiary magistrate for the city of Salford. The question arises in the following way. An information was preferred by the appellants under s. 6 of the Sale of Food and Drugs Act, 1875, against the respondent for selling to the appellant and to his prejudice a certain article of food, namely, extract of meat and malt wine, which was not of the nature, substance, and quality of the article demanded. The magistrate, having heard the information, dismissed it, and the question raised by this Case is whether in so doing he came to a correct decision in point of law. It is not necessary to repeat all the findings of fact. It is enough to say that on a certain day in June, 1927, the appellant, seeing in the window of the respondent's shop bottles of what were described as "extract of meat and malt wine," entered the shop and asked for a bottle of extract of meat and malt wine. It is found as a fact that that substance is a food. The label upon the bottle bore, among other things, the words

> "Extract of meat and malt wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A tonic and a food."

The stuff in the bottle was analysed by the public analyst, and the certificate of analysis was offered in evidence. The conclusion was that the contents of the bottle were: Water 81.2 per cent., total sugars 16.4 per cent., other extractive matter 2.4 per cent.; in other words, everything in this bottle was water or sugar except 2.4 per cent. The public analyst continued:

> "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above 'other extractive matter' contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract, and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial."

The Case further finds that there is no fixed standard of quality for extract of meat and malt wine. It was a contention, and no doubt the main contention of the respondent, that the article purchased had no recognised standard of quality, and that, therefore, the sale was not an offence. The opinion to which the learned magistrate came is as follows:

> "I was of opinion that the article of food purchased by the appellant was one for which there is no recognised standard of quality, and that I was bound by the decision in *Davidson* v. *M'Leod* (1)."

With regard to the decision in *Davidson* v. *M'Leod* (1), I think it is necessary to make two observations. The first is that it has no real bearing upon this case, and the second is that, if it had, it would not be binding upon the magistrate sitting in Salford. Section 21 of the Sale of Food and Drugs Act, 1875, provides as follows:

> "At the hearing of the information in such proceeding, the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness. . . ."

What are the facts stated in this certificate? The statements with regard to the constituent elements of this compound are undoubtedly statements of fact. The statement of the relative proportions in which those elements are found is undoubtedly a statement of fact. Then the certificate contains a sentence which, it is suggested, is really a statement of opinion, or, it may be, an aspiration:

> "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts, with a wine basis."

Speaking for myself, I read that sentence as meaning that a genuine meat and malt wine does normally contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. Starting from that conclusion, the certificate proceeds step by step to demonstrate that there was here a deficiency to the extent of at least 60 per cent. of the minimum amount of meat and malt extracts, and, having set out the stages and the factors in the conclusion, it sets out this statement: "This is not a meat and malt wine." It is said that these are not statements of fact, but expressions of opinion. The distinction between the two becomes a little metaphysical. In form they seem to me to be statements of fact, and if it had been desired to say that these are not statements of fact, but mere statements of opinion, the proper course was for the respondent to require the attendance of the analyst so that he might be cross-examined, and it was open to the respondent to tender evidence per contra. This Case, however, states in the clearest terms: "On the hearing of the information, the respondent did not tender any evidence."

In those circumstances, what was the true conclusion for the magistrate? I think that the matter is made quite clear by two cases. One is *Harrison* v. *Richards* (4), where LINDLEY, J., said (45 J.P. at p. 553):

> "The magistrate in this case seems to have treated the certificate as matter of opinion and not of fact. He sets out his own opinion against the certificate, but I think that cannot be done, for the certificate is primâ facie evidence, and it could not be thrown over merely by an opinion not founded on the evidence. No evidence was given to contradict the certificate."

That was a certificate in which, the constituent elements having been set out, the analyst said: "I am of opinion that the same is a sample of milk adulterated with 20 per cent. of water." That case was in the year 1881. In a much more recent case, in the year 1917, *Robinson* v. *Newman* (5), it was said by this court (per LORD READING, C.J., 117 L.T. at p. 97):

> "The magistrates have refused to act upon the certificate of the analyst, which appears to be in the form set forth in the schedule to the Act. The observation inserted in the certificate is one which is justified under the form in the schedule, and I do not think it necessary to say more than that the analyst was entitled to express his opinion, and in the absence of a request that he should be called as a witness, or of evidence to the contrary, the justices should have acted upon it. *Harrison* v. *Richards* (4) is in point, and the appeal must be allowed."

Finally, I should like to refer to a passage in *Roberts* v. *Leeming* (6), where RIDLEY, J., who was one of the majority of the court, said (69 J.P. at p. 419):

> "We have to consider the case of an article compounded for the purposes of commerce. It is not a natural product. You cannot say there is a certain standard which nature has laid down which is the proper standard for the qualities to be possessed by this particular article, and, as I think, it is like the Scottish case, *Wilson and M'Phee* v. *Wilson* (7) . . . in which the court must lay down for itself a standard. In this case, therefore, the justices had to make their own standard according to the evidence before them, and they had to say: Was this article in accordance with the standard, or was it not?"

In like manner, LAWRENCE, J., said (ibid. at p. 420):

> "That the court can and must, unless the enactment is to be brought to nothing at all, fix some standard is, I should have thought, abundantly clear. There is nothing in the Act to show what margarine is. If it were not so, and if evidence of that kind were not admitted, it would be perfectly impossible to get at what margarine is under the Margarine Act at all . . . But the decision in the case of *Wilson and M'Phee* v. *Wilson* (7) is absolutely clear, and I think that the court has power to, and must, dealing with an Act like the Margarine Act, fix some standard for itself."

Undoubtedly the words "fix some standard" are ambiguous. I do not think that those learned judges meant that there must be a quantitative standard, drawing a hard and fast line. That is, of course, one way of fixing a standard, and in some cases it may be the best way, but there is clearly another way of fixing a standard, and that is to have regard to a minimum and to say of the contents of a particular admixture that, upon any reasonable view of the true minimum, this compound must fall short of it. In the present case, the learned magistrate seems to have come to the conclusion that, as there was no recognised standard of quality, he was, so to say, functus officio, and that anything could be sold under the name of "Extract of meat and malt wine." It has been suggested that there was some other evidence before him which caused him some doubt. It is upon no such matter that he has stated this Case and re-stated it upon further consideration. The evidence as to the contents of this bottle, and as to the real meaning of "Extract of meat and malt wine," at least so far as the minimum required is concerned, is to be found in the certificate. Having set out the certificate, the learned magistrate says: "On the hearing of the information, the respondent did not tender any evidence." In those circumstances, that being the state of the evidence, I think it was the duty of the magistrate to say that this mixure fell below the requirements which were placed before him, on the only evidence worth regarding, as to the true nature, substance, and quality of extract of meat and malt wine, and that, therefore, he ought to have convicted the respondent. This appeal ought to be allowed, and the case to go back to the magistrate with a direction to convict.

**AVORY, J.**—I am of the same opinion. This certificate, upon its face, states as a fact that this article, which has been analysed, is not a meat and malt wine. In the absence of any evidence qualifying or contradicting that statement of fact, I think it was the duty of the learned magistrate to find that the article was sold to the prejudice of the purchaser, and I agree that the case should be remitted to him to do so.

**SHEARMAN, J.**—I am of the same opinion, and I desire to say a few words about the authorities. Section 21 of the Sale of Food and Drugs Act, 1875, provides that:

> "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated . . ."

That is usually paraphrased by saying that the certificate of the analyst is conclusive unless contradicted. I think a very serious question arises as to what is the meaning of the words. This is merely a certificate of an expert analyst, and it is conclusive as to the facts therein stated. I do not know whether extract of meat and malt wine, under the Sale of Food and Drug Acts, is a food or a drug; it is said to be a food, but it certainly is not a well-known article of diet. In this particular case the analyst not only states the result of his analysis, but he goes on in this form:

> "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts, with a wine basis."

From that proposition he goes on to draw various inferences, and says that this article does not comply with the standard. If it were not for the authorities, which, in my opinion, bind this court, I should hesitate to say that those are facts stated in the analysis. To my mind, they are an expression of opinion; having regard to this analysis, he thinks that the court ought to convict, and wants them to convict, and it amounts to no more. There is no doubt also that, since this Act was passed, there is a form of certificate which provides, in terms, that the analyst may express his opinion whether the mixture was for the purpose of rendering the article colourable or preservable and state whether the excess is ordinary or not. There are two authorities to which my Lord has referred; one is *Harrison* v. *Richards* (4), and the second is *Robinson* v. *Newman* (5). The second case is ten years old, the other is a great many years old. Although in neither of those cases was more than one side represented, and that the side in whose favour judgment was given, it is quite clearly laid down in both those cases that the analyst is entitled to express his opinion as to what the standard should be, and if that is uncontradicted, the magistrates are bound to accept it. The odd thing is that there are two reported cases: one *R.* v. *Field*, *Ex parte White* (8), and the other *Shortt* v. *Robinson* (9), in which this court decided the exact reverse. There the analyst attempted to express a view and the magistrates declined to accept the view, and the court declined to interfere with their finding, but in my opinion the two other cases to which I have referred have for a long time been regarded as the leading cases. I do not think that this court ought to disturb the principle laid down by them. That principle is that the analyst is entitled to express his opinion in regard to any article what the standard should be, in order that the thing sold may not be sold to the prejudice of the purchaser, and if he expresses his opinion in his analysis, the court is bound to accept it unless it is contradicted. That, I think, is the present state of the law which we have to accept. That being so, I think that this appeal should be allowed.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, for *L.C. Evans*, Salford; *A. R. Lord*, for *Bernard Kuit & Co.*, Manchester.

[*Reported by* J. Ferguson Walker, Esq., *Barrister-at-Law.*]

A

# KREDITBANK CASSEL G.m.b.H. *v.* SCHENKERS, LTD., AND OTHERS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), January 18, 19, 1927]

B [Reported [1927] 1 K.B. 826; 96 L.J.K.B. 501; 136 L.T. 716; 43 T.L.R. 237; 71 Sol. Jo. 141; 32 Com. Cas. 197]

*Company—Directors—Delegation of powers—Unauthorised exercise of power by servant of company—Forgery of bill—Liability of company to holders.*

*Bill of Exchange—Forgery—Signature without authority—Right of holders to* C *enforce payment against named drawers—Bills of Exchange Act*, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 24.

Where a company has an article empowering the directors to delegate their authority anybody dealing with the company without notice of what has actually happened is entitled to say that the article is of itself notice and that such a person must be presumed to have notice of the existence of the article, D and a stranger dealing with a company has a right to assume as against the company that all matters of internal management have been duly complied with. But that doctrine only applies to irregularities and not where a document to which it is sought to be applied is a forgery. Accordingly, where the manager of the local branch of a company without authority, express or ostensible, drew for his own purposes bills in the name of the company in E circumstances which amounted to forgery of the bills, which were dishonoured by the acceptors, the company was not estopped by the above doctrine from repudiating liability on the bills, and holders who had discounted the bills were not entitled to recover from the company.

Per Atkin, L.J.: The bills being forged or signed without authority, under s. 24 of the Bills of Exchange Act, 1882, the holders were not entitled F to enforce payment of them against the company.

Decision of Wright, J., [1926] 2 K.B. 450, reversed.

**Notes.** Considered: *South London Greyhound Racecourses, Ltd.* v. *Wake*, [1930] All E.R. Rep. 496; *Slingsby* v. *District Bank, Ltd.* (1931), 47 T.L.R. 587; *British Thompson-Houston Co.* v. *Federated European Bank, Ltd.* [1932] All E.R. Rep. 448; *Algemeene Bankvereening* v. *Langton* (1935), 40 Com. Cas. 247. Followed: G *Rama Corpn., Ltd.* v. *Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554. Referred to: *Liggett (Liverpool)* v. *Barclays Bank*, post p. 451.

As to the conduct of a company's business and the delegation of director's powers, see 6 Halsbury's Laws (3rd Edn.) 296, 420 et seq., and for cases, see 9 Digest (Repl.) 505, 506, 666 et seq. For Bills of Exchange Act, 1882, see 2 Halsbury's Statutes (2nd Edn.) 505.

H Cases referred to:

(1) *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 9 Digest (Repl.) 687, *4529*.

(2) *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.*, [1927] 1 K.B. 246; 96 L.J.K.B. 25, C.A.; affirmed, ante p. 97; [1928] A.C. 1; 97 L.J.K.B. I 76; 138 L.T. 210; 44 T.L.R. 76, H.L.; 9 Digest (Repl.) 691, *4558*.

(3) *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439; 75 L.J.K.B. 843; 95 L.T. 214; 22 T.L.R. 712; 13 Mans. 248, H.L.; 9 Digest (Repl.) 298, *1881*.

(4) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur. N.S. 633; 119 E.R. 886, Ex.Ch.; 9 Digest (Repl.) 660 *4374*.

(5) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex.Ch.; 34 Digest 129, *987*.

(6) *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K.B. 489; 80 L.J.K.B. 959; 104 L.T. 789; 27 T.L.R. 409; 55 Sol. Jo. 461, C.A.; reversed [1912] A.C. 716; 81

L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991*. A

**Appeal** from an order of WRIGHT, J., reported [1926] 2 K.B. 450, in an action tried by him as a short cause.

The plaintiffs, a German bank, claimed as holders of seven bills of exchange, of which the defendants were drawers and endorsers, which the acceptors had dishonoured. The defendants were a limited company incorporated on February 16, 1921, having a registered office in the city of London. Their business was that of general carriers, forwarding and shipping agents and warehousemen. They had a branch office at Manchester, of which one, Sydney Clarke, was branch manager. By its memorandum of association the defendant company had power to sign, make, draw, accept, and endorse bills of exchange. By art. 18 of the articles of association it was provided as follows : B C

> "The directors shall have power to determine who shall be entitled to sign and make, draw, accept and endorse on the company's behalf bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts and documents."

Two resolutions of the directors were passed on May 14, 1923. By one resolution the defendant company's bank was empowered to honour cheques, bills of exchange and promissory notes drawn, signed, accepted or made on behalf of the company by Mr. J. de Vorsen (manager) and Mr. W. Jager (assistant manager), or by any one director. A later resolution passed on Jan. 2, 1924, was to a similar effect. By the other resolution the bank was empowered to honour on behalf of the company the signature of Mr. S. Clarke on all cheques payable only to his Majesty's Customs. Such cheques were in fact in payment of reparation duties. S. Clarke was described as assistant manager, but in fact he had, with the directors' assent, used a rubber stamp with which he could sign on behalf of the company as Manchester manager. In general, all finance was controlled by the London office, and though Clarke endorsed cheques and paid them into the defendant company's bank he was required to send cheques drawn by the defendant company, other than those dealt with in resolution, to the London office for signature. The defendant company was closely connected with a large and important transport company called Schenker and Co., Berlin, which had a head office in Berlin, and various branches in Germany, including one at Sonneberg. In August, 1924, Sydney Clarke became concerned in the formation of a company called Clarke and Walker, Ltd. In September, 1924, he went to Sonneberg, and on that company's behalf made a large purchase of toys from a merchant called Teichmann, of Sonneberg. He arranged that payment should be made to Teichmann by bills drawn in the name of the defendant company, payable to their order and drawn upon Clarke and Walker, Ltd. The defendant company had no knowledge of this, and gave Clarke no authority. His action was a fraud on the defendant company, but he was supported in these proceedings by one Bauer, the manager at Sonneberg of Schenker & Co., Berlin. Under this arrangement seven bills were drawn, each for £200, and each dated Manchester, Sept. 23, 1924, on behalf of Schenkers, Ltd., S. Clarke, Manchester manager, to drawers' order, accepted by Clarke and Walker, Ltd., and endorsed on behalf of Schenkers, Ltd.: "S. Clarke, Manchester manager." Teichmann took them to the plaintiff bank, who, having obtained unsatisfactory reports as to Clarke and Walker, Ltd., refused at first to discount more than three bills (£600 in all) without further security. It was then arranged between the plaintiff bank and Teichmann that they would discount the remaining four bills if they had the further security of the endorsement of Schenker & Co., Sonneberg, which was done, Bauer signing in their name. The plaintiff bank thereupon discounted the bills, and in turn had them discounted with the Dresdner Bank at Frankfurt. It was admitted that the plaintiff bank acted in good faith and without any actual or constructive notice of any irregularity on the part of D E F G H I

A Clarke, or any actual suspicion that his conduct was unauthorised. The defendant company, however, when the bills were presented and dishonoured by the acceptors and notice was given to them, repudiated the whole transaction and stated that Clarke had acted without their authority, so that they were in no way liable for the bills. The plaintiff bank sued as holders in due course, having repaid the Dresdner Bank and obtained the bills. It was not contended that S. Clarke had actual B authority to pledge the defendant company's credit by drawing or endorsing the bills, but the plaintiffs contended that he had implied or apparent authority, which the defendant company denied.

By s. 77 of the Companies (Consolidation) Act, 1908 [now s. 33 of the Companies Act, 1948] it was provided as follows:

C "A bill of exchange . . . shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf of an account of, the company by any person acting under its authority."

WRIGHT, J., held that, since art. 18 of the articles of association of the company not only empowered delegation to directors, but by its designedly wide wording D enlarged the power of delegation beyond the category of directors, the manager of the Manchester branch was a person who fell within fair construction of the article. Inasmuch, therefore, as the manager was acting within his implied or apparent authority, the company were liable on the bills to a holder in due course, who had neither actual nor constructive notice that the professing agent of the company had not authority in fact. The defendants appealed.

E

*D. N. Pritt* for the defendants.

*A. T. Miller, K.C.*, and *D. B. Somervell* for the plaintiffs.

**BANKES, L.J.**—This case undoubtedly raises an important question, and in this court a point has been raised which was not raised before the learned judge F in the court below. The main facts are not in dispute, and are these. The plaintiffs bring their action against the defendant company alleging that the defendant company were the drawers and endorsers of a number of bills of exchange which were dishonoured by the acceptors on presentation. They commenced their action and took proceedings under Ord. 14. In answer to their claim, the defendant company say that these bills had been drawn and endorsed by a person who was merely manager of a branch of their business in Manchester and that he had done G what he did without any authority whatever, and, although they did not say so in terms, in substance it must be assumed from their affidavit that their case was that he had done it in fraud of the company. Upon that affidavit being filed, an order was made in chambers that the case should be tried as a short cause, and it was tried before WRIGHT, J. There the plaintiffs' case was that, the defendants being a company and having among their articles of association an article which H authorised the delegation of authority to do such an act as drawing or endorsing a bill of exchange, the rule of law laid down in the House of Lords in *Mahony* v. *East Holyford Mining Co.* (1) applied because they had discounted these bills bonâ fide and without notice of any irregularity whatever. It was upon that state of facts and on that contention that the learned judge dealt with the matter. At the time the learned judge gave judgment *J. C. Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (2) had not been before this court. Counsel for the defendants relies on that case as being an authority that on the particular facts of this case and the particular form of the article relied upon, the plaintiffs fail in substantiating their cause of action.

It is clear, I think, and well established, first of all, that in the case of a company incorporated under the Companies (Consolidation) Act, 1908, which has an article empowering the directors to delegate their authority, anybody dealing with the company without notice of what has actually happened is entitled to say that that

article is of itself notice and that such a person dealing with the company must be presumed to have notice of the existence of the article. I think it is also quite clearly established that a stranger dealing with a company has a right to assume as against the company that all matters of internal management have been duly complied with. There are many cases in the books in which, there being an article authorising the delegation of authority, a company has been held liable although the person who has purported to act upon the delegation of authority had in fact no authority, because, whether he had or had not, the authority is a matter of internal management with which the stranger had no concern.

Article 18, which is the article in question in the present case is in this form:

> "The directors shall have power to determine who shall be entitled to sign and make, draw, accept, and endorse on the company's behalf bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts, and documents."

That article is in a somewhat peculiar form. It is not in the form in which it is found in many of the decided cases, namely, that it indicates the person by name or by description to whom the power may be delegated ; it is an article authorising the directors to determine who shall be entitled to sign, and, of course, if they are entitled to say who shall be entitled to sign, they can, if they like, give authority to a most irresponsible person. In *J. C. Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (2), the article was in very much the same terms. The directors were empowered to

> "delegate to any managing director, local board, head manager, manager, attorney or agent any of the powers . . . for the time being vested in the directors."

The authority in that case was more circumscribed, if I may use that expression, because it did indicate by description the persons to whom the authority might be delegated. There were certain facts there upon which all the members of the court came to the conclusion that the plaintiffs were not in a position to rely upon the rule in *Mahony's Case* (1), because upon the facts the true inference was that they did not rely upon the authority or any suggested delegated authority, but distrusted the position and authority of the person who was negotiating, and they required express confirmation. Unfortunately for them the express confirmation was not a confirmation at all. But SARGANT, L.J., in his judgment (and ATKIN, L.J., concurred) did go further, and I think did lay down in terms which cover this case a proposition of law that the circumstances of that case, which I cannot distinguish from the circumstances of this case, the rule in *Mahony's Case* (1) does not apply. If I am correct in that view, that is sufficient to dispose of this appeal.

But during the argument a further point was raised which seems to me to be quite fatal to the plaintiffs' case, and that is that the act of this branch manager was a forgery, and that in those circumstances the documents were merely waste paper, and the plaintiffs could make no claim against the defendants except upon one of two grounds—either that the defendants were estopped from setting up the forgery or that, apart altogether from the rule in *Mahony's Case* (1) or art. 18, the branch manager had such an ostensible authority as rendered the defendants as his employers liable for the acts of drawing and endorsing these bills. It was contended on behalf of the defendants that what is said to be a dictum of LORD LOREBURN in *Ruben* v. *Great Fingall Consolidated* (3) had no application to the facts of this case, but it is very material to see what STIRLING, L.J., said in the Court of Appeal in that case. STIRLING, L.J., deals in terms with the point whether or not the fact that the document is a forgery is of any importance when you are seeking to apply the rule of law in *Mahony's Case*, and this is what he says ([1904] 2 K.B. at p. 729). He first of all refers to the articles of association, and then he says:

A "The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed, and is countersigned by the secretary ; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In the circumstances the certificate (as was indeed admitted by the plaintiffs at the trial) is not a valid or genuine document, and does not in my opinion bind the defendants. It was suggested that, inasmuch B as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs, acting as they did in good faith, were not affected by irregularities in the proceedings of the secretary : (*Mahony* v. *East Holyford Mining Co.* (1)). To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void."

C That being the decision appealed from, what LORD LOREBURN said was this ([1906] A.C. at p. 443) :

> "I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to D inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."

It is quite true, as counsel for the plaintiffs has contended, that that case had E reference to a certificate and not to a bill of exchange, and he relied upon s. 24 in the Bills of Exchange Act, 1882, which he said distinguished the case and protected his clients. But, in my opinion, short of an estoppel, that section does not assist the case which he sets up. It is quite clear that the person setting up the forgery may be estopped from so doing. LORD MACNAGHTEN deals with that ([1906] A.C. at p. 444) in *Ruben's Case* (3). He says, having regard to the fact that the F document was a forgery :

> "Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel."

G In my opinion there was no evidence here upon which an estoppel could be founded. In those circumstances it seems to me that it has been proved that the bills are forgeries, and there being no evidence of estoppel it does not lie in the plaintiffs' mouth to rely upon the rule in *Mahony's Case* (1).

Then they are driven to rely, if they can, upon the ordinary rule applicable to the case of principal and agent, and if they could show, or if they had brought H evidence to show, that the drawing and endorsing of bills of exchange was within the ostensible authority of a person occupying the position that this branch manager did, it might be that they would have been in a position to establish a claim founded upon that ground. But no such evidence was attempted, and I certainly am not prepared to accept the proposition that it was within the ostensible authority of this branch manager, having regard to his position, to accept bills of I exchange to this amount and in this form.

In my opinion, therefore, the appeal succeeds upon both grounds. Counsel for the plaintiffs has relied on a letter that was sent by the Manchester branch manager accompanying the bills, but so far from assisting the plaintiffs' case it seems to me to be against it. It certainly does not amount to an estoppel that he was allowed to use letter paper headed : "Schenkers, Ltd. International Forwarding, Shipping and Insurance Agents. Head Office, 15, Eldon Street, London"; and it certainly is not estoppel, it seems to me, that he was allowed to use a stamp for signing documents : "For and on behalf of Schenkers, Ltd. Branch Manchester manager."

It does not seem to me to amount to an estoppel, and short of an estoppel I cannot see that the document has any greater force or effect than the bills themselves. In all these circumstances I think the appeal succeeds and that the judgment for the plaintiffs should be set aside and entered for the defendants with costs here and below.

**SCRUTTON L.J.**—In my view, this is not an easy case, and but for two cases to which the court has been referred I should desire to go much more carefully into the various lines of authorities than has been done ; but this court is bound by authority on two points to decide that this appeal should be allowed.

The facts are rather curious. A German gentleman named Teichmann was a seller of goods, and he sold a considerable quantity of goods, over £1,000 worth, to a firm of Clarke and Walker, Ltd., 17, Blackfriars Street, Manchester. As is quite usual in commercial transactions, while the buyer desired credit and was only prepared to pay by giving a bill, the seller desired to get the money as soon as possible and desired to discount the bill. The ordinary course of business would be that the seller would draw on the buyer and get the bill discounted either before or after acceptance. That was not the course that was pursued in this case. The gentleman representing the supposed buyers, Clarke and Walker, Ltd., a Mr. Clarke, came to the seller with a bill drawn by a firm of Schenkers, Ltd., signed on their behalf by himself, described as the Manchester manager, and already accepted by Clarke and Walker, Ltd., so that the position was that Clarke and Walker, Ltd., the buyers, being primarily liable, for some reason Schenkers, Ltd., had by drawing become liable on the bills and guaranteed the payment by the buyers. The person who signed the document which would make Schenkers, Ltd., guarantors was a gentleman of the name of Clarke, the same name as appeared in Clarke and Walker, Ltd., and he described himself, not as a director or managing director or anything of that sort, but as Manchester manager. The document was accompanied by a letter from Manchester addressed to the seller: "We beg to enclose you herewith bills of exchange for £1,400 drawn by Messrs. Clarke and Walker and countersigned by your good selves." That document itself was again signed "Schenkers, Ltd. Clarke, Manchester manager." It seems to me to add nothing to the signature that already appeared on the bill of exchange. As a matter of fact, Clarke had no authority to bind Schenkers, Ltd. There was an article in Schenkers, Ltd.'s articles of association which empowered the directors to delegate to anybody the power of signing bills of exchange, but they had not given any delegation to Clarke, and he had no authority to bind them by giving bills of exchange. He knew it ; and in binding them he was defrauding them. The seller, Mr. Teichmann, took the documents to a German bank, who discounted them, and then, when Schenkers, Ltd., said they would have nothing to do with them, sued Schenkers, Ltd., the drawers, the acceptors not being worth anything.

The case came before WRIGHT, J., as did a similar case, namely, *Houghton's Case* (2), and WRIGHT, J., applied the doctrine of *Royal British Bank* v. *Turquand* (4), which, as I understand it, is that any person is deemed to have notice of the articles of association of any company whose articles of association are registered. I think some of the cases go further, and say not only that he is deemed to have notice, but also that he is to be deemed to understand what they really mean, which is sometimes a rather extensive presumption. But if, the person knowing the articles, having looked at them or being deemed to know what they contain, the thing that happened is a thing that might have been done if certain internal arrangements in the company had been carried out, then the person knowing of the articles is not bound to inquire whether the internal arrangements of the company have been carried out, but may assume that the thing is regular because there was an article which justified the proceedings if the company within its own domestic management took certain steps. Acting on that principle, WRIGHT, J., said that there was an article under which power could have been delegated to Clarke, the

A Manchester manager, and the bank were not bound to inquire whether in fact authority had been delegated because it could have been delegated. Consequently, on the line of *Royal British Bank* v. *Turquand* (4), and within the cases about presumption and notice of the contents of articles, WRIGHT, J., held that the bank was excused from inquiring whether the domestic arrangements necessary to delegate to Clarke power to accept bills of exchange had been made, there being B powers in the articles to make such delegation.

There are two matters which I think bind me to say that the decision was wrong. First, I think it has been established by the House of Lords that the doctrine that you are deemed to have notice of articles and need not inquire whether the domestic arrangements necessary to carry them out had been made does not apply where the document to which that principle is sought to be applied is a C forgery. I think, having considered the matter, that the decision in *Ruben* v. *Great Fingall Consolidated* (3) binds me to come to that conclusion. Anyone who remembers the time when that case was decided knows that it excited tremendous discussion both in legal and commercial circles. A secretary of a company had issued a document, purporting to be regularly signed by directors and with the seal of the company on it, to people who advanced money on the strength of it. The D secretary of the company was a person who had authority to issue certificates ; he was the person to whom you would go to get a certificate ; but the company were allowed to say to the person who had advanced the money on the faith of the certificate issued by its secretary : "This is not a document that binds the company at all." That—as my Lord has pointed out—began with the passage in the judgment of STIRLING, L.J., where, citing *Mahony* v. *East Holyford Mining Co.* (1), the E case in the House of Lords which perhaps states most clearly the doctrine that everybody is presumed to know the contents of registered articles of association, he said :

> "To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and F void."

Then he quotes the passage that my Lord has read from LORD HATHERLEY in *Mahony's Case* (1), pointing out that to forgery the doctrine he was laying down in *Mahony's Case* (1) did not apply. When the *Ruben Case* (3) came to the House of Lords LORD LOREBURN said in almost the same language as STIRLING, L.J. :

G > "It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."

H LORD LOREBURN, without referring definitely to the doctrine, puts the ground on which the company are not liable as being that the document is a forgery, is not the company's deed, and there is nothing to prevent the company from saying so. Of course, there is this difficulty about *Ruben* v. *Great Fingall Consolidated* (3), that certainly LORD DAVEY—and I am not certain that another noble Lord did not say so—said that the company were not liable because the act was done for the I benefit of a servant and not for the benefit of the company, following a statement in those terms by WILLES, J., in *Barwick* v. *English Joint Stock Bank* (5) (L.R. 2 Ex. at p. 265). The House of Lords subsequently, in a considered judgment in *Lloyd* v. *Grace, Smith & Co.* (6), to which LORD MACNAGHTEN was a party, have said that that limitation was erroneous, and that, although the act is done for the benefit of an employee alone, not for the benefit of the company, yet the company may be liable. There is a little difficulty reconciling the two cases on the head of forgery. I have always felt that difficulty, more especially as I was the Judge who originally decided *Lloyd* v. *Grace, Smith & Co.* (6), and, having been reversed

by the Court of Appeal, was affirmed by the House of Lords. But in view of the fact that the House of Lords, having *Ruben* v. *Great Fingall Consolidated* (3) cited to them, have not in any way repudiated the doctrine of *Mahony's Case* (1)—the doctrine of presumption of knowledge, of the contents of the articles of association—and the doctrine of *Royal British Bank* v. *Turquand* (4), that you need not inquire into the details of internal management, and having the *Ruben Case* (3) before them, and dissenting from parts of the judgment, have said nothing to interfere with the rest of the judgment so far as it is based on forgery.

It seems to me clear that this document is a forgery within the language of the Forgery Act. It contains a false statement, namely, that the manager is acting for the company, and it purports to bind the company. That statement is in fraud of the company, and those two elements appear to make the document a forgery within the Forgery Act. That being so, I feel bound by the decision of the House of Lords to hold that in this case it is not open to the plaintiffs to say: "This matter whether authority has or has not been delegated to Clarke, the Manchester manager, is a matter of internal management about which I need not inquire under the rule in *Royal British Bank* v. *Turquand* (4)."

The second matter that I think binds me is this. In *Houghton's Case* (2), which in many details is very similar to the present case, when it came before the Court of Appeal, two judgments in effect were given. The judgment of my Lord dealt with the matter on the particular facts, and he declined to express any further opinion. But the judgment of SARGANT, L.J., in the reasons for which ATKIN, L.J., concurred, took a further point. He said, though there is a power of delegation and though you are deemed to know of it, you cannot say: "I am deemed to know of that and I did act upon it," unless it is proved that you did in fact know of it. I hope it is not disrespectful to say that I wish that SARGANT, L.J., who is thoroughly conversant with that branch of the law, had explained to people who are not so thoroughly conversant with it exactly how that fitted in with the doctrine that you are deemed to know and to understand the true meaning of the articles of association. The lord justice has not explained exactly how his decision fits in with the line of cases which *Mahony's Case* (1) is an instance. But whether he has explained his reasons or not, there is no doubt about what he said, and there is no doubt that ATKIN, L.J., has concurred in the reasons. In those circumstances I think I am bound by the decision given by a majority of the court, which prevents the plaintiff putting forward a position like this: "I am deemed to know there was a power of delegation, and I am excused in those circumstances from inquiring into the internal management, because the judgment has said that you need not do so unless you in fact knew of the power of delegation and relied on that power." As I understand, the case being tried as a short cause and only on defences specified in an affidavit, counsel for the defendants did not go into questions of notice, and I think the learned judge rather indicated that he could not do so, otherwise I should have thought that this transaction was so unusual as a commercial transaction that it put the seller and the bank on inquiry as to how it came about that this odd guarantee was given in fact by a gentleman named Clarke who appeared to be the same person as he who was guaranteed. But that point was not taken, and I do not rest my judgment here on that point, though I think there would have been a good deal to be said for it if it had been taken, and though it rather relieves my feeling, apart from the law, that upon the merits there is a good deal to be said for it.

**ATKIN, L.J.**—I agree. The transaction itself which my Lord has just referred to was certainly a transaction which one would not suppose was within the ordinary course of business in this country. The firm of Schenkers, Ltd., are a very large firm of forwarding agents. They do not deal in goods except so far as they make some advances on them. They have a branch, among other places, in Manchester, of which one Clarke was at the material times a manager. But Clarke also formed

A a company of Clarke and Walker for the purpose of dealing, among other things, in toys. He had recently formed this company, and there was apparently a very small capital subscribed. He went over to Germany in his capacity as interested in the firm of Clarke and Walker for the purpose of buying toys in the toy market in Germany, and he bought or agreed to buy a large quantity of toys from a man named Teichmann. Teichmann wanted to be sure about payment, and he con-
B sulted a gentleman named Bauer, who was interested in the German firm of Schenkers, and who also carried on a similar business as a limited company. Mr. Bauer, who apparently was very anxious to help the firm of Clarke and Walker, said: "You had better get your Clarke and Walker Bills endorsed by our firm of Schenkers, in England, who are perfectly sound." Apparently that was done, and Mr. Teichmann was satisfied with that. So Mr. Clarke went back to England
C and then drew seven bills of £200 each, all dated the same day and all made payable three months after date. He drew these bills on Clarke and Walker payable to his order or their order, he drew them in the name of Schenkers, Ltd., "S. Clarke, Manchester manager"; and he sent them to Teichmann, saying: "This is £1,400 of bills." Teichmann took the bills to the bank, and they discounted them. I quite agree that we are not concerned here with the question of notice;
D we must assume that the bank had no notice that there was anything wrong with the bills, but they thought it necessary to make some inquiries, and the man of whom they inquired whether these bills on Schenkers were in good order was Clarke, the man who in fact signed the bills. They got an answer—as might be expected—that the bills were in order, so they were satisfied, and they discounted
E the bills.

The bills, it is quite plain to my mind, were forgeries. They were false documents and they were fraudulent documents; they were concocted by Clarke for the purpose of defrauding Schenkers, Ltd. The firm of Schenkers, Ltd., had nothing to do with these bills or the consideration for them, and what was done was an obvious fraud upon them; and it would appear therefore, that there was no reason
F why they should pay for Messrs. Clarke and Walker's forgery or pay Mr. Teichmann. But it is said that they are liable, and one reason why it is said that they are liable is this. It is said: "You are a limited company, and as a limited company you are in a very much more awkward position than if you were a firm, because you have got an article of association that the directors may determine who may sign bills of exchange, and, as the directors may determine who may sign bills of exchange
G with the authority of the company, therefore anybody who purports to sign a bill of exchange in the name of the company is deemed to have authority to sign the bill of exchange." If that doctrine were really carried to its logical conclusion it would be a very alarming thing for companies, for anybody who has the pen of a ready writer need only sit down and write a bill of exchange in the name of any company who had that article, and that company would presumably be bound
H when the bill got into the hands of a holder for value without notice, even though the thing was an absolute forgery. That, I think, is untrue, and the article cannot have that extended bearing. I think there is a limitation accepted by the learned judge—that the doctrine cannot mean that, not merely the office boy, but anybody might purport to sign on behalf of the company. That cannot be true. The learned judge himself limited the doctrine in his judgment to such a person as falls within the
I category of persons who under the articles might properly be empowered if the appropriate authority had been given. That seems to me to bring one to an entirely different class of case. I agree that that probably is right, but who is the person who might properly be entitled? You are thrown back on the persons who ordinarily, apart from the articles, in their position in the company or elsewhere would be acting within the scope of their apparent authority in signing a bill. That is a question which has to be determined, quite apart from the actual terms of the article which merely empowers the directors to choose a person who can have authority to sign a bill. If you come to consider whether the manager of a branch business is a person

who has ostensible authority to sign bills on behalf of a company, in my view, in the absence of evidence to the contrary, it would be wrong to assume that there was any such ostensible authority. It depends, of course, upon the evidence as to the nature of the business and as to the actual position occupied by the gentleman, but in the absence of evidence I am not prepared to hold that the manager of a provincial branch, even if he is in such an important position as manager of the Manchester branch of a forwarding agency, has ostensible authority to draw bills to bind his company. The evidence given, in the present case, I think, was that the company never signed bills at all, and in the absence of evidence that the branch manager had ostensible authority to draw bills, I should have thought quite plainly that he had not. Therefore this is the ordinary case of a person having exercised or purported to exercise an authority to bind the company in fraud of the company, outside the scope of his ordinary ostensible authority. If that is the case, then under s. 24 of the Bills of Exchange Act, 1882, the holder is not entitled to enforce payment of these forged bills unless the principal is precluded from setting up the forgery or the want of authority. To my mind, inasmuch as the act was not done within the ostensible authority of the agent, the principal is not precluded from setting up the want of authority. That seems to me to determine this case.

I think the true limits of the doctrine as to the effect of an article which empowers the company or its directors to nominate a person to have authority to do a particular act on behalf of the company are made quite plain in the judgments of my Lord and SARGANT, L.J., in *Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (2). It seems to me, therefore, to be unnecessary to consider the further doctrine as to the knowledge of the articles of the company, except that one might say that the doctrine is as to the knowledge of the article, that is to say, you are to be in the same position as though you had read the articles, and, if you had read the articles, all you would see would be that the directors had power to nominate the person who was to sign bills of exchange, and it appears to me that you would not be in a very much better position if you knew that unless you went on further and inquired whether or not the directors had in fact nominated a particular person to sign the bills. There are certain cases where you need not make that inquiry. When you find a power and that the act can be done by the company in a board meeting, and there purports to be a resolution of the board, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board and the quorum and so on have been actually carried out. If you are dealing with a director in a matter in which a director normally would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles before he exercises that power have in fact been complied with. Those are matters of internal management—which an outsider is not obliged to investigate. But we have the authority of the Court of Appeal in *Houghton's Case* (2) and of the House of Lords in *Ruben's Case* (3) for saying that the doctrine that you need not investigate whether or not the internal management of the company has been strictly carried out in accordance with the articles has no application to cases where you have an obvious forgery. As regards that, it appears to me that the cases which have been referred to have no operation. In this case there is the right of this company to say: "These are not our bills, and we are not precluded from denying the authority of the person who purported to sign the bills on our behalf." For these reasons I think the appeal should be allowed and judgment entered for the defendants with costs.

*Appeal allowed.*

Solicitors: *William A. Crump & Son; Durrant, Cooper & Hambling.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

# WELTON *v.* WELTON

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), January 11, 1927]

[Reported [1927] P. 162; 96 L.J. P. 75; 136 L.T. 675; 43 T.L.R. 174; 71 Sol. Jo. 121]

*Divorce—Alimony—Pendente lite—Adultery of wife—Proof in former suit—Wife able to support herself precariously—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (3).

The court has jurisdiction to allow alimony pendente lite to a wife petitioner in a suit for dissolution of marriage, although she has been found guilty of adultery in a previous suit instituted by the husband, whose petition was dismissed for cruelty and conduct conducing to the adultery, for the wife is a competent suitor in her suit and at the time when the application for alimony pendente lite is made the measure or quality of the wrong to be imputed to both or either of the parties has not been finally determined.

An application for alimony pendente lite should not be determined solely according to whether or not, at the time it is made, the wife could have pledged her husband's credit. Whether, where the wife has been living apart from the husband and supporting herself, an order should be granted is a matter for the discretion of the court. An order is justified where it appears from the evidence that the wife has been able to maintain herself only precariously and inadequately.

**Notes.** Section 190 (3) of the Supreme Court of Judicature Act, 1925, has been replaced by s. 19 (1) of the Matrimonial Causes Act, 1950. As to practice on an application for alimony pendente lite see Matrimonial Causes Rules, 1957. Considered: *Bullock* v. *Bullock and Vargolici*, [1942] 2 All E.R. 259. Distinguished: *S.* v. *S.*, [1954] 1 All E.R. 11. Applied: *Waller* v. *Waller* [1956] 2 All E.R. 234. Referred to: *Stevenson* (*otherwise Bowerbank*) v. *Stevenson*, [1944] P. 52; *Sterne* v. *Sterne*, [1957] 1 All E.R. 792.

As to alimony pendente lite see 12 Halsbury's Laws (3rd Edn.) 346, and for cases see 27 Digest (Repl.) 485.

Cases referred to:

(1) *Holt* v. *Holt and Fleeming* (1858), 28 L.J.P. & M. 12; 27 Digest (Repl.) 509, *4513.*

(2) *Whitmore* v. *Whitmore* (1866), L.R. 1 P. & D. 96; 35 L.J.P. & M. 39, 52; 13 L.T. 723; 14 L.T. 171; 14 W.R. 352; 27 Digest (Repl.) 564, *5176.*

(3) *Otway* v. *Otway*, *Otway* v. *Otway and Hoffer* (1888), 13 P.D. 141; 57 L.J.P. 81; 59 L.T. 153; 4 T.L.R. 523, 534, C.A.; 27 Digest (Repl.) 439, *3689.*

(4) *Everett* v. *Everett and McCullum*, [1919] P. 298; 88 L.J.P. 130; 121 L.T. 503; 34 T.L.R. 613; 63 Sol. Jo. 682, C.A.; 27 Digest (Repl.) 439, *3690.*

(5) *Drummond* v. *Drummond* (1861), 2 Sw. & Tr. 269; 30 L.J.P.M. & A. 177; 4. L.T. 416; 164 E.R. 998; sub nom. *Viscountess Forth* v. *Viscount Forth*, 7 Jur. N.S. 762; 27 Digest (Repl.) 394, *3251.*

(6) *Burrows* v. *Burrows* (1867), L.R. 1 P. & D. 553; 27 Digest (Repl.) 490, *4291.*

(7) *Noblett* v. *Noblett and Kershaw* (1869), L.R. 1 P. & D. 651; 20 L.T. 716; 27 Digest (Repl.) 497, *4386.*

(8) *Re Wingfield and Blew*, [1904] 2 Ch. 665; 73 L.J.Ch. 797; 91 L.T. 783; 48 Sol. Jo. 700, C.A.; 27 Digest (Repl.) 610, *5726.*

(9) *Durnford* v. *Baker*, [1924] 2 K.B. 587; 93 L.J.K.B. 866; 132 L.T. 35; 40 T.L.R. 757; 68 Sol. Jo. 790, C.A.; 27 Digest (Repl.) 199, *1579.*

(10) *Parry* v. *Parry*, [1896] P. 37; 73 L.T. 759; 12 T.L.R. 126; sub nom. *Parry* v. *Parry*, *Millis* v. *Millis and Brown*, 65 L.J.P. 35; 27 Digest (Repl.) 426, *3561.*

(11) *George* v. *George* (1867), L.R. 1 P. & D. 553; 37 L.J.P. & M. 17; 17 L.T. 152; 16 W.R. 112; 27 Digest (Repl.) 490, *4290*. A

(12) *Wilson* v. *Glossop* (1888), 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707; 52 J.P. 246; 36 W.R. 296; 4 T.L.R. 239, C.A.; 27 Digest (Repl.) 193, *1527*.

(13) *Cooper* v. *Lloyd* (1859), 6 C.B.N.S. 519; 33 L.T.O.S. 149; 6 Jur. N.S. 125; 141 E.R. 559; 27 Digest 194, *1530*.

(14) *Govier* v. *Hancock* (1796), 2 C. & P. 25, n; 6 Term. Rep. 603; 101 E.R. 726; 27 Digest (Repl.) 193, *1518*. B

**Appeal** from a decision of LORD MERRIVALE, P., on an appeal by the husband from a registrar's order for payment of alimony pendente lite.

On June 4, 1918, the husband petitioned for dissolution of marriage on the ground of his wife's adultery. The wife in her answer denied the adultery and cross-charged cruelty and conduct conducing. At the trial there was a finding of adultery against the wife, but cruelty and conduct conducing were found against the husband, and his petition was dismissed. On July 29, 1926, the wife petitioned for dissolution on the ground of the husband's adultery, and on July 31, 1926, she petitioned for alimony pendente lite. The husband in answer to the alimony petition pleaded the previous finding of adultery against the wife, and, at the hearing before the registrar, contended by counsel that the court had no jurisdiction to grant alimony to a wife found guilty of adultery. The registrar, however, made an order for alimony pendente lite at the rate of 10s. a week and the husband appealed to the learned President who dismissed the appeal, saying that a wife who had brought cohabitation to an end by misconduct for which the husband was not to blame, or a wife who in some independent situation was and could seek divorce and not be granted relief except under the discretionary power of the court, might very likely not be a proper applicant for an allotment of alimony. That would depend upon consideration of the relevant facts, in dealing with which regard must be had not only to the decisions in cases like *Holt* v. *Holt and Fleeming* (1) and *Whitmore* v. *Whitmore* (2), but to the state of the existing law of divorce, under which the court had the responsibility of deciding, not only as to innocent wives, but as to guilty wives, whether provision of some sort should be made for the wife by the husband. There was jurisdiction to make an order in the present case, and he saw nothing in the facts which ought to induce the court to overrule the discretion of the registrar as to the order proper to be made. The husband appealed.

*Acton Pile* and *Hutchinson* (*Rewcastle* with them), for the husband, referred to *Holt* v. *Holt and Fleeming* (1), *Whitmore* v. *Whitmore* (2), *Otway* v. *Otway* (3), *Everett* v. *Everett and McCullum* (4), *Drummond* v. *Drummond* (5), *Burrows* v. *Burrows* (6), *Noblett* v. *Noblett and Kershaw* (7), *Re Wingfield and Blew* (8), *Durnford* v. *Baker* (9), *Parry* v. *Parry* (10), *George* v. *George* (11).

*Merriman, K.C.*, and *T. J. O'Connor*, for the wife, having referred to *Wilson* v. *Glossop* (12), were stopped.

**LORD HANWORTH, M.R.**—This is an appeal from a decision given by the President on Dec. 20 last, by which he confirmed an order of the registrar, made on Nov. 24 last, ordering that a sum of 10s. a week should be paid by the husband to his wife, who is the petitioner in a suit for divorce brought by her against the husband. The argument which we have had has raised a somewhat interesting point. The husband contends that the order of the registrar, which was confirmed by the learned President, was wrong on two grounds.

The parties were married on Mar. 9, 1909. Two children were born of the marriage. In 1918 the husband brought a petition for divorce against the wife, on the ground that she had committed adultery. At the hearing it was proved that the wife had committed adultery, but the learned judge, LORD COLERIDGE, before whom the case was tried on Jan. 22, 1919, allowed an amendment to be made to the answer of the wife, pleading as against the husband cruelty and conduct conducing to her adultery. Giving his judgment on Jan. 23, 1919,

A LORD COLERIDGE found that the wife had been guilty of adultery, but he dismissed the husband's petition on the ground that the husband himself had been guilty of cruelty and of conduct conducing to the wife's proved adultery. Before that hearing there had been, as early as Feb. 5, 1917, an order for maintenance made in the police court under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895. After the decision had been given by the learned judge finding the wife B guilty of adultery, an application was made before the late Mr. Waddy, the magistrate, asking that the order made on Feb. 5, 1917, should be revoked on the ground that the wife had been proved to have been guilty of adultery. Accordingly, acting under s. 7 of the Act of 1895, the court discharged the order that had been made some two years previously. Pausing there, by March, 1919, there were decisions, first of the Divorce Court, and, secondly, of the police court, recognising C the decision of the Divorce Court, that the wife had been guilty of adultery. From the time that the order for maintenance was revoked by Mr. Waddy, no payment was made by the husband to the wife. He had been in the habit, however, for some time previously of making a payment to her towards the schooling fees of his children. That sum he continued, and is now continuing to pay, and no question arises about these payments. On June 29, 1926, the spouses having lived apart from the D time of the earlier proceedings down to the present time, the wife filed a petition charging her husband with adultery. On Sept. 1, 1926, the husband filed an answer admitting his adultery with the person named, but charging the wife with adultery with a man named Ricketts. On July 30 the wife filed a petition for alimony pendente lite. The husband put in his sworn answer on Sept. 1. He E said that his means were not such as had been represented. He also pleaded:

> "On Jan. 23, 1919, the [wife] was found guilty of having committed adultery by the Right Hon. LORD COLERIDGE, sitting as a justice of the High Court in the Divorce Division. In consequence of such adultery a maintenance order made on the 5th Feb., 1917, by the court of summary jurisdiction sitting at the North London Police Court on the application of the [wife] was discharged F on the 3rd March, 1919, on the application of the [husband], and such decision was subsequently upheld by the Divisional Court. For the above reason I submit that the [wife] is not entitled to any order for alimony pendente lite."

To that the wife replied by affidavit:

G > "I am not capable of maintaining myself. I earn a little money by selling goods on commission, but it is only sufficient to enable me to live and pay the rent of one room. I have two children to support, one being an invalid. I receive no money for maintenance from any person whatsoever. The man Ricketts referred to in the [husband's] answer died in New Zealand about eighteen months ago."

H Upon those materials the matter went before the registrar. He made an order against the husband that he should pay as alimony pendente lite the sum of 10s. per week to his wife. The President confirmed that order, and it is from that confirmation by the President that the present appeal is brought.

Two points are raised by counsel for the husband appellant. (i) that the wife, I having been found guilty of adultery, there is no power to grant alimony pendente lite; and (ii) that where one spouse has been separated from the other, and that spouse has been able to maintain herself, no order for alimony ought to be made pendente lite, for, if so, the spouse who makes the application would be improving her position on getting an order for alimony, whereas she has by the facts of the case shown that she is able to maintain and support herself independently of contributions from her husband.

The first point depends upon the interpretation to be given to the statutes. Under s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, which

repeals a previous enactment, there is power to order alimony pendente lite. Sub-section (3) provides: A

"On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony as the court has in proceedings for judicial separation."

The argument is that although that section undoubtedly gives power to order alimony pendente lite, it gives power so far, and no more as the court has power in proceedings for judicial separation. Looking back to s. 32 of the same Act it is provided as follows: B

"The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained." C

Going still further back, by s. 22 of the Matrimonial Causes Act, 1857, it is provided: D

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted, but subject to the provisions herein contained and to the rules and orders under this Act." E

The argument, then, is that this power to give alimony pendente lite is similar to the power of the court in proceedings for judicial separation, that s. 22 comes in because it applies to suits or proceedings for judicial separation, and that the powers which have to be exercised by the court are to be such as would have been exercised in cases of petitions for judicial separation, and no more. It is, perhaps, right at once to observe that s. 22 says that the limitation or direction given under it is to be exercised "subject to the provisions herein contained, and to the rules and orders under this Act." One of the provisions contained in that Act which was new was instituted by s. 31, whereby the court was to pronounce a decree declaring a marriage to be dissolved if satisfied on the evidence that the case of the petitioner had been proved, and had not found that the petitioner had been in any matter accessory to or conniving at the adultery of the other party to the marriage or had condoned it, with the important proviso that the court was not bound to pronounce such a decree if the party applying for the decree had been found to be guilty of misconduct as had been conduced to the adultery. It is said from *Otway* v. *Otway* (3) and other cases such as *Everett* v. *Everett* (4) that a judicial separation can only be granted where the petitioner comes to the court with a pure character and is free from all matrimonial misconduct. It is argued that the present petitioner comes before this court faced with a decision given by Lord Coleridge that she had been guilty of adultery and the fact that the magistrate had revoked the order for payment of maintenance because she had been found guilty of adultery, and, therefore, if we are to test her position by whether she would be able to get a judicial separation, she, upon proof of the decision of the High Court, would fail, because it has been established against her that she is not of pure character, but has been guilty of adultery. Those two cases are cases in which adultery was considered simpliciter without any question of disability arising on the part of the other spouse to rely upon it by reason of his conduct conducing. They may be dealt with, to use a not inconvenient phrase, as cases of adultery simpliciter. I desire to observe, however, that in *Everett* v. *Everett* (4) it is clear that the ground F G H I

A on which the court refused to act in favour of the petitioner was that he came before the court compelled to admit that when the petition was launched and at the moment when the action of the court was invited he was living in adultery. Those two cases appear to deal with the position and rights of persons in reference to a final decree ; they do not deal with the position of persons who are applying for an interim order in the course of the conduct of the case pendente lite.

B The case upon which counsel for the husband is entitled to rely as the strongest in his favour appears to me to be *Holt* v. *Holt and Fleeming* (1). The learned judge there said that inasmuch as the wife had been found guilty of adultery the husband could no longer be compelled to support her, and thus there was no right on her part to ask for alimony. That appears to be based upon the principle that alimony is to take the place of the right on the part of the wife to C pledge her husband's credit for necessaries. There is some authority for that view, but whether that be the true view of alimony or not, it appears to me that that point does not arise in the present case. If we were considering the wife's right to pledge the husband's credit for necessaries, it would be clear that a wife who has been guilty of adultery loses that right. That is in the case of what I have called adultery simpliciter. But, as was pointed out by Scrutton, L.J., in D *Durnford* v. *Baker* (9), following Sir James Shaw Willes in *Cooper* v. *Lloyd* (13), and also *Govier* v. *Hancock* (14), there may be cases in which the husband is not entitled to impute adultery against the wife, as where, subsequent to the adultery, there has been condonation. There may be cases, where, although there has been adultery, it is not available to the husband to take advantage of it, where there has E been connivance or conduct conducing. In this case the right of the husband to impute adultery against his wife is circumscribed and lost by his own conduct or by his negligence.

I have dealt so far with the argument which has been presented to us, although it appears to me that our decision must lie within a smaller compass. It appears to me that in the present case, inasmuch as the finding of Lord Coleridge was F that, although the wife had been guilty of adultery, the husband was not entitled to rely upon it because of his conduct conducing, we have not a case in which adultery simpliciter can be imputed against the wife. Lord Gorell in a passage which has been read to us from *Parry* v. *Parry* (10) has pointed out that conduct conducing to adultery may vary very greatly in degree. He devotes some time to the explanation of that view. It is plain from the action of Lord Coleridge in G dismissing the husband's petition that he did not regard the husband as free from fault. The husband lost the right he would otherwise have had by reason of his conduct conducing. In those circumstances, it appears to me that the cases which have been cited to us are not really in point, and that the decisions in *Otway* v. *Otway* (3) and *Everett* v. *Everett* (4), which deal with final decrees, do not restrict the power of the Divorce Court in the matter of an order for alimony pendente lite. H We must not overlook s. 31 of the Act of 1857, and we must remember that in interpreting the action of the court within s. 22, s. 31 with its proviso as to misconduct conducing to adultery is one of the provisions subject to which s. 22 was passed. In those circumstances it appears to me that it would be a misinterpretation of and an increase of the limitation put upon the powers of the court, if we were to hold that there was no power to grant alimony because of a conviction of I the wife of adultery. The learned President pointed out that the wife was a competent suitor. What may be the ultimate fate of her petition we do not know, but it cannot be said that her petition could be ordered to be withdrawn from the file on the ground that she was incapable of presenting it by reason of the fact that she has been guilty of adultery, and, inasmuch as she may say against her husband that the adultery was due to his conduct conducing, he cannot rely upon it as definitely preventing her from taking proceedings. If, therefore, she is, as I agree with the President, a competent suitor, it appears to me that s. 190 (3), comes into play, and that, giving full weight to the limitation imposed by s. 22, it is

necessary for the court to bear in mind the effect of s. 31, and in those circumstances to say that there was power in the court to make an order for alimony pendente lite at a time when the measure of quality of the wrong to be imputed to the husband and to the wife has not been finally determined between them. It appears to me, therefore, that the first ground on which the case has been argued fails. A

The second point is that where the spouses have been living separately from each other the wife is not entitled to benefit her position by getting an order for alimony pendente lite. That is really based upon the theory that the right to grant alimony is based solely upon the right of the wife to pledge her husband's credit ; at the present moment it is doubtful what the position of the wife may be on that issue. The question of conduct conducing once more may come into play for the purpose of still rendering the husband liable, notwithstanding the fact that his wife has committed adultery. It appears to me that on this point we also cannot neglect the effect of conduct conducing and that it would be wrong to say that she is benefiting herself by obtaining an order for alimony. She is in circumstances which justify the court in considering whether it will make an order. If an order has been made the court would be slow to interfere with the discretion of those who rightly made it. I do not think myself that the basis of alimony pendente lite is solely to be considered from the point of view of whether or not the wife at the time could have pledged her husband's credit. If that be the basis of it, it seems by no means certain whether the wife has lost that right. On the second point taken, namely, that inasmuch as she has been able to support herself and that there was no evidence on which the court could make an order, it appears to me that the evidence before the court was not sufficient to oust or prevent it exercising its jurisdiction, for all that the court had before it was that the wife had been able to get along in some fashion by a precarious course of life, and that the means which she herself had were insufficient to support herself and her two children. In those circumstancees it appears to me that the registrar had abundant material upon which he could make the order, and as he made the order I think it would be wrong for this court to disturb it. For these reasons I think the appeal must be dismissed with costs. B C D E F

**SARGANT, L.J.**—I am of the same opinion. I will compress my remarks as far as possible. Under s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, the court has the same power on any petition for divorce or nullity of marriage to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation. The husband in the present case reads that as if the words were that the court should have power to make, not the same class of interim orders, but orders in the same class of cases as the court could in suits for judicial separation. The argument is that if the suit had been one for judicial separation the wife would necessarily have been barred from ultimate relief and from an interim order for alimony by the facts of her adultery, and that, therefore, that must be so, even in this suit which is a suit for divorce, or in a suit for nullity. It appears to me that that argument is quite ill-founded because the class of cases in which a wife may get relief by way of decree for dissolution or nullity is more extensive than the class of cases in which the wife may get a judicial separation. By the language of s. 190 (3) the power to grant alimony is a general power in suits for divorce or nullity and not merely in suits for divorce or nullity of the same character or brought in circumstances similar to suits for judicial separation. The learned President has stated it in these words : G H I

> "Concisely stated, the argument was this. A suit for divorce a mensâ et thoro could not have been maintained ; therefore, no order for alimony pendente lite could or would have been made ; consequently no such order can be made under s. 190 (3) in a suit for divorce instituted by a wife who has been guilty of adultery."

In my judgment, the argument so concisely stated is almost obviously fallacious, and puts a limitation on the sub-section which the words of the sub-section do not in themselves bear and would have the effect of quite unduly crippling the power of the court in that class of cases where divorce or nullity is permissible, but judicial separation could not be granted. In the present case, as the learned President has said, the wife has a primâ facie right to bring this suit. It is a maintainable position. It is not on the face of it bad. Although she may have committed adultery, nevertheless her conduct may be excused under the relevant sections of the Act, and she may, therefore, succeed in getting a divorce from her husband. That being so, there is no reason for saying that the power of the court under sub-s. (3) to grant interim alimony is limited or is negatived by the fact of her having committed adultery. That sums up concisely, in my view, the reasons why I think the learned President was right in considering that he had power in the present circumstances to grant the alimony now in question.

Then comes the second ground for the appeal, a ground founded on the particular circumstances of the case, which refers to what is said to be a definite, established practice of the court under which interim alimony is never granted in cases where the wife is showing that she is capable of maintaining herself. Two or three cases were sited to that effect: *George* v. *George* (11), and *Burrows* v. *Burrows* (6). To my mind, those were decisions upon the particular facts of those cases, but observed that in both the wife had sufficient means of support. In the present case the wife has made a distinct statement that she is not capable of maintaining herself. She earns a little, but she can only have one room and she has two children to support. It seems to me that in that state of things there was evidence on which the registrar might perfectly well have come to the conclusion that the wife had not sufficient independent means of support, and that it was proper that she should be granted a sum by way of interim alimony. The registrar fixed that sum at a very moderate rate. During six months it would only involve the husband in the payment of £13. So far as the second ground of appeal is concerned, I am sure that, if that had been the only ground, leave to appeal would not have been granted. It can be treated in a somewhat contemptuous fashion. I agree the appeal should be dismissed.

**LAWRENCE, L.J.**—I am of the same opinion. In my opinion, the effect of s. 190 (3) of the Judicature Act, 1925, is not to confine the power of the court to make interim orders to those cases in which the facts are such as would warrant the court in making an order in proceedings for judicial separation, but to confer on the court a general power to make interim orders of the same nature and class as would be made in properly instituted proceedings for judicial separation. If that be the true view, I agree with the learned President that the decisive inquiry in this case is whether the wife on the facts is a competent suitor for relief in a material cause, and that is not disputed. On the second point I have nothing to add to what has already been said by my Lords.

*Appeal dismissed.*

Solicitors: *Mills, Lockyer, Church & Evill; Edmund O'Connor & Co.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

A

# R. *v.* CORY BROS. & CO., LTD. AND OTHERS

[GLAMORGANSHIRE ASSIZES (Finley, J.), February 28, 1927]

[Reported [1927] 1 K.B. 810; 96 L.J.K.B. 761; 136 L.T. 735; 28 Cox, C.C. 346]

B

*Criminal Law—Corporation—Criminal liability—Offence involving personal violence—Criminal Justice Act*, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 33.

By the Criminal Justice Act, 1925, s. 33 (1): "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation C upon trial, make an order empowering the prosecutor to present to the grand jury at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act) any such order shall be deemed to be a committal for trial . . . (3) Where the grand jury at any assizes or quarter sessions return a true bill against a corporation in respect of any offence, D the corporation may, on arraignment before the court of assize or the court of quarter sessions, as the case may be, enter in writing by its representative a plea of Guilty or Not Guilty, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the court shall order a plea of Not Guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of Not Guilty." E

This enactment relates to mere machinery, designed to abolish the inconvenience that formerly existed of a corporation not being triable at assizes or quarter sessions, but it made no change in the substantive law, and an indictment will not lie against a corporation for felony or for misdemeanour involving personal violence, as, for instance, setting or placing, or causing to be set or placed, any engine calculated to destroy human life or inflict grievous F bodily harm, contrary to s. 31 of the Offences Against the Person Act, 1861.

**Notes.** Section 33 (1) of the Criminal Justice Act, 1925, has been replaced by the Magistrates' Courts Act, 1952, Sched. 2, paras. 1, 3, 5.

Referred to: *D.P.P.* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119; *R.* v. *I.C.R. Haulage, Ltd.*, [1944] 1 All E.R. 691. G

As to the criminal liability of a corporation see 9 HALSBURY'S LAWS (3rd Edn.) 90 and ibid., vol. 10, pp. 281, 366. For cases see 13 DIGEST (Repl.) 327. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Cases referred to:

(1) *R.* v. *Tyler and International Commercial Co., Ltd.*, [1891] 2 Q.B. 588; 61 L.J.M.C. 38; 65 L.T. 662; 56 J.P. 118; 7 T.L.R. 720, C.A.; 13 Digest H (Repl.) 329, *1347*.

(2) *R.* v. *Birmingham and Gloucester Rail. Co.* (1842), 3 Q.B. 223; 3 Ry. & Can. Cas. 148; 2 Gal. & Dav. 236; 11 L.J.M.C. 134; 6 Jur. 804; 114 E.R. 492; 13 Digest (Repl.) 328 *1340*.

(3) *R.* v. *Great North of England Rail. Co.* (1846), 9 Q.B. 315; 16 L.J.M.C. 16; 7 L.T.O.S. 468; 11 J.P. 21; 10 Jur. 755; 2 Cox, C.C. 70; 115 E.R. 1294; I 13 Digest (Repl.) 329, *1348*.

(4) *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957; H.L.; 13 Digest (Repl.) 327, *1334*.

**Trial** at Glamorganshire Assizes before FINLAY, J.

The defendants, Cory Bros. & Co., Ltd., were charged, together with three individuals, upon an indictment, the first count of which alleged manslaughter and

the second count the offence of causing to be set up an engine calculated to destroy human life or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, contrary to s. 31 of the Offences against the Person Act, 1861. Before any plea was entered on the record, counsel for the defendants moved to quash the indictment in respect of the company.

*Norman Birkett, K.C.*, and *Trevor Hunter*, for the defendant company,—In this case a limited company is charged, first, with the felony of manslaughter ; and, secondly, with a misdemeanour under s. 31 of the Offences against the Person Act, 1861. It is submitted that s. 33 of the Criminal Justice Act, 1925, which provides for the trial of corporations, relates to mere machinery and made no change in the substantive law. It could not be contended that in consequence of this section a corporation can be indicted for murder, because there is only one judgment in the case of murder, namely, death, and that sentence cannot be passed on a corporation. Obviously, therefore, the section did not purport to deal with existing law. It is clear law that, as a general principle, a corporation can be indicted for breach of duty imposed by law, but not for felony or crime, involving personal violence. [They referred to *R.* v. *Tyler and International Commercial Co., Ltd.* (1), *R.* v. *Birmingham and Gloucester Rail. Co.* (2), *R.* v. *Great North of England Rail. Co.* (3), and *Pharmaceutical Society* v. *London and Provincial Supply Association* (4).] In every case where a corporation has been convicted, the offence was one prescribed under a penalty, and the question of mens rea did not enter into it. In cases of manslaughter or offences against the person.

*Artemus Jones, K.C.*, *A. T. James*, and *G. O. George* for the Crown.—The Criminal Justice Act, 1925, has made a corporation an indictable entity. This is another development in the gradual process of placing an artificial entity within the reach of the criminal law in the same way as a natural person. It is admitted that crimes such as bigamy or rape cannot be committed by a collective body, but the legislature, as well as the practice of the courts, has made serious encroachments on the old common law doctrine that a corporation aggregate cannot commit a felony. Formerly the difficulties of proceeding against a corporation were twofold. One was procedural, for a corporation could appear only by attorney, whereas at assizes and quarter sessions the accused had to appear and plead in his own proper person ; and secondly, in the old days, when the only punishment for felony was death, the judgment of the court could not be enforced against a corporation by execution. Now the legislature has enacted that a corporation can be presented to a grand jury on a bill of indictment. It must, therefore, have been contemplated that a corporation is capable of committing some indictable crimes. It is to be observed that the provisions of s. 33 were not restricted to misdemeanours nor were felonies in terms excluded from its operation. The difficulty in regard to punishment no longer exists. Under s. 5 of the Offences Against the Person Act, 1861, manslaughter can be punished by a fine, and, accordingly, the judgment of the court can be enforced against a corporation in this manner. The old difficulties in regard to procedure and punishment having disappeared, the maxim cessante ratione legis cessit ipsa lex must apply to the liability of a corporation at the present time.

**FINLAY, J.**—I entirely appreciate the great importance of this point, and I am very indebted to counsel for the way in which they have argued it. But I conceive that sitting here I am bound by authority, which I must follow, to decide in favour of the objection which has been taken.

The indictment which is before me is an indictment charging three individuals and a limited company, called Cory Bros. & Co., Ltd., with two offences. In the first count those three individuals and the company are charged with manslaughter ; and in the second count the three individuals and the company are charged with setting up an engine calculated to destroy human life or inflict grievous bodily harm with intent that the same should or whereby the same might destroy or

inflict grievous bodily harm upon a trespasser or other person coming in contact with it. That count is based upon s. 31 of the Offences against the Person Act, 1861. Section 33 of the Criminal Justice Act, 1925, provides

> "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation upon trial, make an order empowering the prosecutor to present to the grand jury at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act), any such order shall be deemed to be a committal for trial."

That is followed by certain sub-sections carrying that out—in particular one may notice sub-s. (3) which enables the corporation to enter in writing by its representative a plea of Guilty or Not Guilty, and provides that, if either the corporation does not appear by its representative or fails to enter any plea, the court shall cause a plea of Not Guilty to be entered and the trial shall proceed.

With regard to the first matter which arises, I entertain no doubt at all that that is merely machinery. It is machinery directed to avoid an inconvenience which had been much felt by reason of the fact that a corporation could not be indicted at assizes, and, therefore, where there was an indictment against a corporation, it was necessary to remove the indictment by certiorari. I entertain no doubt that this is machinery and I am confirmed in that view by the fact that counsel for the Crown in his argument, though I thought I detected at the end a slight tendency to recede from the position which he had taken up at the beginning—none the less did admit quite definitely that this section did not alter the substantive law, but merely provided machinery for carrying out the purpose of the law whereby already a corporation could be charged with a criminal offence. That being so, it is only necessary to ascertain with what criminal offences a corporation could at the date of the Act be charged and, therefore, now can be charged. In Archbold's Criminal Practice (26th Edn.) at p. 9, the law is summarised in this way:

> "By s. 2 (1) of the Interpretation Act, 1889, 'in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after Jan. 1, 1890, 'the expression "person" shall, unless a contrary intention appears, include a body corporate. . . . A contrary intention would be inferred in the case of treason, felony, or misdemeanours involving personal violence . . . .' "

For that proposition *Pharmaceutical Society* v. *London and Provincial Supply Association* (4) is cited. I will look at the authorities in order to ascertain whether that statement of the law is justified, because, if it is, to my mind it is clear that this indictment does not lie against the company. As regards the charge of manslaughter it is, of course, not necessary to say that that is a felony. As regards the second count, involving exactly the same facts as the first count, I entertain no doubt at all that that is a misdemeanour involving personal violence.

I do not think that, sitting here, it is necessary or would be useful that I should attempt to review the law, but I may just observe that there are two cases in which the matter is put very clearly. The first is *R.* v. *Great North of England Rail. Co.* (3), and the second is *R.* v. *Birmingham and Gloucester Rail. Co.* (2). I take as a convenient statement of the law a passage in the judgment of Lord Denman, C.J., in the first of these two cases:

> "Some dicta occur in old cases: 'A corporation cannot be guilty of treason or of felony.' It might be added, 'of perjury, or of offences against the person.' The Court of Common Pleas lately held that a corporation might be sued in trespass; but nobody has sought to fix them with acts of immorality. These

plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large."

In *R.* v. *Birmingham and Gloucester Rail. Co.* (2) the passage which I think useful is to be found in the judgment of PATTESON, J., delivering the judgment of the court. He cites a passage from a decision of LORD HOLT, which is to this effect (3 Q.B. at p. 232): "Note: per HOLT, C.J. A corporation is not indictable, but the particular members of it are." PATTESON, J., goes on:

"What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults."

Then there is a third case—*R.* v. *Tyler and the International Commercial Co., Ltd.* (1)—where in the judgment of BOWEN, L.J., there is this passage ([1891] 2 Q.B. at p. 592):

"It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute, either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment. That was laid down in *R.* v. *Birmingham and Gloucester Rail. Co.* (2) . . ."

The learned lord justice reads a passage from the judgment of PATTESON, J., including the words which I have read "though not for a felony, or for crimes involving personal violence, as for riots or assaults." Passages much to the same effect are to be found in the judgments in *Pharmaceutical Society* v. *London and Provincial Supply Association* (4), which is cited in ARCHBOLD'S CRIMINAL PRACTICE.

In the state of the authorities, I conceive that the less I say about this matter the better. If it is conceded, as I think it must be conceded, that the substantive law is not altered by the Act of 1925, then we are simply driven to ascertain from the authorities what the law is. It is always, of course, a tempting argument (and it has been put to me in a most tempting shape) to say: "Here are enormous developments. Let the common law march with the developments, and let us decide that these authorities are antiquated and that in 1927 they ought not to apply." All I can say is this. It may be that they ought not to apply; it may be that they ought still to apply; it must be not taken that I assent to any part of the argument, seductive as it was, which was addressed to me on that point. It is enough for me to say that, in my opinion I am bound by authorities which show quite clearly that in point of law an indictment will not lie against a corporation either for a felony or for a misdemeanour of that nature which is defined in the second count of this indictment based upon s. 31 of the Offences against the Person Act, 1861. For these reasons, basing myself, as I conceive it my duty to do, upon authority, and deciding the matter as I conceive it my duty to do in accordance with that view, I must decide that the objection taken by counsel for the defence is a good one and that the company cannot be indicted here for these offences.

*Indictment quashed.*

[The trial then proceeded against the three individuals, who were, in the result, acquitted.]

Solicitors: *Morgan, Bruce & Nicholas*, Pontypridd; *Kensholes & Prosser*, Aberdare.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

# JAMES *v.* BRITISH GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Roche, J.), March 21, 22, 1927]

[Reported [1927] 2 K.B. 311; 96 K.B. 729; 137 L.T. 156; 43 T.L.R. 354; 71 Sol. Jo. 273]

B

*Insurance—Negligence—Validity of policy against negligence—No wilful, intentional criminality involved.*

The courts should be reluctant to interfere with a contract unless it is plain that its enforcement is contrary to public policy. While the rules relating to public policy are themselves unchanging, their application may vary infinitely from time to time and from place to place.

C

A policy of insurance indemnifying the assured against the consequences of his negligence is not void as being against public policy since the risks insured against are not the result of the assured's wilful, intentional criminality.

**Notes.** It is now, of course, compulsory under Part II of the Road Traffic Act, 1930, to insure against third-party risks arising out of the use of motor vehicles, but the present case is given because the principles involved apply to insurance by professional persons and employers against the consequences of their negligence, by newspaper proprietors and publishers against loss in respect of libels published by them, and similar cases.

D

Considered: *Haseldine* v. *Hosken*, [1933] All E.R. Rep. 1; *Beresford* v. *Royal Insurance Co., Ltd.*, [1937] 2 All E.R. 243. Referred to: *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35.

E

*Tinline* v. *White Cross Insurance Association, Ltd.* (1), [1921] 3 K.B. 327, applied.

As to liability insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 331, and for cases, see 29 DIGEST 393.

F

Cases referred to:

(1) *Tinline* v. *White Cross Insurance Association, Ltd.*, [1921] 3 K.B. 327; 90 L.J.K.B. 1118; 125 L.T. 632; 37 T.L.R. 733; 26 Com. Cas. 347; 29 Digest 408, *3214*.

(2) *Egerton* v. *Brownlow* (1853), 4 H.L. Cas. 1; 88 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, *2072*.

G

(3) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 12 Digest (Repl.) 271, *2082*.

(4) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 48 W.R. 13; 15 T.L.R. 286; 43 Sol. Jo. 351, D.C.; 42 Digest 980, *112*.

H

**Action** tried by ROCHE, J., without a jury.

The plaintiff was the owner of a motor car insured under a policy issued by the defendants which, inter alia, covered third-party risks. On June 3, 1925, the plaintiff, while driving the car, collided with a motor cycle, injured the driver and killed the passenger. The plaintiff had been to a wedding reception, where he had become intoxicated. No action was brought in respect of the death of the passenger on the motor-cycle, but the driver brought an action for damages for personal injuries and recovered £1500 and costs amounting to some £182. The plaintiff was convicted and sentenced for the manslaughter of the passenger but a charge of unlawfully wounding the driver was not proceeded with. The plaintiff claimed to be indemnified by the defendants to the extent of the expenses incurred, in the action brought by the driver. The defendants pleaded that it was against

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public policy that the plaintiff should be indemnified against the results of his own criminal acts.

*du Parcq*, K.C., and *Malcolm Hilbery* for the plaintiff.
*Barrington-Ward*, K.C., and *Monier Williams* for the defendant.

**ROCHE, J.**—The plaintiff sues to recover certain moneys under a policy of insurance underwritten by the defendant company whereby the plaintiff was insured against a variety of matters in connection with his ownership and driving of a "Fiat" motor car. Among the other matters covered by the policy was what is known as third party risks, or as the margin of the policy expresses it "public liability." The exact terms of the policy in this action so far as they are material are that the company will indemnify the assured against and in respect of accidental bodily injury to any person. There are other clauses which are material, in particular a proviso that the company will undertake the defence of the assured in any police court proceedings in the United Kingdom in respect of any alleged offences by the assured.

The occurrences which led up to the claim are simple, but unfortunate. On June 3, 1925, while the plaintiff was driving his motor car, he collided with a motor cycle which was ridden by a subaltern in His Majesty's Army named Shadwell and carried a passenger, whether in a side-car or behind Shadwell I know not, one Tait, also a subaltern in the Army. The result was that Tait was killed and Shadwell much injured. In respect of Tait, who was killed, no civil proceedings took place, presumably because he had no one dependent on him who lost by his death in the pecuniary sense. In respect of Shadwell, after certain criminal proceedings had taken place to which I will refer, an action was brought for damages, and by the verdict of the jury Shadwell recovered £1,500 damages and certain costs. Costs were also incurred by the present plaintiff, the defendant in that action. Lieut. Shadwell has not yet received his damages for the simple reason that the present plaintiff is not in a position to pay them unless he has rights of recourse to the defendant company on his policy. That fact is not material in one sense to the decision of this case, but it is a point that is not altogether negligible when one has to consider where public policy truly lies, public policy being the topic which is relied upon and raised by the defendant as one of his grounds of defence in this action.

Those being the circumstances of the civil proceedings, what happened in the criminal proceedings was this. The present plaintiff, James, was tried at the assizes on an indictment for the manslaughter of Tait; he was also charged with doing grievous bodily harm to Shadwell—a misdemeanour ordinarily known by the term "unlawful wounding." It appeared at the trial, the shorthand notes of which, by consent, have been put in in this court, that the plaintiff had been at a wedding and that he had been unwise and foolish enough and wrong enough to have had too much to drink there, and was not sober when the accident happened. No doubt that was one of the causes, if not the main cause, of this unfortunate accident. He was convicted of manslaughter and sentenced to twelve months' imprisonment. The matter of Shadwell was not further proceeded with and there was no conviction in connexion with the injuries to him. His claim in the civil proceedings is the subject-matter of the present claim for indemnity. The present action is brought under the insurance policy to recover indemnity and the main defence which raises questions of general interest and importance and is not without difficulty, is that, inasmuch as this accident resulted from criminal conduct on the part of the plaintiff, it is again public policy that he should be indemnified in the case of the happening of such an accident.

[His Lordship reviewed the evidence and found as a fact that the plaintiff was the owner of the car, that he had not made a false declaration in the proposal form regarding his then state of health, and that, under the terms of the policy, he was

entitled to the costs of defending himself in the proceedings in the police court and in the civil action, but not at the assizes, continued.]

It remains to deal with the matter of public policy. That is a question of very great general importance because, if the contention of the present defendants is right, it seems to me that it cuts at the very roots of a very large number of these motor-car policies. I myself see no half-way house whereby it can be said that the rule of public policy precludes from recovering under the policy only those persons who drive when they are drunk. It seems to me that the principle, if it is applicable at all, is applicable to all persons who drive to the public danger. Moreover, the principle affects many other forms of insurance. It affects a very large number of workmen's compensation insurances where workmen are injured by acts or faults on the part of the employers—inadvertent no doubt—which amount to breaches of the Factory Acts—fencing of machinery and things of that sort. The results are very far-reaching if the mere fact that the assured has offended against the criminal law, however inadvertently, precludes him from recovering under a policy of insurance.

Fortunately this has been the subject of express decision by a judge of great experience in matters of insurance law—BAILHACHE, J., in *Tinline* v. *White Cross Insurance Association, Ltd.* (1). In matters such as this affecting public policy the rights and duties of a judge are clear. They have to attend to matters of public policy. If there was any dispute about the matter (and there was some as late as 1853) it was set at rest in the well-known case of *Egerton* v. *Brownlow* (2). It has been established that it is the duty and the right of the courts to refuse to enforce contracts for dispositions of property which are offensive and obnoxious to public policy. It is also true that the principle has been applied, indeed long before *Egerton* v. *Brownlow* (2), to matters of insurance. The principle was laid down by LORD ESHER in *Cleaver* v. *Mutual Reserve Fund Life Association* (3) as follows ([1892] 1 Q.B. at p. 151):

> "No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either in law or in equity, but when people vouch that rule to excuse themselves from the performance of a contract in respect of which they have received full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched and ought not to be carried a step further than the protection of the public requires."

I agree that this principle should not be carried a step further than public policy requires; in other words the courts should be reluctant to interfere with contracts unless it is plain that their enforcement is contrary to public policy. Another general principle may be stated and it is that application of public policy is variable. The rules of public policy which are only, I suppose, a branch of the rules of ethics, are themselves unchanging, but the application may be infinitely various from time to time and from place to place. That, I think, was what BAILHACHE, J., was probably referring to when in *Tinline's Case* (1) he said:

> "LORD HALSBURY said that the law is not always logical and everyone concerned with the administration of the law knows this. If the law is not logical public policy is even less logical."

But I prefer to think that the applications of public policy may be variable from time to time and from place to place. But if it is found that at any given time the courts have adopted a settled rule for the application of public policy in any sphere, I think it is the duty of the judges loyally to follow that rule. The cases dealing with contracts in restraint of trade as between employer and employed are cases that are very familiar. In this case without finding so generally a settled rule as is now established in the cases to which I have last referred (the cases of

employer and employed) I find a definite decision of BAILHACHE, J., in a careful judgment dealing with this very matter, and I think without doubt that I ought to follow it merely because the decision is so unambiguous and I follow it with the more confidence because I agree with it.

It has been said that the present case is distinguishable from *Tinline's Case* (1). I am unable to distinguish the two cases. The principle as it seems to me stands in this way. In *Burrows* v. *Rhodes* (4) KENNEDY, J., said, in a passage that has been often quoted:

> "It has, I think, long been settled law that if an act is manifestly unlawful or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void."

The learned judge applying that rule in that case held that the plaintiff could recover indemnity from the defendant or damages on the ground that, although he, the plaintiff, might have done as was alleged in the pleadings that which was unlawful, yet he did not do it in circumstances which made it to him manifestly unlawful or when he knew it to be unlawful. I think that is fairly paraphrasing that decision of a Divisional Court. In my judgment, that is the principle which is applicable to this case and which BAILHACHE, J., really applied in *Tinline's Case* (1). That is to say, the act which brought about the criminal responsibility in *Tinline's Case* (1) and in this case and brought about the civil responsibility in both cases, was negligence. It may be that it was gross negligence; it may be that it was reckless negligence; whatever may be the degree of negligence which constitutes criminality, nevertheless it was negligence which was not the wilful or advertent doing of an act by which the plaintiff injured or killed the persons who were injured or killed.

In those circumstances, in my view, there is not on the part of the person who does an unlawful act that degree of criminality which makes it against public policy that he should be indemnified in respect of it. It may be possible to evolve a more general rule applicable to this case, but I content myself with saying that in a case of negligence I am not prepared to hold that there is the wilful, intentional criminality which makes it contrary to public policy to allow such a person to be indemnified. With regard to the distinction between this case and *Tinline's Case* (1) based on the ground of drunkenness, it is said that the drunkenness involved a degree of deliberation or intention which was not present in *Tinline's Case* (1), and at one time the argument almost seemed to touch on the degree of moral culpability attaching to the two cases, but in reality it was directed to more legal considerations. With regard to culpability—while I must not be thought to be defending or excusing the conduct of the plaintiff or of any person in his situation—I find it difficult to think that he was any worse than other persons who with deliberation and in their sober senses, drive with reckless disregard of the life and limb of other people. With regard to the legal position it appears to me that they are both in the same position; they are both guilty, ex hypothesi, of criminal negligence for which they are answerable in a criminal court, whether for doing actual bodily harm or for manslaughter. In neither case have they in fact intended the injury to life and limb for which they are tried and convicted. They have been guilty of negligence which is inadvertent and not advertent, or wilful, or intentional, so as to inflict bodily harm.

For these reasons I hold that this case is not distinguishable from *Tinline's Case* (1). I have also thought fit to express my opinion that BAILHACHE, J.'s, decision was right in principle. Before leaving that part of the case I want to express one more conclusion as to the facts. It has been said that the plaintiff deliberately put himself in the condition of drunkenness. On the facts I do not reach that conclusion. I have been informed that it was proposed, and one is

aware at any rate that this principle is advocated, that persons should be obliged to insure against these risks on the ground that with the spread of motoring the risks to other persons on the road are so great, and the risk or chance of injury from any impecunious person is so great, that it is really unfair that people should be driving when they are not covered against third-party risks. It would, I think, be unfortunate, although it might have to be done, that I should be at one moment deciding that it was contrary to public policy that persons should be insured against third-party risks in cases of this kind, and at the next that Parliament should be asked to or even proceed to enact that persons ought to be insured against such risks. I only mention that as a reason for caution in the application of this rule and the application of this principle in regard to public policy. For the reasons I have given I follow the decision in *Tinline's Case* (1), and it follows from that that I give judgment for the plaintiff for £1,857 4s. 11d., with the costs of the action.

*Judgment for plaintiff.*

Solicitors: *Blundell, Baker & Co.*, for *J. M. B. Turner & Co.*, Bournemouth; *Clifford Turner & Co.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

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## O'CEDAR, LTD. *v.* SLOUGH TRADING CO., LTD.

[King's Bench Division (Branson, J.), March 16, 17, 28, 1927]

[Reported [1927] 2 K.B. 123; 96 L.J.K.B. 709; 137 L.T. 208; 43 T.L.R. 382]

*Landlord and Tenant—Insurance—Covenant not to use premises so as to increase premiums for adjacent premises—No correlative obligation on landlord not so to use adjacent premises—Derogation from grant—Purpose of lease not frustrated—Achievement at greater expense.*

By a lease dated May 31, 1922, the landlords let premises to the tenants who agreed to pay "as additional rent" the amount which the defendants might expend in insuring the premises against fire. The tenants covenanted (inter alia) ". . . not to do or suffer any . . . thing which may render any increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance." Subsequently the tenants surrendered part of the demised premises to the landlords who let that part to a woodworker with the result that the premiums payable by the tenants for insurance against fire were greatly increased. The tenants claimed a declaration that the landlords were not entitled to let the part of the premises in question for such purposes as would cause the cost of the insurance of the tenants' premises to be increased.

**Held:** (i) the fact that the landlords had put the tenants under an obligation not to use the premises in such a way that increased premiums became payable for the insurance of the adjacent premises did not result in the landlords becoming bound under a correlative obligation not to use the adjacent land in such a way; (ii) the covenant to be implied in the lease that the landlords would not derogate from their own grant would only apply where the purpose

for which premises had been demised had been frustrated, but not where, as in the present case, that purpose could still be achieved, albeit at a greater expense or with less convenience; and, therefore, the tenants were not entitled to the declaration which they claimed.

**Notes.** Referred to: *Matania* v. *National Provincial Bank, Ltd.*, [1935] All E.R. Rep. 923; *Port* v. *Griffith*, [1938] 1 All E.R. 295; *Newman* v. *Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131.

As to covenants to insure, see 23 HALSBURY'S LAWS (3rd Edn.) 617, and as to derogation by the landlord from his grant, see ibid., p. 608. For cases, see 31 DIGEST (Repl.) 138, 145, 400.

Cases referred to:

(1) *Barnes* v. *City of London Real Property Co.*, [1918] 2 Ch. 18; 87 L.J.Ch. 601; 119 L.T. 293; 34 T.L.R. 361; 31 Digest (Repl.) 98, *2460*.

(2) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, *2846*.

(3) *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200; 90 L.J.Ch. 140; 124 L.T. 418; 37 T.L.R. 91; 65 Sol. Jo. 93, C.A.; 31 Digest (Repl.) 142, *2811*.

(4) *Robinson* v. *Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, *2676*.

(5) *Browne* v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 55 Sol. Jo. 108; 31 Digest (Repl.) 142, *2807*.

(6) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 30 Digest (Repl.) 541, *1755*.

**Action** tried before BRANSON, J., without a jury.

The defendants were the owners of the Slough Trading Estate, at Slough, and their business was to let buildings upon that estate to persons prepared to rent them for the purpose of using them for factories and the like. The plaintiffs were manufacturers of mops and polishes. By an indenture dated May 31, 1922, the defendants demised to the plaintiffs a part of No. 8 building on the estate for a term of twenty-one years at a rent of £3,700 per annum. The plaintiffs agreed to pay "as additional rent" an amount equal to that which the defendants might expend in effecting or maintaining the insurance of the demised premises against fire, and such amount was made recoverable by distress. By cl. 8 of the lease:

> "The lessees will not carry on or permit upon the said demised premises any noxious or offensive trade or business or do or suffer any other thing which may render any increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance . . ."

By cl. 16:

> "In case the said premises or any part thereof shall at any time be destroyed or so damaged by fire as to be unfit for occupation or use and shall not be re-built or reinstated by the lessors within twelve calendar months [the rent was to abate]."

Clause 19 contained a covenant by the lessors that they would adequately insure and keep insured the demised premises against fire, and would re-build or reinstate in case of destruction or damage by fire, and there was also a covenant that they would give quiet enjoyment to the lessees. By a further indenture dated June 22, 1922, the defendants demised to the plaintiffs the rest of the building No. 8 on the same terms. At the outset the defendants, who had a general policy covering all their buildings at a flat rate of 2s. 6d. per cent., allowed the plaintiffs the benefit of that rate, but at the end of 1922 they decided to discontinue this

method of dealing with the matter and sought to make the plaintiffs pay 10s. per cent. To this the plaintiffs objected, and on Jan. 6, 1923, the defendants agreed that, if the plaintiffs could effect an insurance upon the building at a less rate, they might do so as agents for the defendants. The plaintiffs, accordingly, effected an insurance with the Prudential Assurance Co., Ltd., on the building and on the plaintiffs' plant therein at a rate of 2s. 6d. per cent. At that time the plaintiffs did not use machinery in the building for making packing cases. At a subsequent period, however, they started using it for making their own packing cases, with the result that the rate of the insurance premium was raised to 3s. on the building and 3s. 6d. on the contents, at which rate it remained until the happening of the events which gave rise to the present claim. On May 7, 1924, by deed of surrender of that date, the plaintiffs surrendered to the defendants about one-third of building No. 8. This deed contained a covenant by the plaintiffs to build a party wall to separate the surrendered portion from that retained by them, and a wall was built accordingly. On Mar. 24, 1925, the defendants let the surrendered portion of building No. 8 to one Davies, a woodworker and maker of aeronautical parts and motor bodies. The terms of this lease were in all material respects the same as those of the lease held by the plaintiffs. On Sept. 1, 1925, it having come to the knowledge of the Prudential Assurance Co. that the surrendered portion of the premises had been let as a woodworking factory, they raised the rate for insurance to one guinea per cent. for the remainder of the currency of the policy and refused to renew it. After considerable trouble the plaintiffs succeeded in effecting other insurances at a rate averaging 18s. 9d. The learned judge found that this rise in the premiums demanded of the plaintiffs was due to the letting of the surrendered portion of the premises as a woodworking factory. The plaintiffs claimed a declaration that the defendants were not entitled to let the part of No. 8 building which had been surrendered by them, or any part thereof, for such purposes as would cause the rate of the premiums for the insurance of the premises leased by the plaintiffs to be raised. They also claimed an injunction and damages.

*Alexander Grant*, *K.C.*, and *H. Fletcher Moulton* for the plaintiffs.
*F. K. Archer*, *K.C.*, and *H. St. John Field* for the defendants.

*Cur. adv. vult.*

Mar. 28. **BRANSON, J.,** read the following judgment. The present action is brought by the plaintiffs to recover the difference between the 3s. and the 3s. 6d. per cent. insurance premiums which they used to pay and the 18s. 9d. which they now have to pay and will have to pay in the future so long as Davies uses the premises demised to him for the purposes for which they were demised.

Their counsel puts his case in two ways: First he says that when the defendants put the plaintiffs under an obligation to do nothing which might render an increased or extra premium payable for fire insurance upon the demised building or buildings adjacent thereto they impliedly came under a correlative obligation not to do anything on their part which would render an increased premium payable for fire insurance upon the demised premises. For this proposition he relies upon *Barnes* v. *City of London Real Property Co.* (1). In my opinion, that case has nothing to do with the present one. There the decision was that the reservation of a rent for the purpose of providing a housekeeper implied a correlative obligation on the part of the landlords to give an equivalent for that for which the rent was reserved. It was said by way of illustration that if there was a reservation of rent in favour of a lessor for the purpose of effecting insurance against fire on the property there must be an obligation on his part to employ the money paid him for insurance in effecting the insurance. Apart from the fact that in this case the correlative obligation to effect the insurance is express, that is a very different thing from saying, as I am asked to say here, that when a lessor puts his lessee under an obligation not to use the demised premises in a particular way he thereby becomes bound to his lessee not to use the remainder of his land in the way in question.

I know of no authority for such a proposition, nor does it seem to me that it can possibly be sound. Secondly, it is said that the defendants' action, resulting as it has in making it necessary for the plaintiffs to pay vastly increased premiums in order to carry out their obligation to insure the premises, is a breach of the covenant to be implied into the lease that the lessors will not derogate from their own grant. This renders it necessary for me to consider the extent and application of the principle which is relied on.

The principle has been stated on various occasions. It is clear that when premises are let for a particular purpose the lessor must not do anything which would frustrate the purpose for which they were let, see per LORD LOREBURN in *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2) ([1907] A.C. at p. 481); and this is the case although that which is done by the lessor and results in the frustration may have no physical effect upon the demised premises: *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* (3). If there had been evidence to show that the action of the defendants had rendered it impossible in a commercial sense to insure these buildings at all, which as a matter of fact could only be the case if the adjoining premises had been let for some wholly unusual and unexpected purpose, different considerations might well apply. In the case before me, however, the purpose for which the premises were demised to the plaintiffs has not been frustrated by what has been done by the defendants. The plaintiffs can still conduct their business as they were able to before the surrendered premises were let to Davies. The premium they have to pay is still much less than ordinary commercial businesses of some kinds have to pay. For instance, woodworking factories working for the trade often pay as much as 50s. per cent., and most woodworkers not less than 21s. But the advent of Davies has resulted in it costing the plaintiffs £600 or £700 a year more than it used to do to fulfil their covenant to pay for the insurance of the premises. It, therefore, becomes material to consider whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience. That it does not extend to prevent any interference at all with the enjoyment of the property demised is beyond doubt. This appears from *Robinson* v. *Kilvert* (4) and *Browne* v. *Flower* (5). There must be a substantial interference with the use of the premises for the purposes for which they were demised. I was invited by counsel for the defendants to hold that mere interference, although it may be substantial, is not enough, but that the principle applies only in cases in which that which has been done frustrates the purpose for which the premises were demised to the lessee. This appears to me to be contrary to the decision of STIRLING, J., in *Aldin* v. *Latimer Clark, Muirhead & Co.* (6), where a substantial interference with the purpose for which the premises had been demised was held to entitle the lessee to damages although it was not suggested that that purpose had been frustrated. *Aldin* v. *Latimer Clark, Muirhead & Co.* (6) and *Browne* v. *Flower* (5) were treated by the Court of Appeal in *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* (3) as stating the principle correctly.

I see no reason in logic or fairness for limiting the application of the principle to cases in which there has been a complete frustration of the purpose for which the premises were demised. The fact remains, however, that, as was said by YOUNGER, L.J., in *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* (3), the obligation laid upon the grantor is not unqualified. It must in every case be construed fairly, even strictly, if not narrowly. It must be such as in view of the circumstances was within the reasonable contemplation of the parties at the time when the transaction was entered into. It is convenient at this stage to deal with the defendants' contention that the principle that a grantor must not derogate from his own grant has no application at all to the present case, by reason of the fact that the premises let to Davies were originally granted to the plaintiffs and were by them surrendered to the defendants, so that in respect of these premises the plaintiffs and not the defendants are the grantors. In the view which I take of the case it is not

material for me to decide this point. I content myself with saying that it might well constitute a difficulty in the way of the plaintiffs, because if the defendants' contract not to derogate from their grant is to be applied upon the original lease it could not apply to these premises which were included in the original lease, and the surrender contains no new grant by the defendants to the plaintiffs of the premises not surrendered. I proceed, for the purposes of my judgment, upon the assumption that there is nothing in this point, and that the position created by the original lease and the surrender is as it would have been had the original lease contained only those premises now held by the plaintiffs and had the premises now let to Davies been then left in the hands of the defendants.

In my judgment, even so the principle invoked by the plaintiffs does not assist them in this case. The contention is that by doing something upon the adjoining land which is not in itself unreasonable or unbusinesslike, which has not affected the demised premises physically in any way and has not rendered it less easy or less legal to carry on upon them the business for which they were demised, but has had the effect of adding substantially to the expense of carrying on that business there, the defendants have derogated from their grant. I should be extending the application of the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applies to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their use in any way, merely makes it more expensive for the lessee to carry on his business in the demised premises than it was before. I do not think such a case comes within that principle at all. It might as well be said that if the defendants had started paying higher wages in the adjoining factories on their land, and thereby raised the price of labour in the neighbourhood, the plaintiffs would have had an action for damages upon this principle. Many other instances might be cited, for it is difficult to place any limit upon the application of the principle, if it extends to such a case as the present. Counsel for the plaintiffs relies upon the inclusion in the lease of the covenant by the plaintiffs not to do anything on the demised premises which might make it more expensive to insure the adjoining premises as indicating that a similar covenant on the part of the defendants should be implied as having been within the contemplation of the parties. To my mind, it leads rather to the opposite conclusion. The fact that something done on one set of premises might affect the rate of insurance payable upon adjoining ones was obviously present in the minds of both the parties—a covenant by one party in relation thereto was inserted and none by the other. I cannot think that it was within the reasonable contemplation of the parties that the defendants were putting themselves under such an obligation to the plaintiffs as that contended for in this case. The action fails and must be dismissed, with costs.

*Judgment for defendants.*

Solicitors: *Richardson, Sowerby, Holden & Co.; Kenneth Brown, Baker, Baker.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

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## B. LIGGETT (LIVERPOOL), LTD. *v.* BARCLAYS BANK, LTD.

[King's Bench Division (Wright, J.), April 7, 8, 1927]

[Reported [1928] 1 K.B. 48; 97 L.J.K.B. 1; 137 L.T. 443; 43 T.L.R. 449]

B *Bank—Cheque—Payment—Unauthorised cheque—Payment of debt due by purported drawer—Liability of bank.*

*Company—Management—Presumption that directors have acted regularly.*

The plaintiff company, which was a customer of the defendant bank, instructed the defendants to honour only such cheques as were signed by two directors of the company. The defendants paid cheques drawn by the company in favour of trade creditors, some of which bore the signature of one director only and some of which purported to be signed by two directors, though one of these directors had not in fact been properly appointed. The jury found that the bank had been put on inquiry whether the appointment of the second director was in order, and were guilty of negligence in paying the cheques. In an action by the company to recover as money had and received the amount paid by the bank in respect of unauthorised cheques,

**Held:** (i) the bank could not avail themselves of the rule in *Royal British Bank* v. *Turquand* (1), (1856), 6 E. & B. 327, that a person dealing with a company has a right to assume that the directors have acted regularly in matters relating to the internal management of the company, because that rule did not apply where the person seeking to take advantage of the rule had been put on inquiry, and on the facts the bank in the present case had been put on inquiry; but (ii) the bank were entitled to credit for the amounts paid on the unauthorised cheques in respect of trade debts under the equitable doctrine that a person who has paid the debts of another without authority is allowed to take advantage of his payment.

**Notes.** Considered: *Re Cleadon Trust, Ltd.*, [1939] Ch. 286. Referred to: *Lloyds Bank* v. *Chartered Bank of India, Australia and China*, [1928] All E.R. Rep. 285; *Kanssen* v. *Rialto (West End), Ltd.*, [1944] 1 All E.R. 751.

As to payment of cheques by a bank see 2 Halsbury's Laws (3rd Edn.) 190, and as to persons dealing with a company not being concerned to inquire into the regularity of acts of internal management, see ibid., vol. 6, p. 430. For cases 3 Digest 213 and 9 Digest (Repl.) 660.

Cases referred to:

(1) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur. N.S. 663; 119 E.R. 886, Ex.Ch.; 9 Digest (Repl.) 660, *4374*.

(2) *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L., 9 Digest 687, *4529*.

(3) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 43 W.R. 486; 39 Sol. Jo. 331; 2 Man. 223; 12 R. 183, C.A.; 9 Digest (Repl.) 674, *4454*.

(4) *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.*, ante p. 97; [1928] A.C. 1; 97 L.J.K.B. 76; 138 L.T. 210; 44 T.L.R. 76, H.L.; 9 Digest (Repl.) 691, *4558*.

(5) *Kreditbank Cassel G.m.b.H.* v. *Schenkers, Ltd.*, ante p. 421; [1927] 1 K.B. 826; 96 L.J.K.B. 501; 136 L.T. 716; 43 T.L.R. 237; 71 Sol. Jo. 141; 32 Com. Cas. 197, C.A.; 9 Digest (Repl.) 578, *3822*.

(6) *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins, Same* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.

(7) *Exall* v. *Partridge* (1799), 8 Term. Rep. 308; 101 E.R. 1405; 12 Digest (Repl.) 592, *4585*.

(8) *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 52 L.J.Ch. 92; 48 L.T. 33; 31 W.R. 98, C.A.; affirmed sub nom. *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857, H.L.; 12 Digest (Repl.) 555, *4205*.

(9) *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748; sub nom. *Re Cork and Youghal Rail. Co., Ex parte Overend, Gurney & Co., Ltd., and London, Hamburg and Continental Exchange Bank*, 39 L.J.Ch. 277; 21 L.T. 735; 18 W.R. 26, L.C. & L.J.; 10 Digest (Repl.) 1272, *8983*.

(10) *Baroness Wenlock* v. *River Dee Co.* (1887) 19 Q.B.D. 155; 56 L.J.Q.B. 589; 57 L.T. 320; 35 W.R. 822; 3 T.L.R. 603, C.A.; 10 Digest (Repl.) 1278, *9026*.

(11) *Bannatyne* v. *MacIver*, [1906] 1 K.B. 103; 75 L.J.K.B. 120; 94 L.T. 150; 54 W.R. 293, C.A.; 1 Digest 318, *387*.

(12) *Reversion Fund and Insurance Co.* v. *Maison Cosway, Ltd.*, [1913] 1 K.B. 364; 82 L.J.K.B. 512; 108 L.T. 87; 57 Sol. Jo. 144; 20 Mans. 194, C.A.; 1 Digest 318, *388*.

(13) *Reid* v. *Rigby & Co.*, [1894] 2 Q.B. 40; 63 L.J.Q.B. 451; 10 T.L.R. 418; 10 R. 280; 1 Digest 318, *386*.

**Further Consideration** of an action tried at Liverpool Assizes before WRIGHT, J., and a special jury.

The following statement of facts is taken from the judgment:

The action was brought by B. Liggett (Liverpool), Ltd., against Barclays Bank, Ltd. The plaintiffs are a company, registered on Oct. 4, 1923, which was formed to carry on the business of retail provision merchants in Liverpool. The business had been carried on by Mr. B. Liggett as his own business, but a Mr. Melia had bought a half share in the business for £5,000 in cash and thereupon a company was formed. According to arts. 23 to 28 of the articles of association of the company there were to be not less than two and not more than three directors. The first directors were to be George Frederick Benjamin Liggett and Edward Melia, and the directors were to have power at any time to appoint any other qualified person to be a director of the company either to fill a casual vacancy or as an addition to the board. The qualification for each director was to be a holding of not less than £500 nominal value of shares. That qualification was to be acquired in one month from the appointment of a director, and it was provided that the quorum of directors for transacting business should, unless otherwise fixed by the directors, be two.

The company was not solvent when it was registered and was at no subsequent period solvent. Mr. Melia did not take an active part in the management of the business. He was appointed not only as a director, but also as secretary, Mr. G. F. B. Liggett being not only a director, but also chairman. Mr. Melia, far from taking any active part in the conduct of the business from 1924, does not seem to have concerned himself in the management of the affairs of the company. What, however, he did was to keep the control of the banking account of the company. When the company was formed Barclays Bank, Ltd., were appointed as bankers to the company and they were instructed to honour cheques or bills provided they were signed by any two directors for the time being. These instructions of the directors were dated Oct. 19, 1923. They were signed on behalf of B. Liggett (Liverpool), Ltd., by Mr. Liggett and Mr. Melia, and specimen signatures of those two gentlemen were appended to those instructions. The branch of the defendant bank at which the company's account was opened was at Walton Road, Liverpool. With the appointment and the instructions there were enclosed the certificate of the incorporation of the company for inspection by the bank manager and a copy of the memorandum and articles of association. Mr. Jones, the bank manager, read those documents. Mr. Melia, while leaving the conduct of the business to Mr. Liggett, kept control over the banking account. His signature was necessary to any cheque before the bank would honour it. In the course of 1925 he became

doubtful about the way the business was being carried on and consulted his solicitor and an accountant. He already had reason to think that demands were being made to induce the bank to pay out moneys on cheques without his signature. For that reason about July 19 or 20, 1925, he interviewed the bank manager. According to his evidence he told the bank manager that he was having trouble with his fellow-director, who was not doing his duty, but what he did insist upon and made clear to the bank manager was that no cheques were to be paid unless they bore, not only the signature of Mr. Liggett, but also his own signature. By a letter, which is undated but is said to have been written on July 20, 1925, he reiterated those instructions. The letter is in these terms, addressed to Mr. Jones, Barclays Bank, Walton Road, Liverpool, and signed by Mr. Melia:

> "By way of confirming our interview I would state that I wish no cheques to be paid out of the above account unless duly signed by Mr. Liggett and myself, as called for in the original authority. Thanking you sincerely for your kind attention to me."

Mr. Melia was occasionally absent from Liverpool, but either at that date or possibly at some earlier date he gave to the bank manager his address and his telephone number in Liverpool so that if any question arose about the payment of cheques he could at once be communicated with, and that was entered in the bank ledger.

From time to time cheques were drawn and issued by Mr. Liggett signed only by himself, and about the end of July or August, it was arranged that if these cheques were presented they should not be paid until Mr. Melia had been communicated with, and had been consulted about them, and on a number of occasions about the end of July Mr. Melia did attend at the bank, having been notified by telephone, and there affixed his signature to cheques which had come in with only one signature attached, and those cheques were thereupon met. The last occasion, according to Mr. Melia, when he followed that course was Aug. 27 or 28. Mr. Melia at that date had just come back from Ireland, and on Aug. 27 and during the first days in September he was at his Liverpool address. The bank manager, Mr. Jones, went away on his holiday on Aug. 11 and was absent on holiday until Sept. 9. During his absence the affairs at the bank were in charge of the assistant, a Mr. Hicks, who was fully conversant with the arrangement which had been made with Mr. Melia. According to Mr. Hicks' evidence, about the end of August Mr. Liggett came and saw him and said Mr. Melia had gone to Ireland and that he had trade cheques which had to be met. He told Mr. Hicks: "Meet them, and I will get Mr. Melia to sign them." Mr. Hicks said: "I will pay them and I will get the duplicates properly signed for the other cheques," that is to say, cheques not properly signed which had come back through the Clearing House. That course was adopted, first, as regards three cheques respectively dated Aug. 20, 25, and 25, 1925. These amount in all to a sum of £661 12s. 9d., and they were paid on Aug. 27 and 28. Mr. Melia having signed those cheques, that part of the claim was withdrawn. In addition to that, certain cheques were paid by the bank with only one signature. They are three cheques, two dated Aug. 25, 1925, and one dated Aug. 26, 1925, amounting in all to a sum of £470. These were paid on Aug. 27, 28 and 31, on one signature alone. Mr. Hicks had been asked that this should be done, and he was willing to do it, apparently, because Mr. Liggett had pointed out to him a difficulty that would arise if trade cheques were not honoured, and had added that he would be obliged by Mr. Hicks' obtaining the second signature later, which at that time Mr. Hicks must have thought was the signature of Mr. Melia. On Sept. 1 Mr. Hicks received at the bank a notice written on the plaintiff company's paper dated Sept. 1, 1925, addressed to the manager of Barclays Bank at Walton Road, Liverpool, and signed per pro B. Liggett (Liverpool), Ltd., (signed) B. Liggett, chairman. It was in these terms:

"I have to inform you that (Mrs.) Eleanor May Liggett has been appointed an

additional director of the above company and we accordingly enclose herewith the new director's specimen signature. The instructions with reference to the regulation of the bank account will remain the same as hitherto, viz., 'That cheques should be signed by any two directors for the time being.' "

That was received by Mr. Hicks, and without any further inquiry he accepted it as a binding notice and acted upon it. He said he looked up the articles of association and thought the notice covered all that was necessary. The article required not less than two nor more than three directors, and he said that he presumed the new director had been appointed by the chairman. It did not occur to him to ask whether a quorum was present. He thought that Mr. Melia was in Ireland and was in Ireland at the time he paid the three cheques which I have just referred to as having been paid on one signature. That being the position, Mr. Hicks went on honouring cheques, and when the manager returned he followed the same practice and cheques were honoured from time to time bearing the signature of Mr. Liggett and Mrs. Liggett. No inquiry was made of Mr. Melia: he was not told what the bank were doing or that they were deviating from the practice which he had established, namely, that no cheques should be paid if they came in with one signature, and if they so came in he should be communicated with and his signature obtained before the cheques were met. Cheques were accordingly paid with these signatures between the period from Aug. 27 to the end of September. At the end of September Mr. Melia's accountant came to the bank and said he had ascertained that cheques were being paid on the signatures of Mr. and Mrs. Liggett, and pointed out that that was entirely improper, and thereupon, except in isolated instances of two small cheques which had been drawn in September and which apparently were not presented until the end of October, the bank made no further payments. In addition to the cheques dealt with in this way there was also a bill accepted by Mr. and Mrs. Liggett which was drawn on Sept. 12, 1925, and was paid on Sept. 15. Two bills were paid in August, one on Aug. 14 and the other on Aug. 21 on the signature of George Frederick Benjamin Liggett alone. It was admitted by the defendants in this action that they were liable in any case upon those bills, and they paid into court without a denial of liability the amount of those two bills, which is £106 5s. 7d., and no question arose as to those two bills. The company brought this action against the bank for the amount of the cheques which had been paid on unauthorised signatures as being money which the bank had had and received to their use.

*Sir Walter Greaves-Lord, K.C.*, and *N. B. Goldie* for the company.
*J. E. Singleton, K.C.*, *E. Wooll*, and *Mervyn Hughes* for the bank.

**WRIGHT, J.**—This case comes before me on further consideration. I tried it with a special jury at the last Liverpool Assizes and the jury gave certain findings of fact. The question I have to determine now is what result follows from the facts before me and the findings of the jury. [His Lordship stated the facts as set out above and continued:] The question which arises is with reference to all the cheques paid on the signature of George Frederick Benjamin Liggett and Eleanor May Liggett. These cheques, which are considerable in number, amount in all to £5,981 2s. 1d. As regards the first three cheques, they were drawn on Aug. 25 and 26, and they were paid, one on Aug. 27 and one on Aug. 28, and one on Aug. 31, and when they were paid they bore no signature but that of Mr. Liggett. I do not see how there can be any answer on the part of the bank to the payment of those cheques, because they were clearly paid without any authority or any pretence of authority. As regards the three cheques, the further event which happened was obviously most irregular, because when Mrs. Liggett came to the bank on Sept. 2 Mr. Hicks, who was, as I have said, in charge of the bank, obtained her signature to those three cheques. They had been both drawn and paid before there had even been a semblance of an appointment of her as director. In addition

to those cheques there was another cheque drawn on Aug. 29, and certain others, seven in number, drawn on Aug. 31, 1925. These were paid, one on 2nd, and the others at various dates between Sept. 4 and 9, and in each case either before they were paid or immediately after they were paid, having been originally signed by only George Frederick Benjamin Liggett, the signature of Mrs. Liggett was obtained also, and the bank thereupon treated them as being in order. In other words, she signed cheques, or purported to sign cheques, as director which were drawn at a date before she was appointed a director. The remaining cheques were dated various dates from Sept. 1 to Sept. 30, and they all bore the signature of Mr. and Mrs. Liggett.

This action is brought by the plaintiffs, and they claim as for money had and received that they are entitled to have repaid to them the amount of those cheques on the ground that the defendant bank had no authority to pay those cheques, and, therefore, could not debit the plaintiff company with the amount of those cheques as they were claiming to do. The primary defence set up by the defendant bank, is one based upon an application of the well-known rule which is often referred to as the rule in the *Royal British Bank* v. *Turquand* (1), a rule which has been applied in a great many cases to which I have been referred, for instance, in *Mahony* v. *East Holyford Mining Co.* (2) and *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (3), and quite recently discussed in *J. C. Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (4), and even more recently in *Kreditbank Cassel* v. *Schenkers, Ltd.* (5). The rule as relied on by the defendant bank is that, the defendant bank having had the articles of association, were entitled to assume that the notice of Sept. 1, 1925, regarding the appointment of Mrs. Liggett as a director, sent to them by the chairman was a valid and proper notice because, according to the articles of association, it was possible, if the proper steps in the matter of internal management had been taken by the directors of the company, that Mrs. Liggett had been duly appointed an additional director as the notice stated. I am relieved from any examination of the exact definition of this very respectable, but perhaps somewhat ambiguous, rule of law, because the plaintiff company in answer to that contention have alleged that the defendant bank in any case is not entitled to the benefit of that rule by reason of the fact that the defendant bank were put on inquiry by the circumstances of the case and were negligent in not investigating the position before they accepted and acted upon the notice of the appointment of a new director. On that issue I put two questions to the jury, and the questions were these: "Was the bank put on inquiry whether the appointment of Mrs. Liggett was in order?" The jury answered: "Yes." Secondly, "Was the bank guilty of negligence in paying the bills and cheques complained of?" and again the jury answered "Yes." Whatever may be the exact scope of the rule in *Turquand's Case* (1), I think it is quite clear on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is put on inquiry, if the circumstances debar that person from relying on the primâ facie presumption, it is clear, that he cannot claim the benefit of the rule. If, therefore, the answers of the jury to the questions which I put to them stand, it is clear, I think, that this defence will not avail the defendants here.

Counsel for the bank has submitted that there was no evidence upon which the jury could give the answers which they did give. He also submitted, when the plaintiffs' case ended, that there was no evidence to go to the jury at that stage and that I ought to have withdrawn the case from the jury. I did not think so, nor do I think that the contention is sound that there was no evidence to go to the jury on the question which I asked them. I should even go further. If I had been trying the case without a jury I should myself have come to exactly the same conclusion that the jury arrived at. Counsel, in the course of his argument, gave

us one of the reasons why effect should not be given to the answers of the jury, the circumstance that when I was summing-up to the jury I drew their attention to the fact that the directors according to the articles were to be not less than two nor more than three and that I drew their attention to the fact that the quorum of directors for transacting business should be two, but that I did not draw their attention specifically to the fact that there was a term in the articles that that quorum might be otherwise fixed by the directors. The jury had the articles before them and they heard the addresses of counsel, and I have no doubt that point was present to their minds. So far as I am concerned, I did not attach for this purpose any importance to that matter. The substantial ground on which the jury must have held, and I think have properly held, that the defendant bank was put on inquiry was that Mr. Melia was known to them to be a shareholder and a director of the company and he was known to be very anxious that no cheques should be paid without his signature. He had given special directions to that effect and had taken steps to ensure that his signature should be obtained, if it was not originally on cheques, by arranging that the bank should communicate with him. I think in those circumstances the defendant bank ought, before they acted upon an instruction such as that contained in the letter of Sept. 1, 1925, to have communicated with Mr. Melia and ascertained if his concurrence had been obtained to the change. He had been at the bank as recently as Aug. 26 or 27, and this notice was only dated Sept. 1, and, indeed, was sent at a time when it was thought Mr. Melia was in Ireland. The point to which the attention of the jury was directed was that the defendant bank ought to have taken steps to ascertain whether Mr. Melia was concurring in the appointment of a new director, whether that concurrence was given by his voting for the appointment with the other director, Mr. Liggett, or whether it was given in the more indirect way, first, by his voting that the quorum of directors should be one instead of two and thereby vesting the power in Mr. Liggett. I have very grave doubt whether a new director could be appointed without the direct concurrence of both the existing directors. However that may be, the jury had all the circumstances before them and they came, as I think, to a clear and proper conclusion, and I entirely dissent from the argument that there was no evidence on which they could come to the conclusion to which they did. That being the position, I think the defence based upon the rule to which I have referred fails, and, if the matter stopped there, there would be judgment for the plaintiffs for the whole of the amount claimed.

But a further and somewhat difficult point is then raised by the defendant bank, and that point I have now to decide. The various cheques and the bills were originally all drawn in favour of ordinary trade creditors of the plaintiff company and the proceeds of those cheques were all applied to the payment of goods supplied to the company. The position was that as from the end of August, 1925, Mr. Melia withdrew completely from any active part in the management of the business. He had already withdrawn substantially, but his final withdrawal took this form. He told Mr. Liggett that he would not sign any more cheques. He seemed to have thought that that would put a stop to the conduct of the business altogether. The business, as I have said, was insolvent from the outset, and Mr. Melia and his advisers were anxious, if possible, to close it down. They might, however, have taken a much more definite step for that purpose. In particular, Mr. Melia received on the morning of Sept. 1 a notice that a directors' meeting of the company was to be held at 10 o'clock on the morning of the 4th, and on the agenda one of the matters mentioned was the appointment of an additional director. Mr. Melia had been advised by his solicitor that it was unnecessary for him to take any action on that notice, obviously on the view that as there were only two directors and a quorum was two, unless otherwise ordered by the directors, a third director could not be appointed without Mr. Melia's concurrence, and after he had absented himself nothing could be done in his absence. Technically that was very sound advice. Mr. Melia took no notice of the meeting, and, indeed, he apparently took

no further action or cognisance of what was being done. Mr. Liggett, however, who had conducted the business up to that time, continued to do so. He continued to order goods for the purposes of the business, which was a retail provision business. Those goods were delivered, and had to be paid for, and they were in fact paid for from time to time by the cheques in question and the bills in question, so that every cheque represented a legal liability incurred by the company because the people who supplied the goods had no notice that the position had in any way been changed. Mr. Liggett was conducting the business, and not only was the company liable, but the company received the goods which were paid for and which were supplied to them for the purposes of the business.

In those circumstances it is contended by the defendant bank that they are entitled to credit for the amounts so paid—that is to say, for all those cheques—in discharging the debts of the company, and they rely upon the equitable doctrine under which a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment. I take the statement of that equitable doctrine in these terms from the language of SCRUTTON, L.J., in *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martin's* (6). The question which has been debated, and which is not at all an easy question, is whether on the facts of this case that equity applies. It was said by counsel for the company that in law the position would simply be that the bank for this purpose was in the position of a stranger who without the authority of the plaintiff company paid off the debts of the company, and, that being so, the payment was a purely voluntary payment so far as the company was concerned, and hence the company, even if it took the benefit, could not be in any way made responsible for the payments so made. For that rule of common law, which is a rule no one questions, reliance is placed, among others, on the authority of *Exall* v. *Partridge* (7). But the matter must now be decided in a court which takes cognisance of principles of both law and equity, and the question now is whether the equitable principle does apply to the facts of this case. The equitable principle has been applied beyond question over and over again to cases where an agent without the authority of his principal has borrowed money as on behalf of his principal. In those circumstances at common law the principal cannot be sued and cannot be made to repay the amount so borrowed, but in equity it has been held that to the extent that the amount so borrowed has been applied in payment of the debts of the principal, the quasi lender is entitled to recover to that extent from the quasi borrower. The rule is very clearly stated by LORD SELBORNE in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (8), where the noble and learned Lord says (22 Ch.D. at p. 71):

> "And I think the consistency of the equity allowed in the *Cork and Youghal Rail. Co.'s Case* (9) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is: Has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain the benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity ; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."

That principle is well established in respect of borrowings made without authority, and I may refer to *Baroness Wenlock* v. *River Dee Co.* (10) and *Bannatyne* v.

*MacIver* (11), where the principle was applied where the agent who had purported to borrow without authority was the agent, not of the company, but of a private individual, and the equitable right of the lender to recover to the extent that I have stated was fully recognised. The ground is sometimes put in this way, that the quasi lender is subrogated to the rights of the creditor who has been paid off. That, obviously, is not precisely true, because no question of subrogation to securities can arise in such case. The principle has also been applied in *Reversion Fund and Insurance Co., Ltd.* v. *Maison Cosway, Ltd.* (12) to the case where the plaintiff, the quasi lending company, actually knew that the quasi borrowing company had no authority to borrow. If this were a case in which the plaintiff's account was in debit throughout to the defendant bank, then each of the cheques in question when presented would constitute a request for a loan and the payment of that cheque would constitute the granting of that loan, and as the request and the payment were unauthorised the case would be precisely within those authorities I have just referred to. There was some evidence in this case that at the relevant dates the position of the plaintiff company's account at the defendant bank was that it was in debt and that there was an overdraft. To the extent that that is so, the position will be, in my judgment, exactly as in the cases I have referred to, and the position will be precisely covered by the authority of those cases.

But it is not clear that that was so throughout or, indeed, at all. I have to consider, therefore, what the position is if, when each one of those cheques or any one of these cheques was presented, the account was in credit. The position then would be that in paying one of those cheques without authority the defendant bank was taking money which belonged to its customer and paying that away without authority. In other words, the defendant bank would be in possession of a credit balance belonging to the customer, and without the customer's authority it would be misapplying that credit balance. The question is: Does the equity which I have referred to extend to a case of that character? There is only one authority to which I have been referred, and I know of no other, which seems to throw light on this question, and that is *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martin's* (6). The claim by the plaintiff company there was in conversion of cheques. The plaintiff company was a one-man company, and the one man, the sole director, endorsed certain of the company's cheques and then paid them to his own account with the defendant bank. The learned judge and the Court of Appeal held that that constituted a conversion because they were not entitled to collect the proceeds of those cheques and to appropriate the proceeds to the personal account of the sole director, and that being so they were misapplying the property of the company and were liable for conversion. But it was either shown or indicated with sufficient clearness to justify an inquiry that the proceeds or some of the proceeds of those cheques were used to discharge the liabilities of the company, and the Court of Appeal ordered an inquiry to ascertain if that was so. The Court of Appeal did not expressly say what would be the position if that were so; but as I read their judgment, they were disposed to the opinion that in such a case the equity, which I have already referred to as well established as between quasi lenders and quasi borrowers, would apply. SCRUTTON, L.J., states the position in this way ([1924] 1 K.B. at p. 794):

> "But I am not sure that the learned judge had in his mind the equitable doctrine under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments."

and he refers to *Bannatyne* v. *MacIver* (11) and *Reid* v. *Rigby & Co.* (13).

That statement of the equity is, I think, wide enough to cover the question which I have to decide in this case, and although there is and must be a technical difference between a claim in conversion and a claim for money had and received such as I have to deal with in the present action, I do not think that that distinction is of such a nature as to prevent the application in the case before me of the same

principles as would apply if the claim had been a claim in conversion. The relationship of a banker and customer is that of debtor and creditor—that is, when the customer's account is in credit the banker is the debtor to the customer, and, therefore, it is only by a figure of speech that the banker misapplies money of his customer which he has in his possession. That statement would be perfectly true if the banker had in his possession a bag of coins or a bundle of notes. If, acting upon an authority which was invalid, the banker quite honestly, although erroneously took a number of coins out of a bag or a number of notes out of a bundle and paid them on the faith of such an authority, he would be guilty of conversion, and, if I understand the judgment of the Court of Appeal in this case, in that event the banker would be entitled to the benefit of the equity. If that be so, and in principle it seems to me that it ought to be so, I cannot see why the same result should not apply in a case like the one before me, where the banker does not handle actual cash or notes, chattels capable of conversion, but by reason of the present system of banking facilities everything is done by way of credit or debit balances. In such a case there is obviously no conversion, but there is misapplication, under an honest mistake as to the validity of the authority, of the credits which constitute the medium of exchange in place of cash. In these circumstances I think that the equity I have been referred to ought to be extended even in the case where the cheque which was paid was paid out of the credit balance, and was not paid by way of overdraft. If that is so, the banker will be entitled to the benefit of that payment if he can show that that payment went to discharge a legal liability of the customer. The customer in such a case is really no worse off because the legal liability which has to be discharged is discharged, though it is discharged in circumstances which at common law would not entitle the bank to debit the customer.

The result is that I must order an inquiry because I have not the facts before me sufficiently to come to a conclusion whether the rule of equity which I have stated does apply, and if so to what extent. The inquiry I order will be addressed to some referee who will report to me. I shall retain seisin of the case and shall deal with all questions of costs and make such final order as the report which follows on the inquiry may seem to require. The inquiry will be as to the exact circumstances in which each one of the cheques and bills complained of was paid, that is to say, what was the state of the plaintiff company's account with the defendant bank at the date of each payment? Was it made in respect of goods supplied and was it made in the ordinary course of business?

[An order was made for the inquiry to be directed to a referee to be agreed or in default of agreement to the District Registrar at Liverpool.]

*Order for inquiry and report.*

Solicitors: *G. B. Brabner*, Liverpool; *Rutherford's*, Liverpool.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

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# SUNDERLAND CORPORATION *v.* PRIESTMAN

[CHANCERY DIVISION (Tomlin, J.), April 5, 12, 1927]

[Reported [1927] 2 Ch. 107; 96 L.J.Ch. 441; 137 L.T. 688; 26 L.G.R. 64]

B

*Highway—Street works—Recovery of expenses—Concurrent remedies—Public Health Act*, 1875, (38 & 39 *Vict.*, *c.* 55), *s.* 150, *s.* 257.

The two remedies given by s. 257 of the Public Health Act, 1875, to local authorities for the recovery of expenses incurred by them in respect of premises from the owners thereof are concurrent and independent; there is no obligation on the local authority to proceed to exercise their personal remedy before they enforce their charge; nor are they bound to wait until the expiry of the six months during which they can enforce the personal remedy before seeking to enforce the charge.

C

*Local Authority—Statutory duty—Estoppel preventing performance.*

Where there is a public body having a statutory duty to perform or a statutory discretion to exercise of the kind indicated in s. 150 of the Public Health Act, 1875, they can do nothing beforehand outside their statutory duty and acting as private contractors which can estop them performing their statutory duty or exercising their statutory discretion.

D

*Tottenham Local Board of Health* v. *Rowell* (1), (1880), 15 Ch.D. 378, applied.

E

**Notes.** The Public Health Act, 1875, s. 257, was repealed by the Public Health Act, 1936, s. 346 and Sched. 3, Part I, except in so far as it is material for the purposes of any of the unrepealed provisions of the 1875 Act or of any Act directed to be construed with it. Section 257 of the 1875 Act has been replaced by s. 291 and s. 293 of the 1936 Act.

As to making up of streets under the Public Health Act, 1875, see 19 HALSBURY'S LAWS (3rd Edn.) 424 et seq.; and for cases, see 26 DIGEST 520 et seq. For the Public Health Act, 1875, s. 150 and s. 257, see 19 HALSBURY'S STATUTES (2nd Edn.) 70, 93; and for the Public Health Act, 1936, s. 291 and s. 293, see ibid., 469, 471.

F

Cases referred to:

(1) *Tottenham Local Board of Health* v. *Rowell* (1880), 15 Ch.D. 378; 50 L.J.Ch. 99; 43 L.T. 616; 29 W.R. 36, C.A.; 26 Digest 536, *2353*.

(2) *Barraclough* v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp. M.L.C. 290; 2 Com. Cas. 249, H.L.; 16 Digest 115, *147*.

G

(3) *Barry and Cadoxton Local Board* v. *Parry*, [1895] 2 Q.B. 110; 64 L.J.Q.B. 512; 72 L.T. 692; 59 J.P. 421; 43 W.R. 504; 39 Sol. Jo., 507; 15 R. 430, D.C.; 26 Digest 529, *2274*.

H

**Adjourned Summons.**

By an agreement dated Nov. 19, 1879, made between the Estates Committee of the Ecclesiastical Commissioners and the plaintiffs, the Sunderland Corporation, the Ecclesiastical Commissioners agreed to convey to the plaintiffs thirteen acres of freehold land at Roker in the parish of Monkwearmouth, Durham, for the formation with other land acquired from an adjoining owner of a public park. The consideration for this was the provision by the plaintiff of a sum of £2,500, and the erection by them to the satisfaction of the commissioner's surveyor of a bridge and road over the Roker Gill, and the making to the like satisfaction of three new roads 40ft. wide, namely, a road over the bridge from A to B on the plan attached to the agreement, a road from B to D on the plan, and a road from D to C on the plan, such roads and bridge to be dedicated to the use of the public within one month from their completion. And the agreement provided that, as the commissioners intended to lay out the lands on the north side of the road from B to

I

D, and on the west side of the road from D to C, for sale in building sites, the commissioners agreed that whenever (at any time before the expiration of twenty-one years) the commissioners should sell or convey any building site fronting on the road from B by D to C they would sell or convey the same subject to an agreement on the part of the purchaser or grantee to pay to the plaintiffs such a proportion of one moiety of the expenses incurred by the plaintiffs in making and completing the same as the extent of frontage of the same land bore to the whole length of the road. By a lease dated June 12, 1885, the commissioners demised to one Robert Shadforth on building lease, a plot of land containing one acre two roods fronting on the road from B to D (which road was subsequently called Side Cliff) for the term of 999 years from June 24, 1883, at the rent of a peppercorn until Sept. 29, 1884, and thereafter at the yearly rent of £53. The lease contained (amongst others) covenants by the lessee that he would:

> "(1) Pay all taxes duties charges assessments impositions and outgoings including all costs of and rates for paving draining or other improvements or works upon or under the said plot of land or any road or roads then or thereafter abutting upon or adjoining the land demised and which any local board or other local authority might lawfully require to be borne or paid by the owner or occupier. (2) Within twelve months from the date of these presents (if the road or roads abutting on the said plot or parcel of land or ground hereby demised is or are not taken over by the local authority before the expiration of that period) pave flag and channel such road or roads as far as the same are co-extensive with the said plot or parcel of land or ground. (3) Within three months from the date of these presents pay to the Mayor Aldermen and Burgesses of Sunderland their successors or assigns such a proportion of one moiety of the expenses incurred by the said mayor aldermen and burgesses in forming making and completing the road [on which the plot abutted] as the extent of frontage of the plot or parcel of land or ground hereby demised to the same road bears to the whole length of the same road."

By a conveyance dated Dec. 31, 1889, which was made pursuant to the above agreement of Nov. 19, 1879, after recitals (amongst others) of this agreement and that the sum of £2,500 had not been paid to the commissioners, but that part of it had been expended by the plaintiffs in erecting the bridge over Roker Gill and making the road from A to B, which had been completed to the satisfaction of the commissioners' surveyor, and duly dedicated to the public,

> "but that the roads from B to D and from D to C have not yet been wholly completed by the corporation the concreting of the footpaths thereof having been by agreement . . . deferred until such time as may be necessary in consequence of the erection of residences adjoining or abutting such roads respectively but the commissioners are satisfied that the residue of the said sum of £2,500 will be expended by the corporation in forming making and completing the said last-mentioned roads,"

and the commissioners conveyed to the plaintiffs the thirteen acres of land mentioned in the agreement for use as a public park, and, by cl. 12, the commissioners covenanted with the plaintiffs that

> "whenever at any time before the expiration of twenty-one years from the date hereof the commissioners their successors or assigns shall sell or convey any building site or piece of land adjoining or fronting the said road from B by D to C they will sell or convey the same subject to an agreement on the part of the purchaser or grantee that the purchaser or grantee his heirs executors administrators or assigns will at the expiration of three months from the sale or grant and upon demand made in writing . . . pay to the corporation their successors or assigns such a proportion of one moiety of the expense from time to time incurred by the corporation in forming making and completing the said

road and the concreting of the footpaths thereof as the extent of frontage of the said land to the said road bears to the whole length of the said road it being the intention of the parties hereto that the corporation their successors or assigns shall be recouped or paid by the purchasers or grantees of the land adjoining the said road one moiety of the expense of making the same and also of the cost of concreting the footpaths thereof the expense of forming making and completing the said road, except such concreting of the footpaths thereof being paid at the time and after demand made as aforesaid and the cost of concreting the footpaths as aforesaid afterwards paid in like manner and after the like demand whenever the same shall be executed as aforesaid. . . ."

Side Cliff and the other two roads did not become part of the borough of Sunderland until 1895. A house was duly erected on the plot demised to Robert Shadforth and was called Cliffside, and the defendant was a successor in title of that lessee. On July 31, 1923, the plaintiffs gave notice in writing pursuant to the Public Health Act, 1875, on the frontagers to Side Cliff (including the defendant) requiring them to level, pave, metal, flag, kerb, and channel the said street within three months, and, on their failing to comply with the notice, the plaintiffs executed the work at a cost of £1,624 13s. 3d. By a notice to the defendant dated Mar. 4, 1925, the plaintiffs' surveyor, in pursuance of the Public Health Act, 1875, apportioned the sum of £388 8s. as the part of the above total payable by the defendant according to the frontage of Cliffside. This sum was afterwards reduced to £379 15s., and a demand for payment was duly made on Aug. 11, 1925.

This summons was taken out by the plaintiffs asking for an order declaring that the £379 15s. was a charge on Cliffside under the Public Health Act, 1875, s. 257.

*Owen Thompson*, K.C., and *Bischoff* for the plaintiffs, referred to *Tottenham Local Board of Health* v. *Rowell* (1).

*R. A. Glen* for the defendants, referred to *Barraclough* v. *Brown* (2), and *Barry and Cadoxton Local Board* v. *Parry* (3).

**TOMLIN, J.**—This is an application by the plaintiffs, who are the Corporation of Sunderland, to enforce a charge on a frontager in respect of expenses incurred in making-up the road on which the property of the frontager abuts, the charge being the statutory charge conferred by s. 257 of the Public Health Act, 1875, which provides that:

"Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

[His Lordship stated the effect of the agreement of Nov. 19, 1879, the lease of June 12, 1885, and the conveyance of Dec. 31, 1889, and continued:] All those documents, the agreement, the lease and the conveyance fitted into each other, but it is plain that the lease is framed on the footing that, besides the lessee's liability to repay pursuant to the contract of 1879 to the plaintiffs some part of the expense incurred by them in making up the roads, the lessee was also to be under a liability to pay to the local authority charges for paving and making up the road. It is quite plain that the lease was taken by the lessee on the footing that there would be those two co-existent liabilities: first, an obligation to pay the plaintiffs pursuant to the contract obligations beween the plaintiffs and the Ecclesiastical Commissioners, and, secondly, a liability to pay the local authority the proper charges in respect of making up the road to the satisfaction of the

local authority, so that the owner for the time being of that lease always held it on the footing of being subject to those two obligations.

In 1895 these roads were included in the borough and for the first time in 1895 the plaintiffs became the authority in respect of these roads. It appears that, shortly after that, on Jan. 6, 1897, some question arose between the Ecclesiastical Commissioners and the plaintiffs with regard to the repair of these roads, and, as far as I can gather from the minutes and the correspondence referred to in the minutes and the other evidence, what happened was that the plaintiffs contributed one-half of such repairs in connection with roads, the Ecclesiastical Commissioners contributing another half, and at the same time the plaintiffs made it plain that, in doing that, they were not intending to prejudice their rights or duties as the authority in regard to the upkeep of roads.

In those circumstances, the authority recently affected to exercise the statutory powers conferred on them by s. 150 of the Public Health Act, 1875, and, having come to the conclusion that the road was not made up to their satisfaction, made up the road and apportioned the expenses in the ordinary way between the frontagers, and, so far as the expenses have not been paid by the frontagers, they claim a charge on the adjoining premises for the apportioned amount of the expenses. The defendant in this case has disputed the matter, and he resists the claim of the plaintiffs substantially on two grounds. The first ground is this. It is said by counsel for the defendant that, inasmuch as the six months during which proceedings can be brought in a court of summary jurisdiction to recover the amount had not expired when the present proceedings were commenced, the plaintiffs were not then entitled to come to this court to enforce their charge. I think that argument is based on a misapprehension of the effect of s. 257. That section seems to me to do two distinct things: it gives first of all a personal remedy which can be enforced in a court of summary jurisdiction within six months; secondly, it gives a statutory charge by way of security, and the effect of that statutory charge is to confer on the local authority all those rights which are available to any chargee under a charge of a similar kind, that is to say, among other things, a right to come to this court to enforce the charge. But the two remedies are concurrent and independent, and there is no obligation on the chargees to proceed to exercise their personal remedy before they enforce their charge; nor are they bound to wait until the expiry of the six months during which they can enforce the personal remedy before seeking to enforce the charge in this court. It seems to me that this construction of the section is in accordance with the views of the Court of Appeal in *Tottenham Local Board of Health* v. *Rowell* (1), and in particular of BRETT, L.J., who says (15 Ch.D. at p. 393):

> "There is a remedy against him personally for the whole sum, which remedy is to be enforced within six months; but if the board claim the whole payment from him at once, yet fail to recover it from him personally, and there are no means of recovering it from him by distress, or if they pass by the personal remedy, then, if they have done nothing to prevent them from putting the charge into effect, I see no reason why the charge might not then and there be put into effect for the whole sum as against the owner."

That passage seems to me to cover the present case precisely. The plaintiffs have passed by the personal remedy, that is, have not seen fit to put it into force against the defendant but instead they come here, as they are entitled to do, to enforce a statutory charge which is given without any fetter at all, a charge which they are entitled to exercise the moment it is conferred on them. That point seems to me, therefore, to fail.

The other point urged by counsel for the defendant is this. It is said that, in 1889, the plaintiffs had not spent all the money which they were under an obligation to spend on the roads mentioned in the conveyance of that date, and that they have not spent it since: and it is argued, therefore, that they cannot be heard to

say that these roads are not made up to their satisfaction, because it must be assumed against them that they have done everything that they ought to have done and made up the roads to their own satisfaction in the past, and spent all the money which they ought to have spent in doing so. This contention is based, therefore, on something in the nature of an estoppel. There are two answers to this. First, I am not satisfied that I can draw from the evidence any inference that they have not spent all the money. Their obligation was to spend it on the roads, and, among other things, in concreting the footpaths; and evidence that the footpaths of the roads from B to D were not concreted is not evidence that all the money was not spent, because, for all I can tell, the whole of the money may have been exhausted before the work on other roads, such as the road from D to C, had been completed. Therefore, it seems impossible for me to draw the inference that the money was not spent. Secondly, it is to my mind immaterial whether it was spent or not. In my judgment, no such estoppel against the local authority can be set up. In 1879, the plaintiffs, not being at that time the local authority for this area, entered, as any individual or body may enter, into a contract under which they agreed to spend a sum of money in making up certain new roads to the satisfaction of the Ecclesiastical Commissioners and to nobody else's satisfaction at all. For the present purpose it is, in my view, immaterial whether they did or did not complete the roads; but let us assume that they did, and that they spent all the money and completed the road to the satisfaction of the Ecclesiastical Commissioners in the terms of their contract. Still, I am unable to see on what principle this could be said to estop them from saying that the road now in question is not made up to their satisfaction within the meaning of s. 150. True they have in the past contracted to make it up to the satisfaction of the Ecclesiastical Commissioners; but the commissioners' standard may be wholly different from the standard by which it is necessary for a local authority to work in exercising the statutory power under s. 150. It seems to me on this ground alone it would be impossible to hold that there was anything in the nature of an estoppel. But I will go further than that, and I say without hesitation that, where there is a public body having a statutory duty to perform or a statutory discretion to exercise of the kind indicated in s. 150, they can do nothing beforehand outside their statutory duty and acting as private contractors which can possibly be permitted to estop them performing their statutory duty or exercising their statutory discretion. I think that, on that ground alone, whatever be the true view as to the expenditure of this money, the defendant's second point must fail. I, therefore, hold that the plaintiffs succeed, and are entitled to an order in the ordinary form.

A B C D E F G

Solicitors: *Sharpe, Pritchard & Co.*, for *H. Craven*, Sunderland; *Cunliffe, Blake & Mossman*, for *W. Reay-Smith*, Newcastle-upon-Tyne.

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

# Re PAGET. Ex parte OFFICIAL RECEIVER

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ), April 29, 1927]

[Reported [1927] 2 Ch. 85; 96 L.J.Ch. 377; 137 L.T. 369; 43 T.L.R. 455; 71 Sol. Jo. 489; [1927] B. & C.R. 118]

*Bankruptcy—Public examination of debtor—Duty to answer all questions put to him—Purpose of examination—Protection of public—Inquiry into conduct of debtor—Bankruptcy Act*, 1914 (*4 & 5 Geo. 5, c.* 59), *s.* 15 (8).

A debtor cannot be excused from answering any questions which the court may put or allow to be put to him in his public examination even though the court is not satisfied that the answer could secure further assets or rights to the creditors. The debtor is bound to make the fullest disclosure of his affairs in the interests not only of his creditors but of the public, and cannot refuse to answer questions on the ground that it would be very inconvenient, or even that it might incriminate him, to do so.

*Re Atherton* (1), [1912] 2 K.B. 251, approved.

Per Lord Hanworth, M.R. The examination is not merely for the purpose of debt-collecting on behalf of creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose that the public shall be protected . . . and that there shall be a full and searching examination as to what has been the conduct of the debtor, in order that a full report may be made to the court . . . To concentrate on the mere debt-collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law. Before the question could be disallowed, the court would have to be satisfied that it could not secure any further assets or rights to the creditors or any protection to the public.

**Notes.** Applied: *Re Jawett*, [1929] 1 Ch. 108.

As to public examination of debtors, see 2 Halsbury's Laws (3rd Edn.) 331–334, and for cases, see 5 Digest 610–614. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Case referred to:

(1) *Re Atherton*, [1912] 2 K.B. 251; 81 L.J.K.B. 791; 106 L.T. 641; 28 T.L.R. 339; 56 Sol. Jo. 446; 19 Mans. 126; 5 Digest 611, *5496*.

**Appeal** from a decision of Clauson, J., in bankruptcy. The debtor, against whom a receiving order had been made, came up for public examination on Dec. 21, 1926, and answered certain questions, stating that he had used the name of Richard Paget for twenty-four years; had enlisted in the Army in 1916. At a later date he made a written statement, largely inconsistent with his previous answers. Upon further examination on this statement he refused to disclose his real identity, or to state under what name he had enlisted in the Army in 1916. The registrar reported his refusal to answer the questions to Clauson, J., who after examining the debtor in his private room, said that he would make no order compelling the debtor to answer the question, as he was satisfied that the disclosure would not secure any further assets or rights to the creditors, and that there were serious personal reasons why it would be to the detriment of the debtor to answer. The Official Receiver appealed.

The Bankruptcy Act, 1914, s. 73, provides:

"As regards the debtor, it shall be the duty of the official receiver (a) To investigate the conduct of the debtor and to report to the court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under this Act or any enactment repealed by this Act, or which would justify the court in refusing, suspending or qualifying an order

for his discharge ; (b) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct ; (c) To take such part as may be directed by the Board of Trade in the public examination of the debtor ; (d) To take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct."

*The Solicitor-General* (*Sir Thomas Inskip, K.C.*) and *Roland Burrows* for the Official Receiver.

The debtor in person.

**LORD HANWORTH, M.R.**—This application must be granted. It arises on a matter of public importance, but perhaps too great significance should not be attached to it. The debtor in the present case came up for examination on Dec. 21, 1926, and he came up for that public examination in accordance with the provisions of the statute which require that a debtor who has been made bankrupt shall be publicly examined as to his affairs. I use that word comprehensively. The examination is not merely for the purpose of debt collecting on behalf of creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose that the public shall be protected in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what has been the conduct of the debtor, in order that a full report may be made to the court by those who are charged to carry out the examination of the debtor. To concentrate attention on the mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law. [His Lordship read s. 73 of the Bankruptcy Act, 1914, and proceeded :] It is plain from an examination of that section that the duty of the Official Receiver is a wide one and a wide one in the interests of the public. The correlative duty or the correlative to that section is this, that after report has been made the bankrupt, when consideration of his possible discharge is before the court, has to establish that he is entitled to his discharge, which cannot be granted unless certain conditions are fulfilled. Without reading the whole of s. 26, it is sufficient to say that "the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines," and then on proof of certain matters the discharge is necessarily suspended.

It has been laid down by Phillimore, J., in *Re Atherton* (1), and I agree with his decision, that in the course of the examination of a debtor the debtor is not entitled to refuse to answer on the ground that the answers may incriminate him, the purpose of the Act being that there shall be a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of those who are the creditors or the debtors to the bankrupt's estate. Bearing these principles in mind, in the present case, as I say, the debtor under his name of Richard Paget, a name which he uses but a name which he did not acquire at his birth, made certain answers on his earlier examination on Dec. 21. He told the examiner that he had been in the Army in the war time in 1916, and in the London Fusiliers. He gave a number of other answers on that date. Afterwards, on Feb. 7, he made a written statement, in which he has to reveal these important matters. "My full and true name is Vivian Percy Broughton, but I have been known for the past twenty years as Richard Paget, and that I was born in Naples of British parents in 1887 or 1888. I can produce no documentary evidence of any kind with regard to my birth and nationality, nor can I produce any papers relative to my military service. I have never seen a copy of my birth certificate. I am identical with the person charged at Brighton on Nov. 10, 1908, and sentenced to a term of imprisonment." He says that he had certain money at certain times in his possession. When the

examination was resumed on Mar. 8 further answers were given, and those further answers were important. "Are you identical with the person of that name"—that is, Vivian Percy Broughton, "who was proceeded against in the Brighton Court?" (A.) Yes. (Q.) On two occasions, namely, on Nov. 10, 1908, when there was a conviction and sentence? (A.) Yes. (Q.) And again in January, 1915, when there was a charge brought against you? (A.) Yes. (Q.) In the same court? (A.) Yes. You told the court on the last occasion that your true and full name was Richard Paget? (A.) By that name I have been known for twenty-five years. (Q.) Have you ever used the name of Richard Paget before Nov. 10, 1908? (A.) About 1902 or 1903 I first used the name of Paget." That would be when the debtor was something like fifteen or sixteen years old and at a time, if and so far as the statements previously made were true, when he was living with an uncle. It is quite clear that inasmuch as the original statements made on Dec. 20 were both incomplete, inaccurate, and, as to some of them, untrue, it was very necessary for the examiner to probe the statement which was made on Feb. 7 and to go through the life of the debtor in order to ascertain what were the true facts. Some allegation is made that there was a large transaction in respect of which it was necessary to clear up details. He was then asked as to his enlisting at the time of the war: "(Q.) Have you any means of proving you were in the Army at all? (A.) The regiment can prove it. (Q.) Can you produce the evidence for me? (A.) No. (Q.) What has become of your Army papers? (A.) They are with the regiment. (Q.) Will you undertake to produce some evidence that you were in the Army? (A.) No. (Q.) That you cannot do? (A.) I will not. It is not a military tribunal here. (Q.) I am asking these questions with a view to ascertaining what you have been doing before your bankruptcy. I take it you swear positively here to-day you were serving in the 1st battalion of the London Fusiliers from 1916 to December 1918? (A.) Yes. (Q.) In what name did you enlist? (A.) That is entirely my own affair." That question is the question which was put and which the registrar, whose discretion is a wide one, said that he certainly ought to answer. He declined to answer that question. It appears to me that on those facts and those materials it would be quite impossible for the report to be made in accordance with s. 73 or for the questions of the discharge of the debtor to be determined under s. 26 unless this lacuna in the life of the debtor was disclosed. The matter was reported to Clauson, J., and he, no doubt for motives of compassion, was minded to see whether or not the debtor could or could not under those circumstances be excused from being compelled to answer the question, and he took a course which he felt himself justified in doing, in taking the debtor into his room and making some examination of him in the absence of the Official Receiver, who was, of course, not only entitled, but whose duty compelled him to take knowledge of the affairs of the debtor throughout the whole of his course. The learned judge came to the conclusion that he would make no order in the circumstances compelling the debtor to answer this question, although he did not in any way challenge the discretion of the registrar that the question was one that might be put, and which could be legitimately put. Section 15 of the Act of 1914 deals with the public examination of the debtor, and sub-cl. 8 of that section says:

> "The debtor shall be examined upon oath and it shall be his duty to answer all such questions as the court may put or allow to be put to him."

The registrar had allowed the question to be put to him. Clauson, J., in no way disagreed with that exercise of discretion by the registrar, but after he had had his interview with the debtor he determined to make no order, and the form of the order of Mar. 14 is this:

> "And the court not being satisfied that disclosure of the name would secure further assets or rights to the creditors, and being satisfied that there were serious personal reasons why it would be very much to the detriment of the debtor to answer, this court doth make no order."

It appears to me that CLAUSON, J., in coming to his conclusion, failed to appreciate the situation fully. It appears to me that as to the later portion of the statement made in the order, "and being satisfied that there were serious personal reasons why it should be very much to the detriment of the debtor to answer," the learned judge overlooked the principle which is the basis of the decision in *Re Atherton* (1), and it is probable that he had not got his attention drawn to that case or to the principles of which that case is an illustration.

To my mind the principles are plain, although it is useful to look at an illustration such as you find in *Re Atherton* (1). But the earlier basis which the learned judge gives seems to me one which is not a sure foundation: "the court not being satisfied that disclosure of the name would secure further rights or assets to the creditors." That is not a complete survey of the rights or duties which fall on the Official Receiver and the examiner; indeed, further, it is not necessary that the court, when the question is put, should be satisfied by those who are putting the question that disclosure of the name would secure further assets or rights to the creditors. I think it might be put in this way, that before the question could be disallowed the court would have to be satisfied that the answer could not secure any further assets or rights to the creditors or any protection to the public. At any rate, it appears to me that the ground is insufficient, and certainly excludes a side of the bankruptcy law which we are constantly affirming in this court, where it has been necessary over and over again to point out that in matters of bankruptcy it is not merely the creditors who have their rights, but it is the interests of the public themselves which have to be safeguarded.

It is quite easy to make too much of a matter of this sort. It appears to me that the course which was adopted was unsatisfactory, and I think the right course would be to remit the case again to CLAUSON, J. After the observations which I have made I think it is quite plain that our opinion is that the question ought to be answered, that there is no reason for refusing on the part of the debtor, and that he cannot rely on the ground on which he relied before the registrar and again in this court, that it might cause him personally either inconvenience or possibly incriminate him. After these observations I think it is probable that when the matter comes before CLAUSON, J., he will say that the debtor ought to answer the question and then make an order (which has been known to be made in such cases before now) giving the debtor time by allowing a few days to elapse between the affirmance of the order that he shall answer the question, and the resumption of the examination, so that the debtor can reconsider his position and give a full and complete answer to it, and, more than that, in his own interest make a full disclosure of matters which are necessary to be known, in order that his dealings and proceedings may be fully probed. It is in the interest of the debtor, and after what has happened the disclosure should be complete. The debtor will not fail to appreciate that after the evidence he gave on Dec. 21, after the disclosure he made in the statement, and after the answers given at the resumed examination, a burden rests on him of giving information complete to the Official Receiver for the purpose of clearing up matters which undoubtedly require both to be cleared up and a fuller disclosure on his part.

**SARGANT, L.J.**—I am of the same opinion. After a fuller discussion of the matter than probably took place before the learned judge, and after our attention has been called to *Re Atherton* (1), it seems to me that neither of the reasons stated by the learned judge in his order as reasons for declining to order the bankrupt to answer the question was a sufficient reason.

**LAWRENCE, L.J.**—I agree. In order to enable the Official Receiver to perform his duty under the Act I am of opinion that he is not only justified, but bound to find out what the debtor was doing between 1916 and 1919, and under what name he was passing during that period. It also seems to me, and I now speak without knowing what the personal reasons which the debtor gave to the learned judge for

not answering the question were, that the reason given to this court that it might hurt him in connection with certain threatened proceedings about a ship with which he had dealings not only do not excuse him from answering the question, but seem to me to afford strong ground for compelling him to answer. In these circumstances I agree that the case should go back to the learned judge; and I concur in the statement made by SARGANT, L.J., that probably we have heard more than the learned judge of the reasons why this answer should be given.

*Appeal allowed.*

Solicitor: *Solicitor to the Board of Trade.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

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## Re EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY

[CHANCERY DIVISION (Russell, J.), May 31, June 1, 2, 1927]

[Reported [1927] 2 Ch. 217; 96 L.J.Ch. 461; 137 L.T. 633; 71 Sol. Jo. 620]

*Settled Land—"Land held in undivided shares vested in possession"—"Tenant for life"—"Persons having the powers of a tenant for life"—"Person entitled to the income of land"—Powers of sale given by will—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. I, Part IV, para.* 1, *Sched. I, Part II, para.* 5, *para.* 6 (*c*)—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20 (1) (*viii*), *s.* 23 (1) (*b*).

Immediately before the coming into operation of the Law of Property Act, 1925, the entirety of Lord S.'s estate stood limited under his will to trustees for a term of 1,000 years, with power of sale or exchange. Subject thereto, H. and G. were, in the meantime, each entitled to a life interest in an undivided moiety of the estate. The trustees were, during the subsistence of the term, entitled to the rents and profits of the estate, which were to be applied in payment off of incumbrances.

**Held:** (i) para. 1 of Part IV of Sched. I to the Law of Property Act, 1925, was applicable to land held in undivided shares vested in possession only when two conditions were complied with, namely, the absence of any antecedent freehold estate and present immediate beneficial enjoyment by possession, physical or notional, and, therefore, para. 1 did not apply to this case; H. and G. were not "a person entitled to the income of land" who had the powers of a tenant for life under s. 20 (1) (viii) of the Settled Land Act, 1925, inasmuch as the definition of "land" in that Act excluded undivided shares and it was impossible to satisfy the word "land" in that section by adding together two undivided moieties, there being no tenant for life, or person having the powers of a tenant for life; therefore, the trustees of the will had the powers of a tenant for life and the fee simple was vested in them under para. 5 and para 6 (c) of Sched. I, Part II, to the Law of Property Act, 1925, and s. 23 (1) (b) of the Settled Land Act, 1925.

(ii) the powers of sale and exchange and other powers given to the trustees by the will remained exercisable by them.

**Notes.** Distinguished: *Re Stevens and Dunsby's Contract*, [1928] W.N. 187. As to persons having powers of tenant for life, see 29 HALSBURY'S LAWS (2nd

Edn.) 674 et seq.; and for cases, see 40 DIGEST (Repl.) 796 et seq. For the Law of Property Act, 1925, s. 205 and Sched. 5, see 20 HALSBURY'S STATUTES (2nd Edn.) 831, 846, and for the Settled Land Act, 1925, s. 20 and s. 23, see 23 HALSBURY'S STATUTES (2nd Edn.) 58, 69.

Case referred to :

(1) *Re Earl of Stamford and Warrington, Payne* v. *Grey*, [1925] Ch. 162; 94 L.J.Ch. 294; 133 L.T. 337; 69 Sol. Jo. 194; on appeal [1925] Ch. 589, C.A.; 40 Digest (Repl.) 693, *1877*.

**Adjourned Summons.**

Under the will of Lord Stamford, immediately before the coming into operation of the Law of Property Act, 1925, the entirety of his Lancashire estate stood limited to trustees for a term of 1,000 years. On a cesser of that term, and in the meantime subject thereto, Mrs. Grey was entitled to one moiety of the Lancashire estate for her life, with remainder to Mrs. Hoare for her life, with remainder to Mrs. Bateson for her life, with remainder to her son as tenant in tail, with remainders over. Mrs. Grey died on Oct. 31, 1926. Sir John Grey was entitled for his life to the other moiety, with remainder to his daughter Eileen Grey, as tenant in tail, with remainders over. Sir John Grey was not tenant for life under the will of Lord Stamford; under that will he had been tenant in tail, but he had disentailed and executed a re-settlement in 1914, so that his life estate and the remainder over arose under the re-settlement. During the subsistence of the 1,000 years term, the rents and profits of each moiety of the estate did not go to the tenant for life, but to the trustees in order to pay off incumbrances. The term of 1,000 years was still in existence, and the estates for life were all legal estates. The question for determination in this summons was : What became of the fee simple of the entirety of the Lancashire estate on the coming into force of the Law of Property Act, 1925? The summons asked whether the fee simple of such estate became vested in the applicants, the trustees of the will, as statutory owners under para. 5 and para. 6 (c) of Part II of Sched. I to the Law of Property Act, 1925, and s. 23 (1) (b) of the Settled Land Act, 1925, or was vested in them upon the statutory trusts under para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925, or how otherwise the same was vested, and, in either case, whether the power of sale and exchange and other powers conferred on the trustees by the will would remain exercisable by them.

*G. B. Hurst, K.C.*, and *A. L. Ellis* for the trustees of the will.

*Jenkins, K.C.*, and *H. T. Method* for the son of Mrs. Bateson.

*P. M. Walters* for Mrs. Bateson.

*Preston, K.C.*, and *G. R. B. Whitehead* for Sir John Grey, referred to *Re Earl of Stamford and Warrington* (1).

*Bennett, K.C.* and *G. G. Solomon* for Mrs. Hoare.

**RUSSELL, J.**—This summons raises a question as to the position under the new legislation of the Lancashire estates devised by the will of Lord Stamford. I spent some hours wandering, accompanied by counsel, through this legislative jungle in which apparently it is impossible to form a safe opinion about the meaning of any section in one Act without referring to the sections of and the schedules to all the accompanying Acts, and I need hardly say that, in the conclusion at which I have ultimately arrived, I do not feel any real sense of security.

I will first consider the position as regards Part IV of Sched. I to the Law of Property Act, 1925. One side says that Part IV does not apply because the words at the beginning of para. 1 of Part IV, which words govern the whole of para. 1, run thus :

"Where immediately before the commencement of this Act land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect,"

A and they say that "shares vested in possession" means shares vested in such circumstances that the owner is entitled to either the physical possession of the land or notional possession by receipt of the rents and profits of the land ; and they say that it is not true of the present persons who may be described as tenants for life. On the other hand, the other side say that the words "shares vested in possession" mean shares vested in such circumstances that the seisin is in the owner B of the shares, there being no antecedent freehold estate. That is undoubtedly true with regard to the position of the present tenants for life.

It seems to me that the true question to be considered is this. Do the words in para. 1 refer only to the latter set of circumstances, or do they refer to both sets of circumstances; must you have both sets of circumstances co-existing in order to bring para. 1 into operation ? Normally, of course, the two conditions would C co-exist in every case. That they do not do so in this particular case is due to the exceptional provisions of this particular will. Paragraph 2 is merely the antithesis of para. 1, and whatever "possession" means in para. 1, it bears the same meaning in para. 2. In the definition section, s. 205, "possession" is defined as including the receipt of rents and profits. It seems to me, therefore, that I must read para. 1 as including and referring to possession by the receipt of rents and profits as opposed D to physical possession. It also, of course, no doubt refers to possession as opposed to "in reversion" and "in remainder "; but, in my opinion, para. 1 refers to a condition of affairs where both elements are present—namely, first the absence of any antecedent freehold estate, and secondly present immediate beneficial enjoyment by possession, physical or notional ; and, accordingly, in my opinion, Part IV E does not apply to the present case.

The case not being within Part IV, it is not necessary for me to decide under which provisions of Part IV it would fall if the case did fall within Part IV ; but in case this matter goes higher I will state what my view is. The case is clearly not within sub-para. (1) of para. 1 of Part IV, nor within sub-para (2) of para. 1; nor is the case, in my opinion, within sub-para. (3), the land here not being held under F one and the same settlement. The necessary result would be that, if Part IV applied, what I venture to call the residuary provision in Part IV, namely, that indicated in sub-para. (4) of para. 1 of Part IV, would be the one that applied.

If Part IV does not apply, then two rival claims were set up. The persons who are each entitled on the expiration of the terms to a life interest in an undivided moiety (whom I may call, without prejudice, "life tenants") say that, although they G are not tenants for life under s. 19 of the Settled Land Act, 1925, they are persons having the powers of a life tenant under s. 20 (1) (viii), because their estate or interest is in possession (that is as distinct from in reversion or in remainder), and they are within the words of the section if, by means of the Interpretation Act, the singular is read as including the plural. That being so, they say the case falls within the Law of Property Act, 1925, Sched. I, Part II, para. 3, para. 5 and para. H 6 (c). Paragraph 3 provides :

> "Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided."

I Under para. 5 :

> "For the purposes of this Part of this Schedule, a tenant for life, statutory owner or personal representative, shall be deemed to be entitled to require to be vested in him any legal estate in settled land (whether or not vested in the Crown) which he is, by the Settled Land Act, 1925, given power to convey."

Paragraph 6 runs as follows :

> "Under the provisions of this Part of this Schedule, the legal estate affected (namely, any estate which a person is entitled to require to be vested in him

as aforesaid) shall vest as follows: . . . (c) Where at the commencement of this Act or by virtue of any statute coming into operation at the same time the land is settled land, the legal estate affected shall vest in the tenant for life or statutory owner entitled under the Settled Land Act, 1925, to require a vesting deed to be executed in his favour . . ."

They say they are the tenant for life within para. 6 (c), because by s. 205 (1) (xxvi), the expression "tenant for life" has the same meaning as it has in the Settled Land Act, 1925, and by s. 117 (1) (xxviii), "tenant for life" includes a person

"Who has the powers of a tenant for life under this Act and also (where the context requires) one of two or more persons who together constitute the tenant for life or have the powers of a tenant for life."

Therefore, they say, the legal estate of the entirety is vested in them. The flaw in this argument is that these two persons are not persons having the powers of a tenant for life under the Settled Land Act, 1925. On the old authorities they would, I think, have been such persons under the old Settled Land Act, but in that Act "land" expressly included an undivided share in land, whereas "land" in the new Act does not include an undivided share in land. Bearing this in mind and turning to s. 20 (1) (viii) of the Settled Land Act, 1925, these life tenants do not fit that provision. If one reads in the plural, by virtue of the Interpretation Act, the section would run "persons entitled to the income of land under a trust or direction for payment thereof to them during their own lives," but there is no such direction in the present case. There is a direction to pay the income of one undivided moiety of the land to Mrs. Hoare for her life, and, on the assumption that you may treat for this purpose Sir John Grey as life tenant of the other moiety under the will, which he is not, there is a direction to pay the income of the other undivided moiety to him for life. You cannot, in my opinion, satisfy the word "land" in the section by producing and adding together two undivided moieties of land, when undivided shares of land are, in terms, excluded from the definition of "land" in the Settled Land Act, 1925.

There remains the contention of the trustees, which I think is the correct one—namely, that this is the case of a settlement, the entirety being settled under the will, where, as is admitted, there is no tenant for life, and, as I have held, no persons having by virtue of the Settled Land Act, 1925, the powers of a tenant for life. That being so, the trustees of the will have the powers of a tenant for life. Accordingly, by virtue of para. 5 and para. 6 (c) of Part II of Sched. I to the Law of Property Act, 1925, and s. 23 (1) (b), of the Settled Land Act, 1925, the fee simple of the Lancashire estates is now vested in the applicants, and I answer the question in the summons in the terms of its first alternative. The power of sale and exchange, and other powers given to the trustees by the will of Lord Stamford, will remain exercisable by them and will operate as an additional statutory power.

Solicitors: *Bower, Cotton & Bower; Marples, Teesdale & Co.*, for *Lord & Parker*, Worcester; *Peake, Bird, Collins & Co.; Smith, Fawdon & Low*, for *Wright, Woodrow & Aysom*, Leicester.

[*Reported by* J. C. T. Rains, Esq., *Barrister-at-Law.*]

# R. *v.* HARRIS

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Salter, JJ.), July 25, 26, 1927]

[Reported [1927] 2 K.B. 587; 96 L.J.K.B. 1069; 137 L.T. 535; 91 J.P. 152; 43 T.L.R. 774; 28 Cox, C.C. 432; 20 Cr. App. Rep. 86]

*Criminal Law—Evidence—Witness called by judge—Case for defence closed—Evidence admissible only as to matter arising ex improviso—Accomplice—Corroboration—Appropriate warning to jury.*

The right of a judge at a criminal trial to call a witness himself after the close of the case for the defence is limited to a case where some matter arises ex improviso, which no human ingenuity can foresee.

In directing a jury on the value of the evidence of an accomplice, a judge should follow the rule laid down in *R.* v. *Baskerville* (1), [1916] 2 K.B. 658, and warn the jury that it is always dangerous to convict on such evidence if it is uncorroborated.

**Notes.** Distinguished: *R.* v. *Liddle* (1928), 21 Cr. App. Rep. 3. Considered: *R.* v. *Day*, [1940] 1 All E.R. 402. Considered and explained: *Adel Muhammed El Dabbah* v. *A.-G. for Palestine*, [1944] 2 All E.R. 139. Referred to: *R.* v. *Owen*, [1952] 1 All E.R. 1040.

As to the power of a judge at a criminal trial to call a witness not called by either side see 10 Halsbury's Laws (3rd Edn.) 423 and as to corroboration of the evidence of an accomplice see ibid., p. 459. For cases see 14 Digest (Repl.) 298, 533.

Cases referred to:

(1) *R.* v. *Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox, C.C. 524; 12 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 536, *5214*.

(2) *R.* v. *Holden* (1838), 8 C. & P. 606; 14 Digest (Repl.) 307, *2920*.

(3) *R.* v. *Cliburn* (1898), 62 J.P. 232; 14 Digest (Repl.) 298, *2776*.

(4) *Re Enoch and Zaretsky, Bock & Co., Ltd.*, [1910] 1 K.B. 327; 79 L.J.K.B. 363; 101 L.T. 801, C.A.; 22 Digest (Repl.) 460, *5040*.

(5) *R.* v. *Chapman* (1838), 8 C. & P. 558; 14 Digest (Repl.) 306, *2915*.

(6) *R.* v. *Haynes* (1859), 1 F. & F. 666; 14 Digest (Repl.) 323, *3127*.

(7) *R.* v. *Beebe* (1925), 133 L.T. 736; 89 J.P. 175; 41 T.L.R. 635; 28 Cox, C.C. 47; 19 Cr. App. Rep. 22, C.C.A.; 14 Digest (Repl.) 543, *5268*.

(8) *R.* v. *Frost* (1839), 9 C. & P. 129; 4 State Tr. N.S. 85; 14 Digest (Repl.) 192, *1578*.

**Appeal** against conviction and sentence.

The appellant was one of five persons charged at Liverpool City Sessions with stealing and with receiving certain goods knowing them to have been stolen. Two male prisoners, one Benton and another man, pleaded Guilty to stealing, and the case then proceeded against the appellant and two other female prisoners on the charges for receiving. The three female prisoners all gave evidence and were cross-examined, and the case for the defence was concluded. At that stage the recorder asked the prisoner Benton, who had remained in the dock throughout the case, if he was prepared to give evidence. Benton stated that he was, and gave his evidence, which made the case against the appellant much stronger than before. Counsel representing the appellant was given an opportunity of cross-examining Benton, and did so, but the appellant was not invited to go back into the witness box so as to have the opportunity of contradicting this fresh evidence. The recorder then directed the jury to acquit one of the female prisoners, but the appellant was found Guilty and sentenced to fifteen months' hard labour. Against that conviction and sentence she appealed.

*Maxwell Fyfe* for the appellant.—The calling of the witness Benton by the recorder at the stage of the proceedings when he was called was a grave irregularity. It is a rule of practice that a judge may call a witness who has not been called by the prosecution, but he should exercise this right only for serious or extraordinary reasons. Where the judge calls a witness, he should do so before the conclusion of the evidence for the prosecution ; and he ought not to exercise his discretion in a case where he knows that the witness is going to make a statement favourable to the prosecution, and the prosecution have elected not to call him. [AVORY, J.—Was not the recorder here making out a fresh case for the prosecution?] Further, the practice of calling an unsentenced co-defendant who has pleaded guilty is in any event to be deprecated. [He was stopped.]

*Lynskey* for the Crown.—There is a power inherent in a judge to call a witness who has not been called either by the prosecution or the defence, the object of that power being the furtherance of justice. To succeed the appellant must show that the limitation of that power for which she contends is supported by authority. [He referred to ROSCOE'S CRIMINAL EVIDENCE (14th Edn.) p. 160; ARCHBOLD'S CRIMINAL PLEADING AND PRACTICE, (27th Edn.) p. 497; *R.* v. *Holden* (2), and *R.* v. *Cliburn* (3).]

The judgment of the court was delivered by

**AVORY, J.**—In this case, five persons were charged before the recorder of Liverpool City Quarter Sessions with stealing certain goods and with receiving them well knowing them to have been stolen. The two male prisoners, Benton and Meagher, who were charged with steading, pleaded Guilty ; the three other prisoners who were women, named Sing Sai, Dora Harris (the present appellant), and Lightburn, were charged severally with receiving. The case proceeded with the two admitted thieves in the dock and evidence was given on the part of the prosecution establishing, undoubtedly, a primâ facie case against the three women of having received the goods well knowing them to have been stolen. Each of the women went into the witness-box and gave evidence to the effect that they had bought the goods without knowing them to be stolen, and they were cross-examined by counsel for the prosecution. That concluded the case for the defence. Thereupon the learned recorder said to the prisoner Benton :

> "Benton, are you prepared to give evidence?" Benton: "Yes." The Recorder: "I am asking you to give evidence here. I simply want you to tell the truth. You must not imagine you are getting any advantage whatever from what you say." Benton: "Yes." The Recorder: "I think it is more satisfactory we shall hear the boy on the subject. The prosecution, as is usual in these cases, do not call them. I think we might as well. I do not know what he is going to say, but I have some idea."

The thief Benton was, accordingly, called, and gave evidence which undoubtedly made the case against the appellant Harris much stronger than it was before. At the conclusion of his examination-in-chief, which had been conducted by the recorder himself, the recorder said :

> "It is the practice in a case like this to allow cross-examination, though there is no claim as a right. Of course, I permit you to cross-examine, Mr. Fyfe,"

and Benton was then cross-examined by counsel on behalf of the appellant Harris. Upon the conclusion of his evidence, the recorder seems to have formed the view that there was no case against the woman Lightburn, and he directed the jury to find her Not Guilty. Counsel then addressed the jury on behalf of the appellant Harris, and the recorder summed-up. No suggestion appears to have been made to the appellant Harris, nor was she invited to say, whether she desired to go back into the witness-box so as to have the opportunity of contradicting any of this fresh evidence by Benton. In the result, the appellant was convicted and sentenced to fifteen months' imprisonment with hard labour.

A In these circumstances, two questions arise for determination in this court. The first is whether the course taken by the recorder of calling the witness Benton at that stage of the proceedings was in accordance with the recognised rules governing proceedings at a criminal trial. The second is whether, assuming that that witness was properly called, and that there was no irregularity in the trial in his being called at that stage, the recorder in his summing-up gave the jury any appropriate B warning of the danger of acting on the uncorroborated evidence of an accomplice. With regard to the first question, it was clearly laid down in the Court of Appeal in *Re Enoch and Zaretsky, Bock & Co., Ltd.* (4), that in a civil suit the judge has no power to call a witness not called by either side unless with the consent of both parties. It also appears to be clearly established that that rule does not apply at a criminal trial, where the liberty of the subject is at stake, and where the sole C object of the proceedings is to make certain that justice is strictly done between the Crown and the accused. *R.* v. *Chapman* (5) and *R.* v. *Holden* (2) establish that in a criminal trial the judge has the right to call a witness without the consent either of the Crown or of the accused, if, in his opinion, it is necessary that that witness should be called in the interests of justice. It is true that in none of the cases has there been laid down any definite rule limiting the point in the proceedings at which D the judge may exercise that right ; but it is obvious that, unless some limitation be put on the exercise of that right, injustice may be done to an accused person and, for the purposes of this case, we adopt the rule laid down by TINDAL, C.J., in *R.* v. *Frost* (8) where he said (4 State Tr. N.S. at p. 386) :

> "Where the Crown begin their case like a plaintiff in a civil suit, they cannot E afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins ; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by F contrary evidence on the part of the Crown."

That applies only to a witness called by the Crown or on behalf of the Crown. We think that principle should apply to a case where the judge himself calls a witness in a criminal trial after the close of the case for the defence—namely, that the right of the judge should be limited to cases where a matter has arisen ex improviso, which no human ingenuity could have foreseen. Otherwise, as it appears G to us, injury may be done to an accused person; and it is noteworthy that in 1859, in *R.* v. *Haynes* (6), where after witnesses had been called for the defence and counsel had replied on behalf of the Crown, counsel for the Crown proposed to call another witness, so great a judge as BRAMWELL, B., said :

> "It is quite clear that counsel cannot call him, as the cases are closed ; and if H it were allowed, it would necessitate two more speeches. The only doubt I have is, whether I should examine him, as to which I will consult my brother CROMPTON."

Having consulted him, he said :

> "We are both of opinion that it is better to abide by the general rule, and that it I would be inexpedient to allow this fresh evidence to be gone into after the close of the whole case."

In the present case, there was a further objection to the course adopted by the recorder in view of the fact that the thief Benton had been present in court, in the dock, during the whole trial, and it is obvious that when he was invited by the recorder to give evidence, he must have understood that he was being invited to supplement the case for the prosecution against Harris among others, and, being at that time a prisoner who had pleaded Guilty and had not been sentenced, he

had everything to expect from doing something which he thought would be pleasing to the recorder who had invited him to give evidence. In these circumstances, without laying down that in no case can an additional witness be properly called by the judge in a criminal trial after the close of the case for the defence, we are of opinion that in this particular case the course adopted was irregular and calculated to do injury to the appellant Harris.

Apart from that point, we have further to consider whether, assuming Benton to have been properly called, a proper warning was given to the jury on the danger of acting on his uncorroborated evidence. Upon that point, the relevant passage in the summing-up has been read, and it is in these words:

> "You must understand, members of the jury, that this boy is what is called an accomplice on his own story, and the law as regards the evidence of accomplices is this. It is the duty of the judge at the trial to warn a jury that the evidence of accomplices must be received with suspicion. It is not the duty of the judge to tell the jury they must not accept the evidence of accomplices unless it is corroborated, but it is better to tell the jury that they should always look very carefully at such evidence, and, if possible, find corroboration of it before they accept it. Of course, there are cases, many cases, where people are convicted upon the evidence of accomplices, because the jury have heard the evidence of accomplices, and, having heard the evidence, they adopt it, even though it is uncorroborated, and they are entitled to. You heard that boy's evidence to-day, and if you come to the conclusion that he was speaking the truth, you would be perfectly entitled to act upon that evidence, even though there were no other, but there are very few cases in which one would encourage a jury to do it."

With all respect to the recorder, this so-called warning appears to us to be defective for the same reason as the warning given to the jury in *R.* v. *Beebe* (7). Lord Hewart, C.J., dealing with the warning given in that case, said:

> "Now what has happened here? First of all, has the warning itself been clearly and sufficiently given? The important words are: 'So far as that matter is concerned I tell you that it is generally dangerous to convict on the evidence of an accomplice.' With great respect to the learned judge, that is not the warning referred to [in *R.* v. *Baskerville* (1)]. That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration and, by implication, that this case is one of such cases. Then one finds that passage followed by this passage:
>
> > 'If you are quite satisfied that that girl is telling the truth and nothing but the truth, so that you are satisfied in your heart and conscience, although it is uncorroborated, you ought to act upon it.'
>
> Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury so to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this court that is not such a direction as should, according to the law laid down in *Baskerville's Case* (1) be given."

Those words appear exactly to apply to the so-called warning in this case, which we think was insufficient. The court, therefore, is of opinion that on both these grounds this appeal should be allowed and this conviction should be quashed.

*Conviction quashed.*

Solicitors: *John A. Behn*, Liverpool; Town Clerk, Liverpool.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

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## R. *v.* SHEFFIELD JUSTICES. Ex parte T. RAWSON & CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), October 24, 25, 1927]

[Reported 138 L.T. 234; 91 J.P. 193; 44 T.L.R. 43; 25 L.G.R. 536]

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*Licensing—Renewal of licence—Consent to alterations to premises—Condition of payment to compensation fund—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 24), *s.* 19, *s.* 71.

Notice of opposition to the renewal of the licences of two licensed houses in close proximity was served on the licensees, and the licensing justices, under C s. 19 of the Licensing (Consolidation) Act, 1910, referred the question of the renewal of both licences to the compensation authority, which, under s. 6 (1) of the Act, delegated its powers to a committee which, in fact, consisted of the licensing justices. At the transfer sessions of the licensing justices and the principal meeting of the compensation authority, applications were made to the justices, as compensation authority, for the renewal of both licences, and, D as licensing justices, for a consent to certain proposed alterations in both licensed houses. The justices as compensation authority decided that the licence of one of the two houses should be renewed and that the licence of the other should be refused, subject to compensation, but, before they announced that decision, they, as licensing justices, inquired whether the licensees of the house whose licence they had decided to renew had any offer to make, this E inquiry having reference to the application for the justices' consent to alterations in that house. The licensees of that house offered to pay £1,250 to the compensation fund, and on that offer the justices, as licensing justices announced their consent to the alterations, and their decision, as compensation authority, to refuse the renewal of the other licence on the ground of redundancy. The owners of the house which had thus lost its licence obtained a rule F nisi for a certiorari to the compensation authority to quash the refusal, on the ground (inter alia) that the compensation authority had considered matters other than the reports made to them in pursuance of s. 19 (1).

**Held:** the justices were not entitled to make their consent to the alterations conditional on a payment to the compensation fund; their knowledge that the payment would be made and that the alterations would be carried out vitiated G their decision to refuse the renewal of the applicants' licence; and, therefore, the rule must be made absolute.

**Notes.** The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 19 of the 1910 Act is replaced by s. 15 of the 1953 Act, and s. 71 by s. 134. Section 6 of the 1910 Act was repealed by H the Licensing Act, 1949, s. 41 (1) and Sched. IV, Part II.

As to renewal of justices' licences and as to compensation for refusal to renew, see 22 HALSBURY'S LAWS (3rd Edn.) 549 et seq., 574 et seq.; and for cases see 30 DIGEST (Repl.) 28 et seq., 54 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

I Cases referred to:

(1) *R.* v. *Shann*, [1910] 1 K.B. 10; 79 L.J.K.B. 53; 101 L.T. 545; 73 J.P. 515; 26 T.L.R. 25; 54 Sol. Jo. 66. D.C.; reversed [1910] 2 K.B. 418; 79 L.J.K.B. 736; 102 L.T. 700; 74 J.P. 273; 26 T.L.R. 435; 54 Sol. Jo. 474, C.A.; 30 Digest (Repl.) 56 *423*.

(2) *R.* v. *Wandsworth Licensing Justices, Ex parte Whitbread & Co.*, [1921] 3 K.B. 487; 90 L.J.K.B. 1114; 125 L.T. 540; 85 J.P. 171; 37 T.L.R. 619, D.C.; 30 Digest (Repl.) 47, *356*.

(3) *R.* v. *Bowman*, [1898] 1 Q.B. 663; 14 T.L.R. 303; sub nom. *R.* v. *Bowman*,

*etc. Justices and Duncan, Ex parte Patton*, 67 L.J.Q.B. 463; 78 L.T. 230; 62 J.P. 374, D.C.; 30 Digest (Repl.) 36, *275*.

(4) *Leeds Corpn.* v. *Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; sub nom. *Leeds Corpn.* v. *Woodhouse*, 51 Sol. Jo. 716, H.L.; 30 Digest (Repl.) 45, *345*.

**Rule nisi** to the Sheffield Compensation Authority under the Licensing (Consolidation) Act, 1910, for a writ of certiorari to quash an order made by them on June 21, 1927, whereby they refused to renew the licence of the Norfolk Arms in Granville Street, Sheffield.

Notice of opposition to the renewal of the licences of the Norfolk Arms and of another house called the Granville Inn, both being fully licensed houses in the same street and only 10yds. apart, had been served on the licensees. At the general annual licensing meeting on Feb. 8, 1927, the renewals of both licences were referred by the licensing justices to the compensation authority under s. 19 (1) of the Licensing (Consolidation) Act, 1910, on the ground of redundancy. The compensation authority, under s. 6 (1) of the Act, delegated its powers to a committee which consisted of the same persons as the licensing justices. At the transfer sessions of the licensing justices and principal meeting of the compensation authority on June 21, 1927, the owners of the Granville Inn offered to pay £1,250 to the compensation fund, and the justices then intimated that the licence of the Granville Inn would be renewed, and that the licence of the Norfolk Arms would be refused subject to compensation. The owners of the Norfolk Arms thereupon obtained the present rule on the grounds: (i) That the compensation authority considered matters other than the reports made to them pursuant to the Licensing (Consolidation) Act, 1910, s. 19 (1), namely the offer of the owners of the Granville Inn to pay £1,250 into the compensation fund. (ii) That the compensation authority offered to sell the renewal for a money payment which would go to the compensation fund if the committee chose so to direct. (iii) That the evidence before the committee differentiated the two houses in favour of the Norfolk Arms, and nothing but the aforesaid money payment by the owners of the Granville Inn could justify a preference for the latter house. (iv) That to give such a preference for such a reason amounted to a sale of justice, inasmuch as it put it in the reach of a rich person to defeat the claims of a poorer rival, and was thus contrary to the fundamental provisions of the constitution.

*C. Paley Scott* showed cause.

*Mitchell Banks, K.C.*, and *Maurice F. Healy* in support of the rule.

**LORD HEWART, C.J.**—This is a rule nisi for a writ of certiorari to the justices of Sheffield acting as the compensation authority to remove into this court certain orders made by them, or some of them, at a meeting of the compensation authority held on or about June 21, 1927, whereby they refused to renew the licence of certain premises known as the Norfolk Arms, Granville Street, Sheffield. There are four grounds stated in the rule, and perhaps the substance of them is expressed in the first of them—namely, that the compensation authority considered matters other than the reports made to them in pursuance of the Licensing (Consolidation) Act, 1910, s. 19 (1); that is to say, an offer by the owners of the Granville Inn to pay £1,250 into the compensation fund. It is not necessary to repeat all the facts of the case which have been laid so fully and so clearly before the court both by the affidavits and by the arguments of learned counsel. It is enough to say that in the city of Sheffield the compensation authority, who are all the justices for the city and county borough of Sheffield, have delegated, as they are lawfully entitled to delegate, their powers as the compensation authority to a committee consisting of the licensing justices for Sheffield.

Those being the tribunals which, although identical in point of personnel, are quite separate and independent in point of function, it is clear from the affidavits

A that a question arose a considerable time ago—not this year, nor even last year—which of the two licensed houses, namely, the Norfolk Arms and the Granville Inn, should be regarded as redundant. The materials before the court show that there were good grounds for believing that the co-existence of the two houses was not necessary. The question, however, remained which of the two should be taken and which left. Before that controversy was disposed of and while it yet remained
B uncertain, questions arose as to the possibility of improving each of these houses by alteration, and it is not denied that, in considering the question whether a particular house is redundant and what its merits are in relation to or in comparison with another house, the justices are entitled to consider not merely what it is in esse but what it is in posse; in other words, they are entitled to see what are its reasonable prospects of improvement by alteration. It happened, curiously
C enough, that the skilled witness who was prepared to speak as to the potentialities of each of these two houses in the matter of alteration was one and the same, and undoubtedly when the last stage but one in the matter was reached, having given his evidence, he did express the view that, of the two houses, the Granville Inn was the better both for what it was, and for what it might become. That matter involved another question, namely, whether permission should be given for carry-
D ing out the proposed alterations. The question of the alterations was a question for the licensing justices as such. The question of redundancy was a question for the compensation authority, and the first complaint logically and chronologically here is that, in considering the question whether the alterations to the Granville Inn should be permitted, the licensing justices not only took into account, but
E imposed as a condition, the proposed payment of a sum of £1,250. There is no need to read again on the point the extremely frank and clear affidavit of Sir William Clegg, the chairman of the compensation authority. In two passages of the affidavit, he makes it plain that, whether in express words or in silent reflection, the justices treated the payment of this sum of £1,250 as a condition of their assent to the proposed alterations of the Granville Inn.

F The first question in the case is really whether that proceeding was permitted by law, and let me say at once that as in *R.* v. *Shann* (1) so here; there is not the smallest doubt, and I accept unreservedly the view, that Sir William Clegg and his brother justices honestly believed that they were dealing with all these matters according to the merits. The question remains, however, whether that which they did was lawful, and it seems to me to be clear both from *R.* v. *Shann* (1) and from
G *R.* v. *Wandsworth Licensing Justices* (2), that licensing justices are not entitled to impose such a condition as a term of their permission for alterations to be made. The matter is made quite plain, for example, by a passage in the judgment of Lawrence, C.J., as he then was, in *R.* v. *Wandsworth Licensing Justices* (2), and in the judgment of my brother Avory.

I cannot resist the conclusion involved in the words of Sir William Clegg's
H affidavit that the payment of this sum of money was in truth and in fact a condition of the permission to make the alterations. But, while it was for the licensing justices to consider whether the alterations might be made, it was for the compensation authority to decide whether the house, and which house, was redundant, and, although the chronology of the matter is a little involved, it seems to be reasonably clear that the licensing justices sent forward both houses to be con-
I sidered by the compensation authority, the question of the alterations still remaining in suspense, and thereupon the very same gentlemen, uniting in their own persons the functions of the licensing justices and the functions of the compensation authority, sat in the two capacities and entertained first one question, then the other, and then returned to the first question. There is not merely an alternation of their functions to and fro, there is a reiterated alternation to and fro, and, according to the history of the matter, as they finally set it forth, they came to the conclusion as compensation authority that the Granville Inn was the inn to be preserved, and the Norfolk Arms was the inn that was redundant, but all the time

they had in their minds as licensing justices the question whether the proposed alterations to the Granville Inn should be permitted, and that question involved the other question, whether they could with success impose the condition that the owners of the Granville Inn should pay a sum of £1,250.

If they had been sitting separately as licensing justices to consider the question of the alterations by itself, it is obvious on the authorities that they would have taken extraneous matter into consideration if they had been influenced by the offer of £1,250, and I am of the opinion that that extraneous consideration had the effect of vitiating the subsequent decision which they made on the different but allied question of redundancy when the scale was turned against the Norfolk Arms and in favour of the Granville Inn by reason of these very alterations which were still in prospect, but which had been consented to on the terms of the payment of the £1,250. In other words, in coming to their decision as compensation authority they were influenced by the extraneous consideration which operated on their minds as licensing justices in imposing the condition with reference to the proposed alterations of the house. No doubt when the very same persons are acting at one moment as licensing justices, and at another moment as compensation authority, it is difficult for them to keep out of their minds as compensation authority considerations which may have entered into their minds as licensing justices. But one thing is very certain; if they choose to sit in both capacities in the same place on the same occasion, then if, as licensing justices, they permit extraneous matters to be taken into consideration, those extraneous matters must automatically affect their decision as compensation authority.

I have come to the conclusion, while I recognise to the full the public purpose which animated these justices and the honesty of their belief that they were deciding the question according to the merits, that this decision cannot stand. I think that the extraneous considerations which were permitted to operate on their minds as licensing justices did not cease in their effect with the making of the order about the alterations, but continued so as to affect and to destroy the decision which they also made in their capacity as compensation authority, because that decision was evidently influenced by those very alterations which had been sanctioned in this improper way. In those circumstances, it seems to me that this rule ought to be made absolute, and this order ought to be quashed.

**AVORY, J.**—I have come to the same conclusion. This rule does not specifically raise any question about the constitution of the compensation authority in the present case, but having been informed, as we have been, what the facts were, I think it right to say that, although it may be that the committee who acted as the compensation authority in this case were strictly within the letter of the law as provided by s. 6 of the Licensing (Consolidation) Act, 1910, I am satisfied that the appointment of such a committee, namely, of the same licensing justices who acted as the licensing justices for the borough, as the committee to act as the compensation authority, is clearly contrary to the spirit of the Act of Parliament, which, in my view, contemplates that the compensation authority shall at all events be a different body from the licensing justices. That view is certainly expressed in one of the judgments in *R.* v. *Shann* (1), in which FARWELL, L.J., said ([1910] 2 K.B. at p. 434):

> "It is, in my opinion, clear that the licensing justices and the compensation committee are two distinct and independent bodies, whether the latter be quarter sessions, as provided by s. 1 (1) of the Licensing Act, 1904, or the majority of the whole body of justices as provided by s. 8 (2) of that Act as amended by the Licensing Act, 1906."

It is idle in this case, in my view, to say that this compensation committee was a distinct and independent body from the licensing justices who were dealing with the very same matter; in fact, they were the same persons, and, moreover, in fact in this case, they were actually sitting on June 21 which is the material date, in

both capacities, both as the compensation authority and as the licensing justices, who were dealing with the application for alterations in licensed premises.

Apart from that point, which I think might have been made one of the grounds of this rule, the only question which remains is whether, on the affidavits which are before us, and particularly whether, on the affidavit made by the chairman, Sir William Clegg, we can avoid the conclusion that the compensation committee, or the compensation authority in this case, in refusing to renew the licence of the Norfolk Arms and in granting a renewal of the licence of the Granville Inn, were influenced by some extraneous consideration which ought not to have influenced their judgment. Whether it be put as a condition which they were not authorised to impose, or whether it be put as an extraneous consideration which influenced their judgment, is immaterial. I think, on the evidence which is before us, we should be justified in saying that in fact, although not in terms, the compensation authority in this case were imposing as a condition of the renewal of the licence of the Granville Inn the payment of a sum of £1,250 to the compensation authority; and, in effect, they were saying that they would not renew the licence of the Norfolk Arms unless either the same or a better offer were made on behalf of the Norfolk Arms. When once one is driven to the conclusion that they were influenced by that consideration, it is clear on the authorities that that was a matter which they had no right to take into consideration at all.

*R.* v. *Shann* (1), to which my Lord has already referred, I think deserves a little consideration as showing its application to the present case. In that case, the Divisional Court had held that the compensation authority were entitled for the purpose of differentiating between the two houses to take into consideration the offers made by the respective owners, and the Divisional Court discharged the rules. That decision was reversed on appeal, and for the purpose of explaining a passage in the judgment of one of the learned lords justices, which I am going to read, it is right to look at the argument of Sir Edward Carson, K.C., where he put the matter before the Court of Appeal in this way. He said ([1910] 2 K.B. at p. 421):

> "Possibly, in a case where the owner of a licensed house, the renewal of the licence of which had been referred to the compensation authority, had another licensed house, there might be no objection to his arranging with the authority to give up the licence of the latter house if the authority would renew the licence of the former; but, assuming that to be so, it is quite clear that, where two persons are applying for the renewal of the licences of their respective houses, it is ultra vires for the authority to make the question which licence shall be renewed, and which suppressed, the subject of an auction, as was in effect done in the present case."

That view appears to me to have been supported and endorsed by the decision of the lords justices in that case. While it is true that Vaughan Williams, L.J., differed in the sense that he did not see his way to differ from the conclusion of fact at which the Divisional Court had arrived, he said this (ibid., at p. 429):

> "The contention, as I understand it, is this, that the only body which has to deal with the question of the alteration or rebuilding of these public-houses was the licensing justices, and that at no time and for no reason had the compensation authority a right to get information as to what these people would be willing to offer either by way of surrender of licences or of contribution to the compensation fund. I think that probably that view is right, if it means that the compensation authority had no right to make willingness to conform to their conditions a condition necessary to avoid the refusal of the licence. I do not think the compensation authority had any right to do that; in fact, I doubt whether even the licensing justices had any such right, at all events after the matter had been referred by them to the compensation authority."

Then FARWELL, L.J., says (ibid., at p. 434): A

"I can find nothing in the Act that justifies the committee [that is, the compensation committee] in offering to sell the renewal, either for a money payment which would go to the rates as if made under s. 4 (4), or to the compensation fund, as the committee might choose to direct, or for the surrender of other licensed premises. The illegality of a money payment is, in my opinion, decided by *R.* v. *Bowman* (3), and is the more marked in this case because the Act expressly authorises money payments in the case of new licences and does not do so in the case of these renewals of old licences." B

KENNEDY, L.J., took the same view that the proceedings in that case could not be upheld even though one accepted the view which was put forward in that case, as it is in the present case, by the chairman of the justices, that they believed they C were deciding according to the merits. After saying that he was prepared to accept that view, KENNEDY, L.J., proceeds (ibid., at p. 439):

"But at the same time I concur with LORD ALVERSTONE, C.J., when, in delivering the judgment of the Divisional Court, he stated that, if the court thought that it was improper for the compensation authority to ascertain what licences the respective owners were prepared to surrender in consideration of the D renewal, the court would agree with the contention of Sir Edward Carson on behalf of the present appellants that the reception and consideration of the offers of the licensees as to the surrender of the licences or contribution to the compensation fund, if their licences were renewed, would vitiate the subsequent proceedings and establish the contention that the renewing magistrates acted E beyond their jurisdiction, even though they disregarded the offers in coming to the decision."

He says he agrees with the Lord Chief Justice in that view of the law, and, in the view of the lord justice, it was fatal to the respondent's case. Then he proceeds to say why he did not agree with the Divisional Court, and he goes on (ibid., at p. 440): F

"The Lord Chief Justice went on to hold, however, that the compensation authority in deciding the question of renewal were entitled to consider what (if any) licences the respective owners would be prepared to surrender, or what contribution they would make to the compensation fund. From this view I respectfully dissent. I cannot find any justification for the action of these justices either in the provisions of the Act of 1904, or in general principles of G justice, or in the authority of *Leeds Corpn.* v. *Ryder* (4), to which the Lord Chief Justice proceeded to refer to in his judgment."

In those circumstances, it appears to me to be quite impossible to say that the compensation authority was not influenced by the consideration that this money payment was going to be made to the compensation fund, and on that short ground H I agree that this rule should be made absolute.

**SALTER, J.**—I agree.

**LORD HEWART, C.J.**—The rule nisi will be made absolute, and the costs of both sides will be borne by the compensation fund.

*Rule absolute.* I

Solicitors: *Church, Rendell, Bird & Co.*, for *F. B. Dingle*, Sheffield; *Godden, Holme & Ward*, for *Chambers & Sons*, Sheffield.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

# Re CHARDON. JOHNSTON *v.* DAVIES

[CHANCERY DIVISION (Romer, J.), October 28, November 2, 16, 1927]

[Reported [1928] Ch. 464; 97 L.J.Ch. 289; 139 L.T. 261]

*Burial—Cemetery—Maintenance of grave—Gift in will of income of fund to cemetery company—"So long as they continue to maintain the grave"—Validity of gift—Perpetuities—Restraint on alienation.*

A bequest of a sum of money to trustees upon trust to pay the income thereof to a cemetery company during such period as they should continue to maintain and keep two graves in good order, with a provision that if the graves should not be so kept the income should fall into residue, **held,** not to infringe either the rule against restraint upon alienation, since the company could dispose of its interest at any time, or the rule against perpetuities, since the interest of the company vested at once, and, therefore, to be a valid gift.

**Notes.** Distinguished: *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds* v. *Fielding-Ould*, [1950] 1 All E.R. 689. Applied: *Re Chambers' Will Trusts, Official Trustees of Charitable Funds* v. *British Union for the Abolition of Vivisection* [1950] Ch. 267. Referred to: *Harper* v. *Liverpool Corpn.* (1944), 88 Sol. Jo. 213; *Re Fry*, [1945] 2 All E.R. 205; *Re Martin, Barclays Bank, Ltd.* v. *Board of Governors of St. Bartholomew's Hospital* (1952), 96 Sol. Jo. 462.

As to gifts for the maintenance of tombs see 4 HALSBURY'S LAWS (3rd Edn.) 236, and as to the rule against perpetuities see 25 HALSBURY'S LAWS (2nd Edn.) 86 et seq. For cases see 37 DIGEST 55 et seq. As to restraint on alienation see 34 HALSBURY'S LAWS (2nd Edn.) 421–423, and for cases see 44 DIGEST 1231 et seq.

Cases referred to:

(1) *Wainwright* v. *Miller*, [1897] 2 Ch. 255; 66 L.J.Ch. 616; 76 L.T. 718; 45 W.R. 652; 41 Sol. Jo. 561; 37 Digest 93, *293*.

(2) *Re Gage, Hill* v. *Gage*, [1898] 1 Ch. 498; 67 L.J.Ch. 498; 67 L.J.Ch. 200; 78 L.T. 347; 46 W.R. 569; 37 Digest 107, *408*.

**Adjourned Summons.**

By his will, dated Feb. 28, 1923, Francis Edward Chardon, who died on Dec. 22, 1925, directed as follows:

"I give unto my trustees the sum of £200 free of duty upon trust to invest the same upon any of the investments hereinafter authorised and to pay the income thereof to the South Metropolitan Cemetery Co., West Norwood, during such period as they shall continue to maintain and keep the graves of my great-grandfather and the said Priscilla Navona in the said cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me."

The testator went on to provide that, if the graves should not be kept in good order and condition as specified, the trustees were to apply the income in accordance with the provisions of the will with regard to the testator's residuary estate. This summons was taken out by the trustees to determine whether the trust created by the provision above set out was valid, or whether it was void as infringing the rule against perpetuities.

*Farwell, K.C.*, and *Colquhoun Dill* for the plaintiffs.

*B. A. Hall* for a beneficiary.

*Stafford Crossman* for the Attorney-General.

*D. D. Robertson* for the cemetery company.

*J. H. Stamp* for the official trustee of charity lands.

**ROMER, J.**—This is a very interesting and, I think, a very difficult case to determine, but as I have formed a definite opinion as to the right answer to be

given to the question I do not think there would be any advantage in my considering the matter further. A

The gift with which I have to deal is in these terms:

> "I give unto my trustees the sum of £200 free of duty upon trust to invest the same upon any of the investments hereinafter authorised and pay the income thereof to the South Metropolitan Cemetery Co., West Norwood, during such period as they shall continue to maintain and keep the graves of my great-grandfather and the said Priscilla Navona in the said cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me." B

It is argued that that is a void gift, and on reading it the mind is naturally directed to the cases in which it has been established over and over again that a trust to keep in C repair a tomb not in a church is invalid, either because it offends the rule against perpetuities, the beneficial interest not necessarily vesting in a life in being and twenty-one years, or because the beneficial interest never vests in anyone at all. One is, therefore, inclined at first sight to come, I think too hastily, to the conclusion that any trust, not being a charitable trust, which may go on, as this one may go on, indefinitely beyond the lives in being and twenty-one years is invalid. But D when the matter is considered a little more closely this question presents itself: If this be a bad gift it must be because there is some principle of law or equity that makes it bad. There is a rule to the effect that vested interests in property cannot be rendered inalienable. But the interest of the cemetery company under the gift is certainly not alienable; they could dispose of it, if they could find a purchaser, to-morrow. There is also the well-known rule against perpetuities, which is quite E a different rule from that against inalienability, and that rule is that the vesting of property real or personal (and it also applies to interests legal or equitable) cannot be postponed beyond lives in being and twenty-one years. This gift does not appear to offend against that rule. The interest of the cemetery company, such as it is, vests at once. It has been pointed out on more than one occasion, perhaps it was last pointed out in the case to which my attention was called, *Wainwright* F v. *Miller* (1), that the rule against perpetuities deals, not with the duration of interests, but with their commencement, and so long as the interest vests within lives in being and twenty-one years, it does not matter how long that interest lasts. If that were not the case, the limitation of a fee simple would offend the rule against perpetuities. It is well known that in many settlements the limitations continue long beyond the lives in being and twenty-one years. I cannot see, therefore, that G this gift offends against the rule against perpetuities, as I understand that rule.

Then the case was put in two different ways, first by counsel for the Attorney-General and then by counsel for the trustee of charity lands.

Counsel for the Attorney-General said: Never mind about the rule against perpetuities or the rule against inalienability, this is an interest in personal estate H which is unknown to the law. At first he was inclined to contend that the only interests which could be given by way of trusts in personalty were interests for lives and absolute interests. However, I then suggested to him that a trust to pay the income of a fund to A. and his executors, administrators, and assigns for ten years would not be bad. He assented. Then I asked him what the position would be if the trust was to pay the income to the person, his executors, administrators and assigns for twenty-two years. That, he said, would be bad, because it I would offend against the rule against perpetuities. But for the reasons I have already given, this is not the case. In my opinion, this rule does not render invalid a trust to pay the income of a fund to A., his executors, administrators and assigns for twenty-two years. Counsel admitted that a trust to pay the income to A., his executors, administrators and assigns indefinitely—that is to say, for ever—would be a good trust, because it would be equivalent to giving an absolute interest, and so it would, but he says that a trust to pay the income to A. for an indefinite period

—that is to say, until the happening of an event that may never happen—is bad, because it is not equivalent to an absolute interest. While it is true that it is not equivalent to an absolute interest it is very much like, and analogous to, a determinable fee in real estate. Where land was limited to A. and his heirs until a certain event should happen, a determinable fee was created, though the question whether, since the Statute of Quia Emptores a determinable fee can be created is a matter upon which lawyers are not agreed. But if the determinable fee in real estate can no longer be created, it is because of the Statute of Quia Emptores, and most assuredly the Statute of Quia Emptores had nothing to do with personal estate. I, therefore, do not know any reason why a trust to pay the income indefinitely to a certain person, his executors, administrators, and assigns until a certain event happens should be bad unless it be for the reason advanced by counsel for the trustee of charity lands.

His contention was this. He said, and truly, that there are fundamental differences between real and personal estate and that there is a rule which appears to me, if it be a rule, to be one that is distinct from the rules against inalienability and perpetuity, by virtue of which it is impossible to separate the legal from the equitable interest in personal estate for a longer period than a life in being and twenty-one years. It is agreed that there is no authority for the proposition so stated; indeed, what authority there is is against it, because in *Re Gage* (2) it appears to have been held by KEKEWICH, J., that a trust to pay the income to an unborn person for life was a good trust; it certainly did not offend the rule against perpetuities, because the equitable interest vested in a life in being and twenty-one years, but it was a trust that might last beyond the perpetuity rule. KEKEWICH, J., did not seem to find any difficulty in that case in allowing a separation of the legal interest in the fund for more than a life in being and twenty-one years. Counsel says that that is an exception from the rule. But he has not called my attention to any text-book or authority in which the rule itself is stated, and for myself I do not think that any such rule exists. The cemetery company and the persons interested in this legacy, subject to the interest of the cemetery company, could combine to-morrow and dispose of the whole legacy. The trust does not, therefore, offend the rule against inalienability. The interest of the cemetery company is a vested interest; the interests of the residuary legatee, it being agreed on all hands that, subject to the interest of the cemetery company, the legacy falls into residue, are also vested. All the interests, therefore, centred in this £200, legal and equitable, are vested interests, and, that being so, the trusts do not offend the rule against perpetuity. I know of no other rule which will enable me to come to the conclusion that this is an invalid gift.

Solicitors: *Theodore Goddard & Co.*, for *Chamberlain, Johnson & Parker*, Llandudno; *The Treasury Solicitor; Devonshire, Wreford Brown & Co.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

A

# WISBECH RURAL DISTRICT COUNCIL *v.* WARD

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.), November 14, 15, 16, 1927]

[Reported [1928] 2 K.B. 1; 97 L.J.K.B. 56; 138 L.T. 308; 91 J.P. 200; 44 T.L.R. 62; 26 L.G.R. 10]

B

*Building Contract—Architect—When acting as arbitrator or quasi-arbitrator, or agent of building owner—Grant of final and interim certificates.*

A building contract provided that "no certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions [of the contract], nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

C

**Held:** the interim certificates were not made with a view to regulating advances and showing how much should be paid on account; in granting them the architect was merely acting as agent of the building owners, and not as an arbitrator or quasi-arbitrator; and so he was liable to the employers for any negligence in granting those certificates.

D

*Stephenson* v. *Watson* (1) (1879), 4 C.P.D. 148, criticised. Dictum of A. L. SMITH, L.J., in *Chambers* v. *Goldthorpe* (2), [1901] 1 K.B. at p. 624, applied.

E

Per SANKEY, J.: It is probably right to say that in giving a final certificate the architect acts in a quasi-judicial character unless there is some express clause in the contract to contradict it. In giving an interim certificate he is merely acting as agent for the building owner unless there is something in the contract to contradict that relationship.

F

This question, so decided by SANKEY, J., was not argued on appeal, as the Court of Appeal gave judgment in favour of the defendant on the ground that he had not been negligent.

**Notes.** As to the position of architects under building contracts see 3 HALSBURY'S LAWS (3rd Edn.) 525 et seq., and for cases see 7 DIGEST 434 et seq.

Cases referred to:

G

(1) *Stevenson* v. *Watson* (1879), 4 C.P.D. 148; 48 L.J.Q.B. 318; 40 L.T. 485; 43 J.P. 399; 27 W.R. 682; 7 Digest 440, *428*.

(2) *Chambers* v. *Goldthorpe*, *Restell* v. *Nye*, [1901] 1 K.B. 624; 70 L.J.K.B. 482; 84 L.T. 444; 49 W.R. 401; 17 T.L.R. 304; 45 Sol. Jo. 325, C.A.; 7 Digest 439, *425*.

H

(3) *Tharsis Sulphur & Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040, H.L.; 7 Digest 385, *215*.

**Action** tried before SANKEY, J., without a jury.

In this action, which was tried at Cambridge Assizes and adjourned to London for legal argument, the plaintiffs, the Wisbech Rural District Council, sued the defendant, Mr. Frank Ward, who had been employed as architect in connection with a housing scheme of the plaintiffs, for a sum of £221 3s., which they alleged they had been compelled to pay twice over, to the Disposals Board and also to the builders, owing to the negligence of the defendant in granting interim certificates. The defendant contended, inter alia, that he was in the position of an arbitrator or quasi-arbitrator and was therefore not liable for negligence.

I

*Sir Malcolm Macnaghten, K.C.*, and *Gerald Dodson* for the plaintiffs.

*A. P. M. Schiller, K.C.*, and *Linton Thorpe* for the defendant.

*Cur. adv. vult.*

July 19. **SANKEY, J.,** read the following judgment: Shortly after the war the plaintiffs were minded to erect a number of houses under a housing scheme and for that purpose they made a contract with Messrs. Wright and Wilson on Sept. 30, 1920. The defendant was the architect under that contract. The Ministry of Health had rights in connection with the scheme by which they could compel war material which the Disposals Board had for sale to be used. The Ministry further had the right of revising the prices and making allowances in the event of the prices of labour or material rising or falling during the continuance of the contract. In the years 1920-21 the houses were in course of erection, and the defendant gave twelve interim certificates, the first on Nov. 29, 1920, and the last on Nov. 24, 1921, in pursuance of cl. 29 of the building contract which regulated the method of payment as follows:

"(1) *Interim Payments.*—No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto.

(2) When work to the value of £250 has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under this contract, and shall issue such monthly certificate not later than the 15th day of each month following that in which the first certificate is given, and the employer shall within fourteen days of the date of issue of the certificate pay to the contractor the sum so certified.

(3) The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorized extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made, and in preparing any certificate the architect shall take account of any alteration in rates of wages or price of materials which may by virtue of clause 25 hereof affect the amount payable to the contractor in respect of the works. The balance of 10 per cent. of the value of the work shall be retained until the sum so retained (hereinafter called 'the retention fund') amounts to £467 10s., after which the contractor shall be entitled to be paid monthly to the full value of all work executed and material supplied. One-half of the retention fund shall be paid (subject to the conditions set out herein) to the contractor at the completion or occupation of the works, and the other half, together with any sum found due to the contractor at the final adjustment of the accounts by the quantity surveyor, shall be paid four months after completion or occupation of the works, provided that all defects for which the contractor is liable are made good and that he has otherwise discharged his liabilities under the contract.

[(4) Dealt only with the retention fund.]

(5) No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions [of the contract], nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

It is unnecessary for the purposes of my judgment to go into minute details, but it is sufficient to say that in addition to giving those certificates to the builder the defendant also gave documents under which the plaintiffs paid, and in my opinion rightly paid, the Disposals Board for some of the prime cost articles, if they may so be called, supplied by the board. Unfortunately, he gave some interim certificates and documents under which the plaintiffs had to pay both the builders and the board for the same material, chiefly consisting of baths. I find as a fact, indeed

it was not really disputed by the defendant, whose memory was not of such a character as enabled the court to place absolute reliance on it, that, owing to the defendant's negligence, he certified that a sum of £221 3s. was due both to the Disposals Board and to the builders. The plaintiffs' witnesses said, and I accept it, that they had paid this sum twice over. The defendant said: "I allowed for the baths in my certificate to the builders and the plaintiffs have paid the builders for them; I have also certified that the Disposals Board was entitled to be paid for the baths, and the plaintiffs have paid them also for the baths."

After considerable delay, which was due to the fault of the defendant, the parties endeavoured to get a final settlement of the accounts and, as late as October, 1923, the defendant went through the accounts with some of the plaintiffs' officials and, in effect, admitted that he had made a mistake. He did not deny the correctness of the sum paid twice over and promised to obtain a refund from the builders. The plaintiffs gave the defendant an opportunity, at his request, to recover the amount of the money, if he could. Unfortunately, the builders dissolved partnership, and one went bankrupt. The present writ was then issued to obtain from the defendant the overpaid money. I find that owing to the negligence of the defendant the plaintiffs have had to pay the sum of £221 3s. twice over.

On behalf of the defendant four points were taken: (i) That the defendant was a quasi-arbitrator, and, therefore, not liable. (ii) That the action is premature because there is power to rectify under a final certificate and no final certificate has at present been issued. Should that final certificate be issued it would be found that the builders have not been overpaid, because a sum of £221 11s. 8d. is due to them in respect of sums they ought to be allowed for paying increased wages, and so, in effect, the plaintiffs have suffered no damage. (iii) If the matter cannot be rectified there has been a final certificate contained in a document known as Summary No. 4, which was the document gone into between the parties to find what the exact position was, and the defendant has issued his final certificate, and cannot be sued for negligence. (iv) If the defendant was negligent, so, too, were the plaintiffs for not keeping and checking their accounts.

I will deal with the last three points at once. In regard to (ii), in my view there is no power to rectify by giving a final certificate, and for several reasons: (a) By reason of the delay in this matter which has been caused by the defendant. As far back as 1923 he admitted the mistake, and he was allowed time to see whether he could not get the money out of the builders. They, as above pointed out, were in a partnership, which came to an end a considerable time ago. Subsequently, Mr. Wright, who carried on the business by himself, became insolvent, and was adjudicated a bankrupt. (b) In my view the builders were not entitled to any sum at all in respect of an increase in wages, and, in fact, the Ministry disallowed it. In regard to (iii), in my view Summary No. 4 was not a final certificate. Moreover, it was not intended by the defendant to be one, nor was it issued or accepted as such. The real question here is whether the defendant was negligent in giving an interim certificate. In regard to (iv), this is a question of fact. I find that the plaintiffs were in no way negligent, and that there was no breach by them of any duty which they owed to the defendant.

I, therefore, turn to the important part of the case. In regard to (i), Was the defendant a quasi-arbitrator, and is he, therefore, not liable? In my opinion an architect under a building contract may occupy two positions: (a) He may be merely an agent of the building owner; or (b) he may be placed in the position of an arbitrator, or quasi-arbitrator. If he is merely acting as an agent for the building owner, he may be liable for negligence. If he is acting as an arbitrator or quasi-arbitrator, he is clothed with the duty of exercising an impartial judgment (*Chambers* v. *Goldthorpe* (2), [1901] 1 K.B. at p. 645), and he will not be liable for mere negligence. He will only be liable when he has been shown to be fraudulent. In this case there is no suggestion that the defendant has in any way been fraudulent. It was urged before me that in *Stevenson* v. *Watson* (1) both

A LORD COLERIDGE and DENMAN, J., said that in circumstances like the present the defendant would have been in a quasi-judicial position. As it appears to me, they said no such thing. The facts of that case have to be carefully regarded. The plaintiff was a builder. The architect had issued his final certificate and refused to reconsider it, and it was held on demurrer in that particular case.

B "that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of arbitrator, against whom, no fraud or collusion being alleged, the action would not lie."

C But DENMAN, J., points out (4 C.P.D. at p. 161) that the question is what duty did the architect undertake. That depends on the nature of the employment of an architect who acts under a contract of that kind. The remarks at the bottom of that page must be taken to refer to the facts of that case. A more accurate statement of the law, if I may be allowed to say so, is that of the Master of the Rolls, A. L. SMITH, L.J., in *Chambers* v. *Goldthorpe* (2) ([1901] 1 K.B. at p. 634):

D "I have no doubt that under many clauses of the building contract in this case the plaintiff acted merely as the agent for the defendant, the building owner, for the purpose of seeing that the builder did his work properly, and used proper materials. As regards matters in which the plaintiff was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer if he acted negligently in such matters."

E Although it is probably right to say that in giving a final certificate the architect acts in a quasi-judicial character unless there is some express clause in the contract to contradict it, it cannot, I think, be asserted that in giving an interim certificate he is so acting. Personally, I should have thought that the inference was just the other way—namely, that in giving an interim certificate he is merely acting F as agent for the building owner unless there is something in the contract to contradict that relationship. But, after all, the contract must be looked at to see whether or not in giving an interim certificate the architect was acting as an arbitrator or quasi-arbitrator. Having regard to the course of business under this contract, and having regard to the clause dealing with the method of payment, especially cl. 29 (1), (3), and (5), I have come to the conclusion that, in giving G these interim certificates, the architect was not acting as an arbitrator or as a quasi-arbitrator. The interim certificates were not made with a view to regulating the advances and showing how much should be paid on account: (*Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (3); see per LORD BLACKBURN, 3 App. Cas. at p. 1049). The defendant was deciding no dispute, he was settling no final balance; he was, as I think, merely acting as agent for the plaintiffs. He was beyond all H question negligent, and, in my opinion, he is liable to pay the amount claimed. For these reasons there must be judgment for the plaintiffs.

The defendant appealed.

*Schiller, K.C.*, and *Linton Thorp* for the defendant.
*Sir Malcolm Macnaghten, K.C.*, and *Gerald Dodson* for the plaintiffs.

I **LORD HANWORTH, M.R.,** in the course of his judgment, said that by cl. 29 of the contract the architect had to certify for the amount of work done and materials supplied. The payments contemplated were to be no more than interim payments, and the architect was to give his certificate each month. It seemed to him that the mistake made in the court below was in misunderstanding the duty imposed on the architect under cl. 29, and treating the payments made as if they had been a final adjustment between the parties. There had been no final adjustment, and in that sense the action was premature. The defendant, as architect, was clearly

bound to certify for the full amounts, both of labour and material, and he had sufficiently indicated to the plaintiffs that the amount paid to the Disposals Board was to be deducted from the amounts of the interim certificates. The appeal must be allowed with costs.

**ATKIN** and **LAWRENCE, L.JJ.,** concurred.

*Appeal allowed.*

Solicitors: *Lee, Ockerby & Co.*, for *Sharp, Wade & Whittome*, Wisbech; *Withers, Bensons, Currie, Williams & Co.*, for *Metcalfe, Copeman & Pettefar*, Wisbech.

[*Reported by* T. R. F. Butler *and* Geoffrey P. Langworthy, Esqs., *Barristers-at Law.*]

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## THE JANERA

[Probate, Divorce and Admiralty Division (Hill, J.), December 12, 1927]

[Reported [1928] P. 55; 97 L.J.P. 58; 138 L.T. 557; 44 T.L.R. 193; 17 Asp. M.L.C. 416]

*Practice—Stay of proceedings—Lis alibi pendens—Plaintiffs defendants in action abroad relating to same subject-matter—Plaintiffs formerly plaintiffs abroad in abandoned action.*

An action will not be stayed upon the ground that the plaintiffs are defendants in an action pending in a foreign court concerning the same subject-matter. The position of the actions here and abroad is to be considered at the time when the motion to stay the English proceedings comes before the court, and, therefore, the fact that the plaintiffs have themselves been plaintiffs in an action abroad concerning the same subject-matter, but have abandoned that action, is not a ground for setting aside proceedings in this country.

**Semble:** Where a plaintiff in England is also a plaintiff in a foreign court in proceedings relating to the same subject-matter the court will put him to an election in which court he will proceed.

**Notes.** Distinguished: *The London*, [1931] P. 14. Applied: *St. Pierre* v. *South American Stores* (*Gath and Shaves*), *Ltd.*, [1935] All E.R. Rep. 408. Considered: *The Madrid*, [1937], 1 All E.R. 216; *Sealey* (*Otherwise Callan*) v. *Callan*, [1953] 1 All E.R. 942.

As to stay of proceedings and lis alibi pendens see 26 Halsbury's Laws (2nd Edn.) 69–71 and 7 Halsbury's Laws (3rd Edn.) 170–175. For cases see 11 Digest (Repl.) 542.

**Motion** by the defendants, Anglo-Egyptian Oilfields, Ltd., owners of the steamship *Janera*, to set aside the writ and subsequent proceedings in an action by the owners of the steamship *Masconomo*, claiming damages arising out of a collision between the *Janera* and the *Masconomo*. The collision took place just outside Egyptian waters, and the owners of the *Janera* commenced an action in the Mixed Arbitral Tribunal in Egypt, claiming damages from the owners of the *Masconomo*. The owners of the *Masconomo* themselves commenced an action against the owners of the *Janera* in Egypt, but their action was discontinued prior to the date of this motion. There was no counterclaim by the owners of the *Masconomo* in the action by the owners of the *Janera* in Egypt.

*Langton, K.C.*, and *Wilmer* for the defendants.

*Dunlop, K.C.*, and *Balloch* were not called upon to argue.

**HILL, J.**—In my view this motion fails. It is a motion to stay an action in personam which has been brought by the owners of a German ship against the defendants, the Anglo-Egyptian Oilfields, Ltd., on the ground that they have been improperly served within this jurisdiction. The ground of the application is that it was vexatious of the plaintiffs to issue their writ and that, therefore, they ought not to be allowed to sue here. The collision in respect of which the proceedings arise happened somewhere near Egyptian waters, and the present defendants, owners of the *Janera*, began an action against the owners of the *Masconomo*. At some stage of that proceeding the owners of the *Masconomo* issued a cross-writ against the owners of the *Janera*. When this motion was pending the owners of the *Masconomo* withdrew their cross-action, and, therefore, they are not parties, as plaintiffs, to any proceedings in Egypt. They still remain parties to a proceeding in Egypt as defendants to the writ issued against them by the Anglo-Egyptian Oilfields, Ltd.

It seems to me quite clear that the court ought not to stay a plaintiff here upon the ground that he happens to be a defendant elsewhere, and, therefore, as things stand now in Egypt there is no ground for staying the plaintiffs' action. But it is said that I ought to stay the action here because up to a point the owners of the *Masconomo* took part in the proceedings, and themselves at one time were plaintiffs there. I do not think that I ought to do more than consider the state of the proceedings in the one country and the other at the time when I am asked to stay. As regards the plaintiffs' action in Egypt it is to be presumed that the Mixed Tribunal in Egypt will be able to give the owners of the *Janera* all the costs that have been thrown away by the proceedings by the owners of the *Masconomo* which have been so abandoned. The owners of the *Janera* have bail in a sum which appears to be in excess of the damage suffered.

Ought I to stay a proceeding properly brought in this country because the people who have brought it are defendants in a proceeding relating to the same collision in Egypt? I have asked for an authority for that, counsel for the owners of the *Janera* says that he cannot find any, and I can see no justification, in that position, for staying the action. In general if the cross-action brought by the plaintiffs was still proceeding in Egypt I think then the proper course would have been to put them to election, but as they have already elected themselves—and acted upon their election—to abandon the proceedings, and as there are no proceedings by them anywhere else, it seems to me I cannot interfere to deprive them of the right which they otherwise undoubtedly have to sue in this country.

*Motion dismissed.*

Solicitors: *Waltons & Co.; Thomas Cooper & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

A

# Re DRAYCOTT SETTLED ESTATE

[CHANCERY DIVISION (Tomlin, J.), November 15, 16, 23, December 20, 21, 1927]

[Reported [1928] 1 Ch. 371; 97 L.J.Ch. 193; 139 L.T. 59]

*Settled Land—Land deemed to remain settled land—Limitation, charge, or power "under the settlement"—Termination of rentcharges—No subsisting settlement—Purchase of land with settlement moneys—Conveyance to trustees by conveyance creating settled estate—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 3.

B

Estates were purchased by the trustees of a will subject to jointure rentcharges created by certain settlements, and on Jan. 1, 1926, the estates were held subject to a compound settlement consisting of the will, the said settlements, and a deed of 1907. In 1927 the last of the jointure rentcharges determined on the death of a jointress.

C

**Held:** (i) the words "under the settlement" in s. 3 (a) of the Settled Land Act, 1925, meant "under the settlement deemed to be subsisting," i.e., in the present case under the compound settlement ; a limitation, charge, or power could be said to be "under the settlement" only where it was necessary to resort to the compound settlement for overriding the limitation, charge, or power ; and, therefore, when the rentcharges came to an end the compound settlement was not to be deemed, under s. 3 (a), to be a subsisting settlement; (ii) lands to be purchased in the future out of moneys forming part of the residuary personal estate of the testator or out of proceeds of sale of lands previously so purchased should be conveyed to the trustees of the will by a form of conveyance which created a settled estate and not by one which created a trust for sale.

D

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**Notes.** As to the duration of settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 668 et seq., and for cases see 40 DIGEST (Repl.) 792–794. For the Act of 1925 see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

F

Case referred to :

(1) *Re Lord Alington and L.C.C.'s Contract*, [1927] 2 Ch. 253; 96 L.J.Ch. 465; 138 L.T. 131; 71 Sol. Jo. 695; 40 Digest (Repl.) 793, *2746*.

**Originating Summons.**

G

By his will the testator, who died on Mar. 27, 1896, settled certain real estates in such manner that, in the events which happened, the applicant was tenant for life thereof in possession, and his daughter, the respondent, T. H. Childs, an infant, was tenant in tail in remainder, though her interest was liable to be deferred to those of other persons if and when such other persons came into existence. By the will the testator's residuary personal estate was settled upon trust to invest in or upon any of the investments mentioned therein or with the consent in writing of the tenant for life or tenant in tail for the time being of the testator's real estate if of full age, and, if there should be no such person, then at the absolute discretion of his trustees in the purchase of freehold or copyhold lands in possession or subject to leases at improved rents in Great Britain, with power with such consent and at such discretion from time to time to alter and vary any such investments for other or others of a like nature, and to pay the income of his residuary personal estate to the person actually in possession or receipt of the rents of the real estate devised by the will, but subject to and in accordance with the proviso as to vesting of such income therein contained, and so that his residuary personal estate should not absolutely vest in any person thereby made tenant in tail general, unless such person should attain the age of twenty-one years, and so that such residuary personal estate should devolve and remain as if the same had been and formed part of his estate, and had been thereby devised and settled accordingly. After the testator's

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I

death the trustees of the will from time to time invested portions of the residuary personal estate in the purchase of real estate. By a conveyance dated Dec. 12, 1899, and executed to give effect to the first of such purchases, the property purchased (called Gorsty Birch Farm) was conveyed to the trustees (therein called "the purchasers") to hold unto the purchasers, their heirs and assigns, as joint tenants to the uses and upon the trusts and with and under and subject to the powers, provisions, and agreements to and by the testator's will declared and contained of and concerning the real estate thereby settled, or such of them as were then subsisting and capable of taking effect. The second purchase was made subject to certain jointure rentcharges arising under family settlements of the previous owners, the Vavasour family, but with the benefit of an indemnity against such rentcharges. By a conveyance dated Jan. 31, 1907, by which the second purchase (known as the Draycott estate) was carried into effect, the Draycott estate was conveyed unto the trustees (therein called "the purchasers") to hold the same unto and to the use of the purchasers, their heirs and assigns, free from all rights and equity of redemption, under certain mortgages, but subject, together with other hereditaments, to the rentcharges above mentioned, but indemnified against the same in manner provided by an indemnity deed upon trust that the purchasers or the survivors or survivor of them or other the trustees or trustee for the time being of the conveyance should, at the request in writing of the person of full age who should for the time being be tenant for life or tenant in tail of the real estate devised by the testator's will, or if there should be no such person, then at the discretion of the trustees or trustee, sell the hereditaments thereby assured or any part or parts thereof, and should stand possessed of the net moneys to arise from every such sale and of the rents and profits of such hereditaments until the same respectively should be sold upon the same trusts and with and subject to the same powers and provisions, including the power of purchasing hereditaments, as the money laid out in the purchase of the hereditaments so sold and the income thereof would have been subject to if the same had not been so laid out. By a conveyance dated July 29, 1907, the property then purchased and situate at Fulford Dale, was conveyed to the trustees (therein called "the purchasers") to hold the same unto and to the use of the purchasers, their heirs and assigns, free from all claims under certain mortgages, upon the trusts, and subject to the powers, provisions, declarations, and agreements declared and contained by the testator's will concerning the real estate thereby settled, or such of them as were then subsisting and capable of taking effect. By an order of Eve, J., dated Nov. 25, 1908, the court expressed the opinion that no compound settlement of the Draycott estate was created by the testator's will and the conveyance of Jan. 31, 1907, and it was ordered, pursuant to s. 7 of the Settled Land Act, 1884, that the powers conferred upon a tenant for life by s. 63, together with ss. 6 to 13 of the Settled Land Act, 1882, be exercised by the present applicant with regard to the Draycott estate. By a subsequent order made by Russell, J., on July 18, 1921, the applicant was authorised to exercise, with regard to the Draycott estate, further Settled Land Act powers. Early in 1927 the last of the jointure rentcharges, subject to which the Draycott estate was conveyed to the trustees, determined. In 1927 the last of the jointure rentcharges determined on the death of a jointress.

The tenant for life took out the present summons to determine (i) whether, notwithstanding the death of the jointress, the compound settlement constituted by (i) an indenture of Aug. 24, 1886, a Vavasour settlement ; (ii) an indenture of Nov. 11, 1902, a Vavasour settlement ; (iii) the will and codicil ; and (iv) the indenture of Jan. 31, 1907, was or was to be deemed to be a subsisting settlement for the purposes of the Settled Land Act, 1925 ; (ii) whether, notwithstanding the death of the jointress, the compound settlement constituted by (i) an indenture of June 23, 1859 ; (ii) an indenture of Feb. 4, 1902, was or was to be deemed to be a subsisting settlement for the purposes of the Settled Land Act, 1925, and, if so, who were the trustees of such settlement who should execute a vesting deed.

Nov. 15, 16.—*Vaisey, K.C.*, and *Tillard* for the tenant for life. A
*J. V. Nesbitt* for the trustees of the indenture of Feb. 4, 1902.
*Cleveland-Stevens* for the infant tenant in tail in remainder.
*C. J. Radcliffe* for persons interested in remainder in the settled properties.
*A. Bromet* and *Shufeldt* for other parties.

*Cur. adv. vult.*

Nov. 23.—**TOMLIN, J.**, read the following judgment. All the settled estates are now to be sold, and the question arises how, in the events which have happened and having regard to the forms of the conveyances and the recent legislation, a title can now be made. For the moment I am dealing only with the title to the Draycott estate. But for the former rentcharges on that estate there would be no difficulty. A title could, I understand, be made under the conveyance of Jan. 31, 1907, and the will in such a way as to cover the case whether there is a trust for sale or whether there is not. It is said, however, that, assuming the land is not held upon trust for sale, s. 3 of the Settled Land Act, 1925, applies, and that, although the rentcharges are at an end and there is no interest prior to the interests under the testator's will to be overridden, yet by reason of the estate having been once subject to the rentcharge, a compound settlement constituted by the Vavasour instruments, under which the rentcharges arose, the conveyance of Jan. 31, 1907, and the will, must be deemed to be still on foot under the section, or at any rate, is dormant, and (to use the language employed by RUSSELL, J., in *Re Lord Alington and L.C.C.'s Contract* (1)) is capable of being awakened by the embrace of that section. If this is a result of the language employed in the section under consideration, it is, in the present case, an absurd result, for additional difficulty and expense will be occasioned without any advantage at all being obtained. B C D E

Section 3 of the Act, as amended by the Law of Property (Amendment) Act, 1926, by the addition of the words "not held upon trust for sale" reads as follows:

> "Land not held upon trust for sale which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—(a) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised; or (b) the person who, if of full age, would be entitled as beneficial owner to have that land vested in him for a legal estate is an infant." F

I have no doubt, having regard to s. 1 of the Act, that the Draycott estate has been subject to a compound settlement constituted by the Vavasour instruments and the conveyance of Jan. 31, 1907, and that such settlement was in existence after the commencement of the Act. The question is whether it is still a subsisting settlement notwithstanding the determination of all the charges under the Vavasour instruments. The answer must depend upon whether it can be said of it that a condition mentioned either in para. (a) or para. (b) of s. 3 still continues. Paragraph (b) seems to have no application to this case. There is certainly at present no infant who, if of full age, would be entitled as beneficial owner to have the land vested in him for a legal estate. Is there, however, within the meaning of para. (a) any limitation, charge or power of charging "under the settlement" subsisting or capable of being exercised? The words "under the settlement" must mean under the settlement deemed to be subsisting that is, in this case, under the compound settlement. In one sense it may be said that where there is a compound settlement every limitation, charge, or power of charging under any one of the instruments making up the compound settlement is under the compound settlement, but in another sense it is only where it is necessary to resort to the compound settlement for overriding the limitation, charge, or power that such limitation, charge, or power can fairly be said to be a limitation, charge, or power under the settlement. Section 3 is a section to facilitate and not to impede dealings with the land, and, in my opinion, the expression "under the settlement" is used G H I

in para. (a) in the second sense which I have indicated. It follows, therefore, in the present case, that the compound settlement, comprising the Vavasour instruments, ceased when the joint rentcharges came to an end, and is not, under s. 3, now to be deemed to be a subsisting settlement. If this land to-day is settled land, it is settled land under or by virtue only of the instrument or instruments which created the existing limitation, charges, and powers, and the earlier Vavasour instruments may be disregarded.

Dec. 20 and 21.—A further question on the summons now came before the court for decision, namely, whether any lands hereafter to be purchased out of moneys forming part of the residuary personal estate of the testator, or out of proceeds of sale of lands heretofore so purchased, ought to be conveyed to the trustees of the will upon trust for sale, or ought to be comprised in an appropriate vesting deed as provided by s. 10 of the Settled Land Act, 1925, or how otherwise the same ought to be conveyed and dealt with.

**TOMLIN, J.**—Primâ facie, apart from any special statutory provision, I think that a direction, such as that contained in this will, to invest in personal investments or real estate, with power to vary, has the effect that the property is land or personal estate according to the state of investment in which it is at the time, so that, strictly speaking, it would not be proper to convey the land to the trustees in a form which would stereotype it in a particular way. Before the Conveyancing Act, 1911, at any rate, there seems to have been nothing to prevent the trustees of a will such as this having the property conveyed to them in a form which would give effect to the intention of the testator subject only to this, that if it was conveyed to them with power to sell, as distinct from a trust for sale, it might well be that, having regard to the provisions of the old Settled Land Acts, it must always remain real estate, because the only sales which would be effective would be sales by the tenant for life under the Acts, and the proceeds of those sales would be capital moneys, and those capital moneys would be affected with the character of real estate. In regard to settlements of personal estate coming into operation after the Act of 1911 and containing a power to invest in the purchase of land, the conveyance where such a purchase was made probably ought to have been in the form of a trust for sale. In either of these two cases it might be said that the legislature had effectually secured that the intention of the testator should not be carried out. But that, of course, is of minor importance. As matters stand to-day, however, I think that there is little doubt that the proper form for a conveyance, whether on a purchase of land by means of money arising from the proceeds of sale of land formerly purchased out of money forming part of the residuary estate, or whether on a purchase of land by means of money forming part of the residuary estate and not previously invested in the purchase of land, ought to be in the form of a conveyance creating a settled estate and not in the form of a conveyance creating a trust for sale. The consequences are statutory consequences. The trustees thereby do their best and that their best is not effectual is not their fault.

Solicitors: *Cunliffe, Blake & Mossman*, for *Knight & Sons*, Newcastle, Stafford; *Torr & Co.*, for *George Bromet & Son*, Tadcaster; *Gibson & Weldon*, for *Hand, Morgan & Co.*, Stafford.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

# Re F. AND E. STANTON, LTD. HOGG *v.* MAULE AND ANOTHER

[KING'S BENCH DIVISION (Avory and Salter, JJ.), November 10, 11, 1927]

[Reported [1929] 1 Ch. 180; 98 L.J.Ch. 133; 140 L.T. 372; [1928] B. & C.R. 161]

B

*Company—Winding-up—County court—Jurisdiction—Fraudulent preference—Floating charge—Discretion of court—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 131 (2), (3) *and* (6), *ss.* 210, 212.

A county court in which a company is being wound-up has jurisdiction to decide questions as to fraudulent preference, and as to floating charges created on the eve of the winding-up, as these are both matters which can only arise in the winding-up and their determination is necessary for the purposes thereof. Where the county court judge, in the exercise of his discretion, decides to hear an application as to these matters, the High Court cannot interfere.

C

*Re Ilkley Hotel Co.* (1), [1893] 1 Q.B. 248 and *Re Centrifugal Butter Co., Ltd.* (2) [1913] 1 Ch. 188, explained and distinguished.

D

**Notes.** The Companies (Consolidation) Act, 1908, has been repealed. The provisions of the current act, the Companies Act, 1948, corresponding to s. 131 (1), (3), (6), s. 210 (1) and s. 212 respectively of the 1908 Act are s. 218 (1) and (2), (3), (6), s. 320 (1), and s. 322 (1). These provisions of the 1948 Act, though differing in some details from the corresponding provisions of the 1908 Act, are essentially similar thereto, and this case accordingly remains an authority on the 1948 Act provisions.

E

As to winding-up of companies by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 528–733, and for cases see 10 DIGEST (Repl.) 848–1043. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

F

(1) *Re Ilkley Hotel Co.*, [1893] 1 Q.B. 248; 62 L.J.Q.B. 333; 68 L.T. 164; 57 J.P. 281; 41 W.R. 639; 5 R. 154, D.C.; 10 Digest (Repl.) 850, *5598.*

(2) *Re Centrifugal Butter Co., Ltd.*, [1913] 1 Ch. 188; 82 L.J.Ch. 87; 108 L.T. 24; 57 Sol. Jo. 211; 20 Mans. 34; 10 Digest (Repl.) 944, *6485.*

(3) *Re Yates, Ex parte Brown* (1879), 11 Ch.D. 148; 48 L.J. Bcy. 78; 40 L.T. 402; 27 W.R. 651, C.A.; 4 Digest 36, *312.*

G

(4) *Re Vestal Hosiery Co., Ltd.* [1922] W.N. 62; 91 L.J.Ch. 627; 126 L.T. 631; 66 Sol. Jo. 334; [1922] B. & C.R. 155; 10 Digest (Repl.) 952, *6545.*

(5) *Re New Par Consols, Ltd.*, [1898] 1 Q.B. 573; 67 L.J.Q.B. 595; 42 Sol. Jo. 98; 5 Mans. 273, D.C.; 10 Digest (Repl.), 909 *6193.*

(6) *Re New Par Consols, Ltd. (No. 2)*, [1898] 1 Q.B. 669; 67 L.J.Q.B. 598; 78 L.T. 312; 46 W.R. 369; 14 T.L.R. 287; 42 Sol. Jo. 343; 5 Mans. 277, C.A.; 10 Digest (Repl.) 850, *5600.*

H

(7) *Re Inns of Court Hotel Co.* (1868), L.R. 6 Eq. 82; 37 L.J.Ch. 692; 10 Digest (Repl.) 1030. *7122.*

(8) *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467; 75 L.J.Ch. 697; 95 L.T. 292; 22 T.L.R. 708; 13 Mans. 306; 10 Digest (Repl.) 772, *5019.*

(9) *Re Columbian Fireproofing Co., Ltd.*, [1910] 2 Ch. 120; 79 L.J.Ch. 583; 102 L.T. 835; 17 Mans. 237, C.A.; 10 Digest (Repl.) 773, *5030.*

I

(10) *Re Orleans Motor Co., Ltd.*, [1911] 2 Ch. 41; 80 L.J.Ch. 477; 18 Mans. 287; sub nom. *Re Orleans Motor Co., Ltd., Smyth* v. *Orleans Motor Co., Ltd.*, 104 L.T. 627; 10 Digest (Repl.) 772, *5017.*

(11) *Re Oakwell Collieries Co.*, [1879] W.N. 65; 10 Digest 933, *6390.*

**Appeal** from Greenwich County Court.

A company, F. and E. Stanton, Ltd., was incorporated on April 3, 1922 with a capital of £5,000 divided into £1 shares, of which 3,337 were issued. On Jan. 20,

1926, debentures for an aggregate sum of £4,500 were created in favour of Edwin Maule and Albert Harris in consideration of moneys previously advanced by them to the company. Particulars of this issue were duly filed with the registrar. Each debenture was for £500, and was one of a series expressed to rank pari passu as a first charge on the company's property and to be by way of floating security. On Jan. 25, 1926, a petition was presented to the Greenwich County Court for the winding-up of the company, and a winding-up order was made on Feb. 19, 1926. On Feb. 4, 1926, Maule and Harris had purported to appoint a receiver of the assets of the company under powers contained in their debentures. On May 18, 1926, the liquidator applied by motion in the above court for a declaration that the debentures in question were invalid as a fraudulent preference under s. 210 of the Companies (Consolidation) Act, 1908, or alternately as a floating charge created within three months before the commencement of the winding-up, contrary to s. 212 of the same Act. Objection was taken on behalf of the debenture holders that the county court had no jurisdiction to hear this application. The deputy county court judge overruled the objection, but gave leave to appeal. The debenture holders appealed.

The Companies (Consolidation) Act, 1908, provided:

"Section 131 (1): The courts having jurisdiction to wind-up companies registered in England shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and the county courts. . . . (3) Where the amount of the share capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situated within the jurisdiction of a county court having jurisdiction under this Act, a petition to wind-up the company shall be presented to that county court. . . . (6) Every court in England having jurisdiction under this Act to wind-up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding-up of a company."

*Edward Clayton*, K.C., and *Arthur Mulligan* for the debenture holders referred to: *Re Ilkley Hotel Co.* (1), *Re Centrifugal Butter Co., Ltd.* (2), *Re Yates, Ex parte Brown* (3). Practice Note [1921] W.N. 356; *Re Vestal Hosiery Co., Ltd.* (4); and BUCKLEY ON COMPANIES (10th Edn.) s. 193 and s. 215.

*H. B. Vaisey*, K.C., and *Oscar Keen* for the liquidator referred to: *Re New Par Consols, Ltd.* (5), *Re New Par Consols, Ltd. (No. 2)* (6), *Re Yates, Ex parte Brown* (3), *Re Inns of Court Hotel Co.* (7), *Re Jackson and Bassford, Ltd.* (8), *Re Columbian Fireproofing Co., Ltd.* (9), and *Re Orleans Motor Co., Ltd.* (10).

*Edward Clayton*, K.C., replied.

**AVORY, J.**—This was a motion in the county court of Greenwich asking that it might be declared that debentures purporting to have been created by a company in favour of two persons, Harris and Maule, on Jan. 20, 1926, for an aggregate sum of £4,500 were invalid either under s. 212 of the Companies (Consolidation) Act, 1908, or, alternatively, under sub-ss. (1) and (2) of s. 210 thereof, and that Harris and Maule had respectively no rights in the sum of £4,500 or any part thereof except as unsecured creditors in the winding-up of the company. The company in question was, at the time when the motion was made, being compulsorily wound up in the Greenwich county court, and there is no dispute that the winding-up of this particular company was within the jurisdiction of the county court. The case was within sub-ss. (2) and (3) of s. 131 of the Companies (Consolidation) Act, 1908. Sub-section (6) of s. 131 provides:

"Every court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court. . . ."

The winding-up, therefore, was admittedly within the jurisdiction of the county court in question, but on this motion coming before the learned deputy county court judge objection was taken that he had no jurisdiction to entertain this application relating to these debentures. After hearing argument, he held that he had jurisdiction and this appeal arises upon that decision.

A further point has been taken by counsel for the debenture holders and fully argued—namely, that even if the county court judge had jurisdiction, he ought not, in the circumstances of this case, to have exercised it, or, in other words, that he ought in the exercise of a judicial discretion to have declined to exercise his jurisdiction. With all respect to the argument addressed to us, I am unable to follow how that proposition can be maintained. If in law a county court judge had jurisdiction in this matter, and if he were to say that in the exercise of his discretion he ought not to exercise that jurisdiction, it would be open to the liquidator to come to this court and ask for a mandamus ordering the county court judge to exercise his jurisdiction, and to such an application there would be no answer. In my view, therefore, this question ought to be treated as the question whether in law the county court judge had jurisdiction in this application.

The appeal is based on s. 210 and s. 212 of the Companies (Consolidation) Act, 1908. Section 210 (1) provides:

> "Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound-up, a fraudulent preference of its creditors, and be invalid accordingly."

Section 212 provides:

> "When a company is being wound-up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding-up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum."

Now it is quite true, as counsel for the debenture holders has pointed out, that neither of these sections confers any express or particular power either on the county court or the High Court; all they do is to declare that certain acts done by a company shall be invalid in law in certain circumstances. While that is true, it is also equally true that both the matters dealt with in these sections are matters which arise and can arise only in the winding-up of a company; they are matters which cannot arise as a dispute between parties prior to a winding-up, but must arise and be dealt with in the course of a winding-up. The question, then, resolves itself into this, whether, when an allegation has been made that there has been an infringement either of s. 210 or of s. 212 of the Companies (Consolidation) Act, 1908, a county court judge has jurisdiction in the winding-up of a company to deal with such an allegation. It appears to me that in view of s. 131 (6), of the Act—I am speaking now apart from any decided cases and am looking only at the statute—unless it can be said that the High Court would have had no power and no jurisdiction to deal with this motion made in the county court, the county court also had jurisdiction.

Counsel for the debenture holders has, however, invited us to hold, substantially on the strength of the two decisions, eithers that the High Court had no jurisdiction, or that, if it had, in view of the decision of NEVILLE, J., in *Re Centrifugal Butter Co., Ltd.* (2), that court ought not to have exercised it. I confess that for some time during the argument I was inclined to the view that the decision of CAVE, J., and LORD COLERIDGE, C.J., in *Re Ilkley Hotel Co.* (1) did amount to a decision in

favour of the debenture holders in this case, on the ground, to put it shortly, that the result would be, if the liquidator were right, that the county court judge in such a case would be assuming jurisdiction to make orders without limit in regard to amount and in many cases without appeal, but on closer consideration of this decision and of the sections of the Companies (Consolidation) Act, 1908, I have come to the conclusion that this decision does not govern the present matter. It is perhaps to be regretted that the report of the *Ilkley Hotel Case* (1) does not state in what way exactly the question arose between the parties there, but it is abundantly clear that in whatever way the transfer of the wine by the manager of the company came about, there was no decision by the court on any matter of fraudulent preference or floating charge on the assets of the company, and Cave, J., expressly declined to express any opinion whether the county court judge had jurisdiction to declare the transaction to be a fraudulent preference. In other words, this decision is not a decision that a matter which arises and can only arise in the course of a winding-up, and which ought to be dealt with by the tribunal that has charge of the winding-up, is not within the jurisdiction of the county court. It is quite true that the judge in that case founded his judgment to a great extent on the fact that there was in the Bankruptcy Act then in force a section giving certain powers to the county court, but limiting the jurisdiction to a case where the amount in dispute did not exceed in value £200, and to the fact that there was no similar provision in the Companies Act then in force. I am unable, for myself, to say that the fact that there is no such provision in the Companies Act is of itself in any degree sufficient to take away the jurisdiction of the county court expressly conferred by s. 131 (6) of the Companies (Consolidation) Act, 1908.

However, it is necessary that I should now say a word about *Re Centrifugal Butter Co., Ltd.* (2), in which Neville, J., was dealing with a case which arose under s. 193 of the Companies (Consolidation) Act, which provides:

> "Where a company is being wound-up voluntarily the liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court. . . ."

The section is, therefore, one which gives to the court the same power in the case of a voluntary liquidation as exists where the liquidation is compulsory. In that case there undoubtedly was a question arising between the company and its directors, and the learned judge said:

> "The real question in this case is whether the court ought to allow s. 193 of the Companies (Consolidation) Act, 1908, to be used for the purpose of setting aside a contract between the company and third parties. I am not sure whether it is a question of jurisdiction or only one of discretion. I cannot in this case make any distinction between a contract with directors and a contract with other persons, because the original contract was clearly in order having regard to the constitution of the company. I cannot find the directors guilty of misfeasance until the contract is set aside, and I am doubtful whether I have jurisdiction to set aside the contract on this summons. In the case of *Re Oakwell Collieries Co.* (11), which was relied on, the application was for delivery up to the company of possession of an estate to which they were primâ facie entitled; that is quite a different case from the one before me. But if I have jurisdiction I am clearly of opinion that I ought not to exercise it. Before coming here for relief the applicants must bring an action for rescission of contract and succeed in it."

That appears to me to be a decision that in the present case the county court judge might, if he had been so advised, have said, as Neville, J., did, that this was a matter on which there would be so much dispute of fact that it was one which

ought not to be determined on affidavit and that he ought not to determine it but leave the parties to bring an action. I cannot hold that that decision made it imperative on the county court judge to follow the same course as NEVILLE, J., did, and therefore it does not appear to me to be an authority in support of the proposition that the county court judge had here no jurisdiction to hear the application.

Reference has been made to certain rules of practice laid down by learned judges having charge of the winding-up of companies for the convenience of the court in dealing with disputed questions of fact. So far as I know, it is open to county court judges to lay down rules for their own guidance and convenience in such matters. If that be not so, that might form a ground for an application to remove a case from the county court into the High Court; but, in my opinion, in this application we have simply to determine the bald question whether the county court judge had jurisdiction to entertain the application. In my opinion he had, and we ought not on this appeal to make an order for the transfer of the case to the High Court. I am of opinion, therefore, for the reasons which I have stated, that this appeal ought to be dismissed.

**SALTER, J.**—I am entirely of the same opinion, but as this case appears to me to involve a question of some importance, I will give my reasons. The county court in question has undoubtedly jurisdiction under s. 131 (1) and (2) of the Companies (Consolidation) Act, 1908, to wind up this company. Sub-section (6) of s. 131 of the same Act provides:

> "Every court in England having jurisdiction under this Act to wind-up a company shall for the purposes of that jurisdiction have all the powers of the High Court. . . ."

We have to construe those words, and especially the words "for the purposes of that jurisdiction." The construction of this sub-section seems to be almost entirely free from authority and we have, therefore, first to construe the sub-section for ourselves, and then to refer to such authorities as can assist us on the question. The section confers very wide powers on inferior courts in the matter of the winding-up of a particular company, if the court has jurisdiction to wind-up. With regard to the particular company, the inferior court is to have all the powers of the High Court for the purposes of winding-up jurisdiction. I think that means that the inferior court is in that case clothed with all the powers of the High Court which are necessary for the purposes of winding-up that particular company. Those would be powers to decide matters of administration and disputes, the powers to decide disputes being limited to disputes which arise in and in consequence of the winding-up and which come into existence because the company is being wound-up and which must be decided in order that the winding-up may be complete. That, I think, is the meaning of the sub-section. In this case the county court judge was invited by the liquidator on motion to decide two disputes between himself and persons outside the company. One was that certain debentures issued by the company were alleged to be a fraudulent preference, and, in the other case, a certain charge was said to be a floating charge created on the eve of the winding-up in violation of s. 212 of the Companies (Consolidation) Act, 1908. The real question for us to decide is whether the determination of those matters was a thing necessary to be determined for the purpose of winding-up the company. I think that the dispute was one necessary to be determined in order that the company might be wound-up, and so far as we are free to construe the words of the sub-section apart from authority, I think that the county court judge was right.

We have, however, been referred to authority on both sides. On behalf of the liquidator we were referred to *Re New Par Consols, Ltd.* (5), and *Re New Par Consols, Ltd. (No. 2)* (6). With regard to the first report, a Divisional Court had to construe sub-s. (6) of s. 1 of the Companies (Winding-up) Act, 1890, the words of which are identical with the words now in question; but it was a case where

A the county court had acted under an express power, and I do not think the observations of LORD RUSSELL, C.J., are of any assistance in this case. In the second case, which came before the Court of Appeal, the question was one of prohibition. The county court judge had made a committal for disobedience to an order by him, and the Court of Appeal held that the county court judge was for the purposes of the winding-up a court of co-ordinate jurisdiction, and therefore a prohibition to him B could not be granted. The words in question were considered both by A. L. SMITH, L.J., and CHITTY, L.J. A. L. SMITH, L.J., said ([1898] 1 Q.B. at p. 672):

> "By that enactment the county court judge is, for the purpose of winding-up companies, invested with all the powers possessed by the High Court in relation to a winding-up."

C CHITTY, L.J., said at the same page:

> "In this case the county court judge has jurisdiction to wind up the company in question under the Companies (Winding-up) Act, 1890, and the effect of s. 1 (6) of that Act is that he has conferred upon him for the purposes of such a winding-up all the powers of the High Court. . . ."

D CHITTY, L.J., therefore, keeps more closely to the actual words of the sub-section than does A. L. SMITH, L.J., but I do not think those judgments throw any real light on the question whether matters of fraudulent preference and floating charges are matters in which the county court has the powers of the High Court as matters necessary for decision for the purposes of winding-up jurisdiction.

Both sides have availed themselves of the analogy of bankruptcy, and reference E has been made to *Re Yates, Ex parte Brown* (3). The headnote is as follows (11 Ch.D. 148):

> "Where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. F But where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself."

There the order appealed against was made on the application of the trustee in bankruptcy and it directed that a mortgage executed by the bankrupt should be G delivered up to be cancelled on the ground that the deed was a contrivance to defeat the creditors of the bankrupt, and also that it was a conveyance of substantially the whole of his available assets to secure a pre-existing debt. It was argued that the Court of Bankruptcy ought not to exercise jurisdiction, the appellants being mere strangers to the bankruptcy. JAMES, L.J., said:

H > "This point is really not arguable. Questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy."

So far as there can be any help from the analogy of bankruptcy, this case assists the liquidator rather than the debenture holders: in both matters submitted to I the county court judge the liquidator was seeking to enforce rights which existed only by reason of the winding-up.

We were referred on behalf of the debenture-holders to *Re Ilkley Hotel Co.* (1) and the judgment of CAVE, J., therein. In that case the county court judge had been asked to rule on the question of fraudulent preference. He held that there was none, but made an order that certain property transferred by the manager of the company to particular persons should be given back again, on the ground that the manager had no authority from the company to make the transfer. On appeal, CAVE, J., said ([1893] 1 Q.B. at p. 249):

"It appears to me to be quite clear that the county court judge had no jurisdiction to make the order which he has made in this case. An application was made to him to declare the transfer of certain wine to the appellant to be a fraudulent preference. The question was raised in argument whether he had any jurisdiction to accede to that application and declare the transaction to be a fraudulent preference. As to that question I give no opinion. It is unnecessary to decide the point, because the county court judge came to the conclusion that there had been no fraudulent preference by the company, on the ground that what was done was done by the manager acting without authority, and therefore there had been no valid transfer of the wine; and he thereupon ordered the delivery of the wine to the liquidator. The question to be decided is whether he had authority to make that order"

so that in that case CAVE, J., expressly left open the matter we have to consider. There is nothing in that judgment inconsistent with the view that we are expressing. The learned judge there decided a matter between the company and some other persons which had nothing to do with a winding-up.

We were referred also to *Re Centrifugal Butter Co., Ltd.* (2). There, after the company had gone into voluntary liquidation, the liquidators took out a summons to set aside an agreement between the company and third parties, and were not exercising any right created by the winding-up. The application was made under s. 193 of the Companies (Consolidation) Act, 1908, and the judgment of NEVILLE, J., has been already quoted by my brother AVORY. The decision appears to me to be in no way inconsistent with the view we are expressing here. Counsel for the debenture-holders then referred us to BUCKLEY ON COMPANIES (10th Edn.), s. 193 (p. 449) and s. 215 (p. 504). We are not concerned to deal with those sections, but I do not think that the observations there to be found conflict with our view. Counsel for the debenture-holders also referred us to ss. 163 to 172 of the Companies (Consolidation) Act, 1908, which set out a series of powers for the purpose of winding-up, and he argued that, because those express powers were given, it therefore followed that not only had the county court no power, but also the High Court had no power to deal with questions of fraudulent preference or floating charge by way of motion in a winding-up. He admitted that it was often the practice for the High Court to do so, but agreed that it was essential to his argument that, if the point were taken, it must be decided that the High Court had no power. I think that we ought not to accede to an argument which is inconsistent with ordinary practice.

For these reasons I am satisfied that the county court judge had jurisdiction to deal with this matter. It was said, however, that, even if he had jurisdiction, he ought not to have exercised it, in view of the large sum involved and the inadequacy of county court procedure. If the county court deals with the matter at all, it must be by motion. The comparative magnitude of this case and the inadequacy of county court procedure might support an application to transfer the matter to the High Court, but we do not think that such a transfer can be made on this appeal, and that matter has been already dealt with by my brother AVORY. On the question whether the county court judge ought to have exercised his jurisdiction, the difficulty is that, if the matter was within his jurisdiction, he had the right to deal with it and, as he has done so, we cannot interfere. For these reasons I agree that this appeal fails.

*Appeal dismissed.*

Solicitors: *Dalston, Sons & Elliman; Leader, Plunkett & Leader.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

# R. v. DAILY MIRROR (EDITOR AND PROPRIETORS) AND OTHERS. Ex parte SMITH

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), January 31, February 4, 1927]

[Reported [1927] 1 K.B. 845; 96 L.J.K.B. 352; 136 L.T. 539; 43 T.L.R. 254; 28 Cox, C.C. 324]

*Contempt of Court—Prejudicing fair trial of legal proceedings—Publication of photograph of accused person—Defence of mistaken identity not raised—Prejudice of imminent proceedings.*

On Jan. 7, 1927, an attempt at murder was made. On Jan. 9 S. was arrested, and on Jan. 10 he was brought before magistrates and charged with the attempted murder. On Jan. 13 he was put up for identification by witnesses at an identification parade. On the morning of Jan. 13, before the parade took place, two newspapers published his photograph, together with a statement that he was the man who had been charged with the crime. None of the witnesses who attended the parade had in fact seen the photograph in the newspapers, and on Jan. 26 and 27, when the hearing before the justices of the charge against S. was completed and he was committed for trial, his counsel said that there was no question as to identity, but indicated a different defence.

**Held:** the editors and proprietors of the two newspapers were guilty of contempt of court, because when the photograph was published it was reasonably clear that a question of identity might arise, and so in publishing the photograph together with the statement they had published matter which was calculated, even though not intended, to prejudice the fair trial of S.

Principles stated in *R.* v. *Payne & Cooper* (1), [1896] 1 Q.B. 577, applied.

QUAERE: whether a publication calculated to prejudice the fair trial of proceedings said to be imminent, but not actually commenced at the time of publication, could constitute contempt of court.

Dictum of WILLS, J., in *R.* v. *Parke* (2), [1903] 2 K.B. 432, considered.

**Notes.** Referred to: *R.* v. *Lawson, Ex parte Nodder* (1937), 81 Sol. Jo. 280. As to comments and newspaper articles on pending proceedings constituting criminal contempt of court, see 8 HALSBURY'S LAWS (3rd Edn.) 7–12, and for cases see 16 DIGEST 22–30, as to punishment by the Queen's Bench Division for contempt of inferior courts see ibid. 19–20.

Cases referred to:

(1) *R.* v. *Payne and Cooper*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 44 W.R. 605; 12 T.L.R. 321; 40 Sol. Jo. 416, D.C.; 16 Digest 23, *190*.

(2) *R.* v. *Parke*, [1903] 2 K.B. 432; 89 L.T. 439; 67 J.P. 421; 52 W.R. 215; 19 T.L.R. 627, sub nom. *R.* v. *Parke, Ex parte Dougal*, 72 L.J.K.B. 839; 47 Sol. Jo. 692, D.C.; 16 Digest 22, *179*.

(3) *R.* v. *Goss* (1923), 17 Cr. App. Rep. 196, C.C.A.; 14 Digest (Repl.) 406, *3966*.

(4) *R.* v. *Dwyer*, *R.* v. *Ferguson*, [1925] 2 K.B. 799; 95 L.J.K.B. 109; 132 L.T. 351; 89 J.P. 27; 41 T.L.R. 186; 27 Cox, C.C. 697; 18 Cr. App. Rep. 145, C.C.A.; 14 Digest (Repl.) 406, *3967*.

(5) *R.* v. *Haslam* (1925), 134 L.T. 158; 28 Cox, C.C. 105; 19 Cr. App. Rep. 59, C.C.A.; 14 Digest (Repl.) 305, *2889*.

**Rules nisi** for attachment for contempt of court against Alexander Campbell, the editor, and Daily Mirror Newspapers, Ltd., the proprietors, of the Daily Mirror, and against W. G. Fish, the editor, and Associated Newspapers, Ltd., the proprietors, of the Daily Mail, in publishing a photograph of Edgar William Smith, the **applicant for the rules.**

The facts, which are summarised in the headnote, are fully set out in the judgment of LORD HEWART, C.J. A

*Sir Patrick Hastings*, *K.C.*, and *J. B. Melville* showed cause for the editor and proprietors of the Daily Mirror.

*Sir John Simon*, *K.C.*, and *H. M. Giveen* showed cause for the editor and proprietors of the Daily Mail. B

*A. M. Lyons* in support of the rules.

**LORD HEWART, C.J.**—The phrase "contempt of court," as has been observed more than once, is, in relation to the kind of subject with which we are now concerned, a little misleading. The mischief consists not in some attitude or supposed attitude to the court itself, but in the prejudice to an accused person. It is not something which affects the status of the court, but something which may profoundly affect the rights of citizens. What is now complained of is that when a man named Smith had been arrested on a charge of attempted murder and brought before the magistrates, and before those proceedings had been completed, two newspapers, the Daily Mirror and the Daily Mail, on Jan. 13, 1927, printed photographs of the accused person. The wording accompanying the two photographs is somewhat different, but it is not suggested that the information in the Daily Mail office was different from that in the office of the Daily Mirror. C D

The principles on which the court acts in such cases have been stated on several occasions. In particular in *R.* v. *Payne and Cooper* (1), LORD RUSSELL OF KILLOWEN, C.J., said:

> "The applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending." E

In the same case WRIGHT, J., said:

> "In order to justify an application to the court the publication complained of must be calculated really to interfere with a fair trial."

In the present case it is not alleged that there was on the part of anyone concerned an intention to prejudice the fair trial of Smith; what is said is that the publication of these photographs was calculated to prejudice the fair trial of Smith. F

In recent years the Court of Criminal Appeal have had, on more than one occasion, to consider the use of photographs of accused persons by the police. In 1923, in *R.* v. *Goss* (3), it was stated:

> "No doubt there are circumstances in which the police of necessity make use of photographs, but to make use of photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one." G

In the following year, 1924, the matter was further considered in *R.* v. *Dwyer*, *R.* v. *Ferguson* (4): H

> "It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to persons in order to obtain information or a clue upon that question; it is another thing for a police officer to show beforehand to persons who are afterwards to be called as identifying witnesses photographs of those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph." I

The question was again considered in 1925 in *R.* v. *Haslam* (5):

> "Two matters emerge clearly in this appeal. First, witnesses who were called on to pick out the appellant at an identification parade as being the wrongdoer had previously been shown a photograph of him. It is not suggested that

the photographs were shown to the witnesses that the police might obtain a clue to the direction in which inquiries might usefully be made or to the person whom it would be proper to arrest. The appellant had already been arrested, and the effect of what was done was to give the witnesses—or certainly three of them—an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shown a photograph of the accused person. One can see that sometimes it will happen that when a person has been shown a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him."

The kind of mischief which the publication of the photograph of an accused person may bring about is indicated in those passages. No one would excuse a police officer if, bringing together all the persons among whom witnesses of identity might be found, he said: "I have arrested a man and am going to put him up for identification by you," and then showed them a photograph of the man whom they were going to be asked to identify, because, for one reason among others, the witnesses would approach the important, and it might be crucial, task of identification with the knowledge that that particular man had been arrested. The fact that a photograph is published in a money-making business does not excuse a newspaper for doing that which would be reprehensible in a police officer. In my opinion, in the publication of photographs no less than in the publication of narrative, it is the duty of a newspaper to take care lest prejudice should be caused to a man about to stand his trial. An attitude of cynical indifference is manifestly wrong. By that I do not mean to lay down that a newspaper may never publish a photograph of a person who is a party to a civil or criminal proceeding; no one would dream of laying down so wide a proposition. But I do say that there is a duty to exercise care in the publication of the photograph of an accused person. If a newspaper publishes a photograph in such circumstances it runs a grave risk—a risk which in one sense affects the accused person, and in another sense affects those responsible for the newspaper.

In the present case the attempt to murder took place on Jan. 7, Smith was arrested on Jan. 9, and brought before the magistrates on Jan. 10. It was not till Jan. 13 that the identification parade was held, and it was while that identification parade was still pending and before it had taken place, that those photographs appeared. Was it, or was it not, reasonably clear that a question of identity might arise? I think that it was clear. It certainly was not clear that a question of identity would not arise, and what the newspapers did was to take the risk. It is quite true that when the identity parade took place only one person identified Smith; and it is quite true that later, on Jan. 27, when Smith was committed for trial, his counsel said that the question of identity no longer arose. But that could not have been forseen by those who published these photographs on Jan. 13. They ought to have seen that the question of identity might arise, and I think that they published matter which was not intended, but was calculated, to prejudice the fair trial of Smith.

The question does not arise whether there can be contempt in a case where proceedings are said to be imminent, because in this case proceedings had begun. The other question may one day have to be decided, but for the present it is only necessary to refer to a passage in *R.* v. *Parke* (2), where Wills, J., said:

"Great stress has been laid by Mr. Danckwerts upon an expression which

has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

But this further and larger question does not arise. There was in this case a duty to take care, with reference to a case which had arisen, and to an accused person who was then under arrest. That duty was, perhaps, made even more manifest by the statement made in open court and reproduced in the Press that there might be further charges.

In those circumstances I am of opinion that these rules ought to be made absolute, but as it is the first time that proceedings have been taken in respect of the publication of a photograph I think that it is not necessary to impose any penalty. Very different considerations will apply if and when a similar case arises again. But in this case the rules will be made absolute, and will lie in the office subject to further order. The respondents must pay the whole costs of the proceedings.

**AVORY, J.**—I agree.

**TALBOT, J.**—I have entertained grave doubt whether material exists for the exercise of our jurisdiction, but as we are not deciding the wider question of contempt in respect of pending proceedings, I do not dissent.

*Rules absolute.*

Solicitors: *Michael Abrahams, Sons & Co.; Lewis & Lewis; Patersons, Snow & Co.*, for *Langley, Stevens & Phillips*, Lincoln.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

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## Re RYDER AND STEADMAN'S CONTRACT

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), May 5, 9, 10, 11, 23, 1927]

[Reported [1927] 2 Ch. 62; 96 L.J.Ch. 388; 137 L.T. 281; 43 T.L.R. 578; 71 Sol. Jo. 451]

*Settled Land—Land held in undivided shares vested in possession—Not "settled land" before Jan.* 1, 1926—*Land subject to jointure rentcharge—Contract to sell land subject to jointure—Land vested in trustees of settlement upon statutory trusts—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35, *s.* 39, *Sched. I, Part IV, para.* 1 (2), (3), *as amended by Law of Property (Amendment) Act*, 1926 (16 *& 17 Geo.* 5. *c.* 11), *s.* 7, *Schedule.*

In 1926 three vendors contracted to sell Blackacre, which had been conveyed to them in 1924 in fee simple as tenants in common in undivided shares, subject to, but with an indemnity against, a jointure rentcharge. The vendors contracted to sell Blackacre subject to the jointure rentcharge, but with the benefit of the indemnity, and proposed to convey the land as joint tenants on the statutory trusts under the Law of Property Act, 1925, Sched. I, Part IV,

para. 1 (2). The purchaser took the objection that, on Jan. 1, 1926, the land, by reason of the jointure rentcharge, became settled land within the Settled Land Act, 1925, s. 1 (1) (v), and that the land was not vested, under the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (2), in the vendors, but was vested, under Sched. I, Part IV, para. 1 (3), in the other person or persons specified in that sub-paragraph.

**Held:** (i) para. 1 (2) and para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925, constituted alternative provisions, the former applying to land which was not, and the latter applying to land which was, settled land under the law existing prior to the commencement of the Act of 1925; Blackacre, not then being settled land, vested in the vendors as joint tenants on the statutory trusts under para. 1 (2), and they could show a good title in accordance with the contract; (ii) section 35 of the Law of Property Act, 1925, did not apply where the sale was made subject to the incumbrance, since the rights of the jointress were left entirely unaffected by the sale, and s. 28 (1) of the Act of 1925 did not apply for, inasmuch as the equitable interest of the jointress would not attach to the net proceeds of sale, the exercise of the powers conferred by that subsection would not operate to overreach the equitable interest of the jointress; further, even if Blackacre was held from and after Jan. 1, 1926, under a compound settlement (which was doubtful), the vendors could, by virtue of the Law of Property (Amendment) Act, 1926, s. 1, convey subject to the rentcharge.

Decision of ASTBURY, J., [1927] 1 Ch. 509, reversed.

**Notes.** Considered: *Re Pedley, Wallace* v. *Wallace*, [1927] 2 Ch. 168; *Re Gaul and Houlston's Contract*, [1928] All E.R. Rep. 742. Applied: *Re Catchpool, Harris* v. *Catchpool*, [1928] All E.R. Rep. 606. Referred to: *Re Alington and L.C.C.'s Contract*, [1927] 2 Ch. 253; *Re Parker's Settled Estates, Parker* v. *Parker*, post p. 546.

As to the transitional provisions under the Law of Property Act, 1925, see 27 HALSBURY'S LAWS (2nd Edn.) 619 et seq.; and for cases see 40 DIGEST (Repl.) 858–863.

For the Law of Property Act, 1925, s. 35, s. 39, Sched. I, Part IV, see 20 HALSBURY'S STATUTES (2nd Edn.) 491, 498, 859; and for the Settled Land Act, 1925, s. 1, s. 2, see 23 HALSBURY'S STATUTES (2nd Edn.) 15, 22.

Case referred to:

(1) *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp. M.L.C. 513; 6 R. 258, H.L.; 41 Digest 822, *6807*.

**Appeal** from a decision of ASTBURY, J.

By a conveyance on sale dated Apr. 14, 1924, the Duke of Marlborough and Marquess of Blandford appointed Blackacre to the three vendors, Harold Arthur Ryder, Alick Llewellyn Davies and Reginald Phillip Capel, in fee simple as tenants in common subject to a jointure charged on certain freehold lands including Blackacre, but with an indemnity therefor. By an agreement dated Feb. 13, 1926, the vendors agreed to sell Blackacre to Josephine St. Germain Steadman—hereinafter called the purchaser—and another property to Lady Mary Lee Terry. The title was to commence with a settlement dated July 19, 1897, made by the Duke and Duchess of Marlborough. Both properties were sold subject to a jointure rentcharge of £2,500 per annum, payable to the Marchioness of Blandford, during her life, charged on the said properties and other lands, by a deed of 1869, but with the benefit of a joint and several covenant by the Duke of Marlborough and the Marquess of Blandford, his eldest son, with the vendors that such jointure rentcharge should be duly and punctually paid, and of an indemnity given by the Duke and the Marquess to the vendors that they, or one of them, would keep the vendors and the properties indemnified against the said rentcharge. It was provided that the two

sales and purchases should be completed simultaneously. Lady Mary Lee Terry accepted the title to the property and was ready to complete her purchase, and no question now arose as to the sale to her. When the abstract was delivered to the purchaser's solicitors, it appeared that Blackacre had been conveyed to the vendors as tenants in common, and had been held by them as tenants in common until the Law of Property Act, 1925, came into force on Jan. 1, 1926. By arrangement between the parties a summons was issued, under s. 49 of the Law of Property Act, 1925, to decide whether in paras. (2) and (3) of Part IV of Sched. I to the Law of Property Act, 1925, the expression "settled land" meant land which was settled land before the commencement of the Act, that is, under the Settled Land Acts, 1882 to 1890, or whether it meant land which was made settled land by the Settled Land Act, 1925. The vendors contended that the first view was correct, and the land was not "settled land," and that para. 1 (2) applied, so that the land was vested in them as joint tenants on the statutory trusts. The purchaser contended that the second view was correct, and that para. 1 (3) applied, so that the land vested in the trustees of the settlement on the statutory trusts, or, in default of such trustees, vested in the Public Trustee or in trustees to be appointed in his place. Before the commencement of the Settled Land Act, 1925, land charged with a rentcharge was not settled land but was made settled land by s. 1 (1) (v) of that Act. By s. 205 (1) (xxvi) of the Law of Property Act, 1925, "settlement" and "settled land" have the same meaning in that Act as in the Settled Land Act. The vendors, by their summons, asked for a declaration that the requisitions and objections of the purchaser to the title of the freehold property comprised in the contract had been sufficiently answered and that a good title had been shown. ASTBURY, J., held that the land (referred to as "Blackacre") had vested in the settlement trustees (existing or to be appointed) on the statutory trusts under the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (3), and not in the vendors under para. 1 (2).

The vendors appealed.

*C. J. W. Farwell, K.C.*, and *Walter Banks* for the vendors.

*Hubert Rose* for the purchaser.

*Cur. adv. vult.*

May 23. The following judgments were read.

**LORD HANWORTH M.R.**—This is an appeal from a judgment of ASTBURY, J., given on February 17, 1927, on a vendor and purchaser summons, taken out by the vendors, for a declaration that a requisition made on behalf of the purchaser had been sufficiently answered, and a good title shown.

By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and his eldest son, under their powers, appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares, subject to the jointure charged on certain freehold estates including Blackacre, but with an indemnity therefor. By a contract dated Feb. 13, 1926, the three vendors agreed to sell Blackacre to the purchaser, subject to the jointure, but with the benefit of the indemnity, so that the price was not affected by the jointure. The vendors contended that, on Jan. 1, 1926, the date when the Settled Land Act, 1925, the Trustee Act, 1925, and the Law of Property Act, 1925 came into operation, Blackacre vested in them as joint tenants on the statutory trusts for sale under Sched. I, Part IV, para. 1 (2), to the Law of Property Act, 1925, and that they were now the estate owners with power to convey subject to the jointure, and to give a proper receipt for the purchase money. The arguments for and against this contention are set out in the judgment of ASTBURY, J. ([1927] 1 Ch. 509), where the facts are also fully stated. ASTBURY, J., decided against the vendors' contention, and they appeal. The question for this court is what is the true construction to be placed on certain clauses in Sched. I, Part IV, to the new Law of Property Act. This is the first case in which the construction of that Act, and of its concomitant Acts, has come before this court. The three Acts are inter-connected not only by the subject-matters to which they relate, but also by the definition clauses contained in them.

It is obvious that the terms of these three Acts, embodied in a total of 400 sections and fourteen Schedules, not to mention other relevant Acts which came into operation on the same day, must give rise to a number of problems in conveyancing and in the law under which property is held and to be dealt with. The Law of Property (Amendment) Act, 1926, which makes amendments in those three Acts, adds its testimony to this statement. These problems must now be determined by the rules of law applicable to the interpretation of statutes. They cannot be solved by reliance on the opinions of able writers of text-books yet living, or of those who have been closely and devotedly identified with the passage of this legislation through Parliament. Such persons may be expected to know what was the original intention of the Bill introduced into Parliament, and what was the purpose and design of later amendments ; but words in the statute must be considered and construed as they stand, even if that construction may involve subsequent difficulties, or even hardship in cases that are conceived as possible to arise.

> "A sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well-settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment."

(see per Lord Herschell in *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal* (1) ([1894] A.C. at p. 516)). It may, however, be observed that Astbury, J., says of the construction of the Act adopted by him ([1927] 1 Ch. at p. 521): "There is no doubt that in this particular case the Acts have worked a very serious hardship on the vendors."

Turning now to the Law of Property Act, 1925, by s. 39, the provisions set out in Sched. I to the Act are to have effect

> "for the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended)."

These provisions, therefore, are to mould what has been done under the law as it existed before 1922 into conformity with the new system. By s. 39 (4) the appropriate provisions in the schedule are to apply for "subjecting land held in undivided shares to trusts for sale." This same heading is placed before the group of provisions in Part IV of Sched. I. The question is which of these provisions applies to the present case? Before the commencement of the Law of Property Act, 1925, the land of the vendors was not settled land, but it was "immediately before the commencement of this Act held at law or in equity in undivided shares vested in possession." Does para. 1 (2) or para. 1 (3) of the subsequent paragraphs in Part IV apply?

In order to answer this question, it seems right to bear in mind the purpose for which these transitional clauses are introduced as already stated, and to repeat the opening words of Part IV of the schedule immediately before each sub-paragraph —whether (2) or (3). The result of this is that the land which is to be operated on by the sub-paragraph is land which is regarded as it was immediately before the commencement of the Act, and that same land is the land affected by the operation of the later words. Can the time at which this same land is to be regarded be changed in the same sentence without clear words to that effect? I think not. "Before the commencement of this Act" is the dominant time at which the land is considered and affected by these transitional subparagraphs. In this view the words "not being settled land" must also be attributed to the time immediately before the commencement of the Act. It may be that those words are unnecessary or tautologous ; but it seems difficult to put a construction on them which brings into the ambit of the sub-paragraph land considered as it was before the commencement of the Act and, a few words later, considered as it is under the operation of the new Act without any indication that the land is to be regarded at two different

moments of time with inconsistent results. This is a part of the Act which is intended to deal with transition, and to formulate how land held as it was immediately before the commencement of the Act can be brought under the new system. It is such land on which the transition is to work. A sufficient meaning can, in my judgment, be given to the words "not being settled land," if they are taken as indicating a caution, or nota bene, that sub-para. (2) in question does not deal with settled land. As to that, the next sub-paragraph is the operative one. This construction is in accord with the ordinary canons of construction, and leads to no hardship on the vendors.

Two objections are raised to this construction. The first that, under the interpretation section, s. 205 (1) (xxvi) of the Law of Property Act, "settled land" is to have the meaning given to it by s. 2 and s. 1 (1) (v) of the Settled Land Act, 1925, so that land subject to such a jointure as Blackacre is, is to be deemed to be "settled land." This definition applies, however, only unless the context otherwise requires, and the difficulty already pointed out of interpreting Sched I, Part IV, para. 1 (2), in the manner suggested appears to me to indicate that the context does "otherwise require." The second objection is that s. 35 of the Law of Property Act militates against the interpretation of the clause that I have adopted. That section expresses the meaning of the statutory trusts. The trustees are to sell and stand possessed of the net proceeds of sale after deductions named have been made

> "upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons interested in the land."

Those persons are defined to include an incumbrancer "whose incumbrance is not secured by a legal mortgage." It is said that the jointress in the present case is such a person, for her incumbrance is not secured by a legal mortgage. She, therefore, fulfils one limb of the definition. It is, however, a definition, and only a definition, which may enable an incumbrancer's rights to be considered ; but, per se, it does not confer new rights, and the trustees for sale are to hold the net proceeds only subject to such powers as may be requisite for giving effect to rights. If the rights of the jointress are not imperilled, it is not requisite to give effect to her rights by withholding the purchase money from the vendors.

The three vendors hold the land subject to the rentcharge. The extent of their estate is not enlarged. They convey it subject to the rentcharge, which is protected by para. 1 (8) of this same Part IV of the schedule, and no such power as of withholding the purchase money is requisite to give effect to the rights of the jointress after sale. ASTBURY, J.'s judgment turned on his feeling unable to accept the interpretation as to the meaning of "not being settled land" in Sched. I, Part IV, para. 1 (2), which I have adopted, and he gives reasons for his view derived from some difficulties or problems that may arise, if the interpretation contended for by the vendors is accepted. I am conscious that I have not referred to or dealt with all of them ; but such difficulties and problems must be considered when they arise in a concrete form. It may be that even yet another amending Act may be required to get rid of difficulties arising as the sequel to the interpretation given to the more fundamental clauses of the Acts. I will only add that I have had an opportunity of considering SARGANT, L.J.'s judgment, and I agree with the view that he has expressed on the other points raised and dealt with by him. The appeal is allowed, and the order will be as stated by SARGANT, L.J.

**SARGANT, L.J.**—The present appeal involves the determination of important questions under the Law of Property Act, 1925, and relates particularly to the effect of the transitional provisions of s. 39 of the Act as affecting land held in undivided shares. The three appellants are the vendors and the respondent is the purchaser under a contract dated Feb. 13, 1926, for the sale of certain freehold land which has throughout been referred to as Blackacre. The origin and nature of the estate and interest of the appellants in this land are sufficiently indicated in the

following paragraph, which is substantially taken from the report of this case in the court below.

In April, 1924, under and by virtue of a resettlement of July 14, 1866, a marriage settlement of Nov. 6, 1869 (appointing a jointure of £2,500 per annum to the wife for life and a term of 1,000 years to secure it), a marriage settlement of July 19, 1897, and a disentail of March 10, 1920, certain freehold estates, including Blackacre, stood limited (subject to the £2,500 jointure and term) to such uses as the Duke of Marlborough and the Marquess of Blandford should jointly appoint. By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares subject to the jointure but with indemnity therefor. In this state of things, the vendors, by the contract above referred to, agreed to sell Blackacre to the purchaser for £1,700 subject to the jointure but with the benefit of the indemnity against it. Apart from the legislation which had come into operation on Jan. 1, 1926, there would have been no difficulty in carrying out this contract, conveying the land to the purchaser and giving a good receipt for the purchase money. But some difficulties have been introduced by this legislation, and particularly by that part of it which relates to undivided shares in land.

Section 34 of the Law of Property Act, 1925, prohibits in general the creation of an undivided share in land, and provides that where, after the commencement of that Act, land is expressed to be conveyed to any persons in undivided shares and those persons (as was the case here) are of full age and not more than four in number, the conveyance shall operate as if the land had been expressed to be conveyed to the grantees as joint tenants on the statutory trusts thereinafter mentioned, being trusts for the sale by the grantees of the land held by them under the conveyance. Section 39 of the same Act, which is headed by the phrase "Transitional Provisions," enacts, so far as material, as follows:

> "For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended)"

such last-mentioned law being identical, for the present purpose at least, with the law enacted by the Law of Property Act, 1925—

> "the provisions set out in Sched. I to this Act shall have effect . . . (4) for subjecting land held in undivided shares to trusts for sale . . ."

Part IV of Sched. I to the Act is headed by the words "Provisions subjecting land held in undivided shares to a trust for sale," and provides, amongst other things, as follows:—

> "1. Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:— . . . (2) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts."

On the other hand, in the event of the entirety of the land being settled land, provision is made by para. 1 (3) for its vesting in the trustees of the settlement (if any), or, until there should be such trustees, in the Public Trustee, and in either event on the statutory trusts. And further, in any case to which the previous provisions of Part IV do not apply, it is provided, by para. 1 (4) that the land shall vest in the Public Trustee on the statutory trusts.

The first question to be determined is: Who are the persons in whom Blackacre became vested under these transitional provisions? Did it vest under sub-para. (2) in the three vendors as joint tenants on the statutory trusts? Or did it vest under

sub-para. (3) or sub-para. (4)? At first sight the answer would seem to be quite simple and straightforward. The entirety of Blackacre was, immediately before the commencement of the Act, vested absolutely and beneficially in the three vendors ; it was not then settled land, and it was subject only to an incumbrance, namely, the jointure, affecting the entirety. And apparently, therefore, it complied with all the requisites of sub-para. (2), and would have been converted by the statute from being vested in the vendors as tenants in common to being vested in them as joint tenants on the statutory trusts. This primâ facie view was, however, controverted by the purchaser's advisers. They asserted that, in the construction of Part IV of Sched. I, the phrase "settled land" must, by virtue of s. 205 of the Law of Property Act, 1925, have the same meaning as in the Settled Land Act, 1925 ; they pointed out that under s. 2 and s. 1 (1) (v) of the Settled Land Act, 1925, land subject to such a jointure as Blackacre was settled land ; and they drew the conclusion, which has been accepted by the learned judge, that the entirety of the land vested under the provisions of para. 1 (3) of Part IV of Sched. I in the trustees of the settlement or intermediately in the Public Trustee. In my judgment, however, this construction gives too rigid an effect to the definition of "settled land" in s. 205 (1) of the Law of Property Act, 1925. Under that subsection, the expression "settled land" and the other expressions in the subsection are given the meanings thereby assigned to them only "unless the context otherwise requires." Now the transitional provisions of Part IV are for the very purpose of changing the legal position existing prior to the Act into a new legal position, to take effect under and subsequent to the Act. And when, in the course of so doing, the Act defines the position existing previously to the Act, the definition must naturally, and, indeed, almost inevitably, refer to the law as it stood before the Act, and can hardly, without some confusion of thought, be importing into that definition a state of law which is only to exist after the Act. In sub-para. (2) itself, the land dealt with is defined as land the entirety of which "(not being settled land) is vested in undivided shares." The last part of this definition obviously refers to the status of the land previously to the Act, and so cannot refer to a status incapable of existing after the Act. It is, therefore, inconsistent with the context to apply to that part of the definition which consists of the words "not being settled land" a meaning derived from the new law introduced by the Act itself. The result would be a mongrel definition involving a mixture of the old law and the new law which is wholly unsatisfactory.

Perhaps there should be noticed here, if only for the purpose of rejection, a somewhat subtle argument for the purchaser of the following nature. It is said that the words "(not being settled land)" in sub-para. (2) imply that the sub-paragraph includes not only land which is not settled land but some land which is settled land ; that if the phrase "settled land" here has reference to the law existing before the Act, there could not be any settled land falling within the definition in sub-para. (2), while if it has reference to the law as changed by the Act it might be satisfied by such a state of things as existed here with reference to Blackacre ; and that, therefore, the language of the sub-paragraph is better satisfied by reading the expression "settled land" as referring to the new law. But this argument neglects the consideration that the paragraph deals with both of two alternatives, namely, that of the land being free from incumbrances and that of the land being subject to incumbrances. Even under the new law, the land, if free from incumbrances, would be no more settled land than under the old law ; and, therefore, in the case of the first alternative the implication said to be involved in the use of the phrase "(not being settled land)" would be no better satisfied by reading the phrase "settled land" as referring to the new law rather than to the old.

But, in truth, the subtleties considered in the last preceding paragraph are based on a suggestion of implication which is too slight to prevail against the more obvious inferences to be drawn from the fact that sub-para. (2) is, as already pointed out, an enactment converting an existing legal position under the old law into a new legal

position under the new law ; and, if sub-para. (2) is closely compared with sub-para. (3), it seems reasonably clear that they constitute alternative provisions, and that, while sub-para. (3) deals exclusively with the case of the entirety of the land being settled land, sub-para. (2) deals exclusively with the entirety of the land being unsettled land. In other words, the words in brackets "(not being settled land)" in sub-para. (2) are merely descriptive of the land being dealt with by that sub-paragraph, and the commencing words of the sub-paragraph are precisely correlative and alternative to the commencing words of sub-para. (3), and mean: "If the entirety of the land is not settled land and is vested," &c. This construction merely imputes some slight clumsiness of expression to the drafting of sub-para. (2), and in all other respects seems far more satisfactory than the construction suggested for the purchaser.

So far, then, the result is that, on Jan 1, 1926, Blackacre became vested, subject to the jointure and to the term of years for securing it, but with the benefit of the indemnity against it, in the vendors as joint tenants in fee simple on the statutory trusts for sale ; and the natural conclusion would seem to be that they could sell what they had got, namely, the fee simple of Blackacre subject to and indemnified against this existing incumbrance, and so carry out their contract. But here again the purchaser raises a difficulty which, as stated by her counsel, may be summarised as follows. It is contended that, under s. 35 of the Law of Property Act, 1925, the jointress here is a person whose incumbrance is not secured by a legal mortgage and would attach to the net proceeds of sale in the hands of the vendors as trustees for sale ; that under s. 28 of the same Act, trustees for sale are to have the powers of sale of a tenant for life under the Settled Land Act, 1925, and that these powers when exercised are to operate to overreach any equitable interests made to attach to the net proceeds for sale ; that tenants for life of the compound settlement said to exist in Blackacre could overreach the equitable interests of the jointress under s. 38 and s. 72 of the Settled Land Act, 1925, if they caused trustees to be appointed of the compound settlement and allowed the purchase money to be paid to them ; and, accordingly, that the vendors cannot sell and convey to the purchaser subject to the jointure, but are bound to sell and convey freed from the jointure and to allow the purchase money to be paid to the trustees of the compound settlement when appointed. This argument is an elaborate and ingenious one ; but, in my judgment, when carefully examined it breaks down at every stage. In the first place, s. 35 of the Law of Property Act is obviously aimed at giving corresponding rights in the net proceeds of sale to incumbrancers whose rights in the land are disturbed by the sale ; it does not apply to a case such as this where the sale is made subject to the incumbrance. In such a case it is not "requisite" to give "effect to the rights of the persons interested in the land" by giving rights against the net purchase money. For the rights of the incumbrancer in the land are left entirely unaffected by the sale. Next, s. 28 (1) of the Law of Property Act, 1925, does not apply ; for, inasmuch as the equitable interest of the jointress will not attach to the net proceeds of sale, the exercise of the powers conferred by that subsection will not operate to overreach the equitable interest of the jointress. Again, it is at the least extremely doubtful whether the documents creating the jointure can be coupled with the statutory trust for sale under Part IV of Sched. I to the Law of Property Act, 1925, so as to form a compound settlement within s. 1 of the Settled Land Act, 1925, especially in view of the provision introduced into that section by a "minor amendment" in the Schedule to the Law of Property (Amendment Act), 1926, namely "(7) This section does not apply to land held upon trust for sale." And lastly, even if Blackacre is held from and after Jan. 1, 1926, under a compound settlement, yet s. 1 of the Law of Property (Amendment) Act, 1926, expressly allows the conveyance of settled land subject to a prior interest where the land had, previously to Jan. 1, 1926, been conveyed to a purchaser subject to the prior interest, whether with exoneration from, or indemnity against, the prior interest or not.

In my view, no importance is to be attached in connection with this case to the inconvenience or inconsistency that may arise in the case of two married women entitled before January 1, 1926, to land in fee simple as tenants in common with in each case a restraint on anticipation. It may be that, in a very unusual case of this kind, difficulties may arise and the protection of one or other of the married women may be endangered. If so, this is the result in one exceptional case of the drastic legislation which converts tenancies in common into joint tenancies on trust for sale. It cannot alter the general construction of the transitional provisions of the Act with regard to land held in undivided shares.

In conclusion, I desire to add that the learned judge attached undue weight of certain expressions in a text-book written by a well-known conveyancer. Such expressions are no authority as to the construction and effect of recent legislation ; at the most they can only be adopted by counsel as embodying their argument or by the court as representing its ultimate view. Nor is any importance to be attributed to the views of the writer, because he may be recognised as the draftsman of the statute in question. On the contrary, that very fact may disable him from taking an unbiased view of the expressions used in the Act. In my judgment, the order appealed from should be discharged, and it should be declared that the requisitions and objections of the purchasers have been sufficiently answered, and that the vendors have shown a good title to the property in accordance with the contract. The purchaser must pay the costs here and below.

**LAWRENCE, L.J.**—I have had the advantage of reading the judgments which have just been delivered by my Lords. I agree with them and have nothing to add.

Solicitors: *Stow, Preston & Lyttelton*, for *Andrew, Walsh & Bartram*, Oxford; *Steadman, Van Praagh & Gaylor.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

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## FIREMEN'S FUND INSURANCE CO. *v.* WESTERN AUSTRALIAN INSURANCE CO., LTD. AND ATLANTIC INSURANCE CO., LTD.

[King's Bench Division (Bateson, J.), June 27, 28, 29, July 1, 1927]

[Reported 138 L.T. 108; 43 T.L.R. 680; 17 Asp. M.L.C. 332; 33 Com. Cas. 36]

*Insurance—Re-insurance—Liability of re-insurer—Voluntary payment by insurer—Unseaworthy ship—Provisions in re-insurance policy: "seaworthiness admitted"; "to pay as may be paid on original policy"—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 39 (4).

The plaintiffs, an insurance company, insured a consignment of gunpowder on a voyage from New York to La Plata. In addition to the gunpowder the ship carried other cargo, including a number of drums of sulphuric acid. Soon after leaving New York some of the drums of sulphuric acid, which had been badly stowed and loaded, leaked, with the result that the ship was damaged by corrosion and had to put into Barbados. The harbour authorities refused to allow the ship into port because of the explosives on board and the gunpowder was jettisoned and became a total loss. The policy covered perils of the sea and

jettison, as did a re-insurance policy which the plaintiffs had taken out with the defendants. The re-insurance policy was endorsed "seaworthiness admitted" and "to pay as may be paid [on the original policy]." The owners of the gunpowder made a claim against the plaintiffs in respect of the loss of the gunpowder which the plaintiffs paid without making a proper inquiry into the cause of the loss, and they now sought to recover the amount from the defendants.

**Held:** (i) the ship was unseaworthy from the time the sulphuric acid was put on board, owing to the condition of the drums and the way they were loaded, and, therefore, the plaintiffs had an answer to the claim made on them by their assured which answer they did not put forward ; (ii) a contract of re-insurance was a contract to indemnify against losses which the original insurer had suffered and was legally compellable to make good, and was not a contract to indemnify against mere voluntary payments ; (iii) the words "seaworthiness admitted" in the re-insurance policy did not prevent the defendants from proving that the ship was in fact unseaworthy, and the words "to pay as may be paid thereon" constituted an undertaking to pay only the claims which the original insurers, the plaintiffs, had been legally bound to pay ; and, consequently, the payment made by the plaintiffs to their assured was a voluntary payment which they could not recover from the defendants.

**Notes.** As to re-insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 103–106; and for cases see 29 DIGEST 117–121. For the Marine Insurance Act, 1906, s. 39, see 13 HALSBURY'S STATUTES (2nd Edn.) 33.

Cases referred to :

(1) *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd., Griffiths Lewis Steam Navigation Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp. M.L.C. 351; 29 Com. Cas. 340, H.L.; 41 Digest 478, *3118*.

(2) *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp. M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609*.

(3) *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp. M.L.C. 163; 41 Digest 473, *3045*.

(4) *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 34 T.L.R. 36; 62 Sol. Jo. 35; 14 Asp. M.L.C. 156; 23 Com. Cas. 205, H.L.; 29 Digest 208 *1675*.

(5) *Marten* v. *Steamship Owners' Underwriting Association, Ltd.* (1902), 71 L.J.K.B. 718; 87 L.T. 208; 50 W.R. 587; 18 T.L.R. 613; 9 Asp. M.L.C. 339; 7 Com. Cas. 195; 29 Digest 118, *720*.

(6) *British Dominions General Insurance Co., Ltd.* v. *Duder*, [1915] 2 K.B. 394; 84 L.J.K.B. 1401; 113 L.T. 210; 31 T.L.R. 361; 13 Asp. M.L.C. 84; 20 Com. Cas. 270, C.A.; 29 Digest 121, *734*.

(7) *St. Paul Fire and Marine Insurance Co.* v. *Morice* (1906), 22 T.L.R. 449; 11 Com. Cas. 153; 29 Digest 217, *1738*.

(8) *Chippendale* v. *Holt* (1895), 65 L.J.Q.B. 104; 73 L.T. 472; 44 W.R. 128; 12 T.L.R. 50; 40 Sol. Jo. 99; 8 Asp. M.L.C. 78; 1 Com. Cas. 197; 29 Digest 118, *719*.

(9) *Fire Insurance Association, Ltd. v. Canada Fire and Marine Insurance Co.* (1883), 2 O.R. 481; 29 Digest 48, *m*.

**Action** tried before BATESON, J. (sitting as an additional judge of the King's Bench Division).

The facts are set out in the judgment of BATESON, J.

*Dunlop, K.C.*, and *Simey* for the plaintiffs.

*Porter, K.C.*, and *David Davies* for the defendants.

*Cur. adv. vult.*

July 1. **BATESON, J.**, read the following judgment:—In this case my judgment is for the defendants. It is a claim by an original underwriter, the plaintiffs, against re-insurers, the defendants, for reimbursement of a claim paid by them, the original underwriters, to their assured. Before the plaintiffs can succeed there must be a liability on the original policy for payment. Here there is no liability because the ship was unseaworthy. The original policy is dated April 25, 1916, and is renewable apparently from year to year. It is an open cover, being an American policy, not the same as ours apparently. That original policy is a policy on goods to cover full interest in all shipments, to attach and cover all goods at the risk of the assured on and after April 29, 1916, intended for shipment by steamer or steamers sailing on and after this date. That policy contained clauses which have been referred to:

> "Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction or the consequences of any attempt thereat, whether lawful or unlawful and whether by the act of any belligerent nations or by Governments of seceding or revolting states,"

and so on. There is another clause in the policy:

> "Warranted by the assured if loaded with grain, petroleum and heavy cargoes to be loaded under the inspection of the surveyor appointed or approved by this company for that purpose."

That clause was referred to, but nothing turns on it because any point on it was given up. It is a policy against loss by perils of the sea or jettison and all other like perils, but there is no "seaworthiness admitted" clause in it. The policy sued on is a policy by the Western Australian Insurance Co., Ltd., dated Nov. 19, 1920, expressed to be on goods, lost or not lost, at and from any port or ports, place or places, on the Atlantic seaboard of the United States of America to La Plata per the steamship *Hyannis* on gunpowder valued as per original policy or policies F.P.A. unless the vessel, craft or lighter be stranded, sunk, burned or in collision as per original policy or policies. It is also against loss by perils of the sea, jettison, restraints and detainments of all kings and princes and people. The clause added to that is:

> "Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

Then attached to it there are the Institute Cargo Clauses:

> "Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof, or of any attempt thereat,"

and by cl. 8 of the Institute Cargo Clauses:

> "The seaworthiness of the vessel as between the assured and the assurers is hereby admitted."

There is a further clause attached:

> "Being a re-insurance subject to the same terms conditions, clauses and warranties as the original policy or policies account F. H. and C. R. Osborn and/or as agents and/or as managers whether re-insurance or otherwise, and to pay as may be paid thereon."

So that it is quite clear that that is a re-insurance policy covering the original insurers against their liabilities. It is also clear that, on the original policy, if the owner of goods lost the goods the original underwriter could avoid payment if in fact the ship was unseaworthy.

The history of the case is this. On Mar. 9, 1920, the *Hyannis*, a wooden screw steamer of 2,556 tons gross, began loading sulphuric acid in drums from several different shippers in New York. She was a vessel with two holds and the acid was

stored in drums in lighters from the ceiling up to the 'tween deck beams. The vessel had no 'tween deck. There were, I think, three tiers of these drums. They were large drums, the smallest of them weighing 15 cwt. Some of the drums were noticed to be defective at the time of loading and some were rejected. Those that were noticed as being defective were rejected, probably, I think, some drums were loaded which were in fact defective, though perhaps not noticed. Sulphuric acid is a very dangerous cargo. It absorbs moisture, and if it does or if it gets mixed with water, it is highly corrosive and eats up metal and chars wood and generates heat. It should be stowed on deck or put under deck in an absorbent material like small coal. It was, in fact, only stowed with some wood dunnage in what seems to me quite an insufficient amount. The drums were mostly standing on their ends, though the top tier was on its side and not adequately secured from rolling about. The subsequent state in which the cargo was found at Barbados, where she had to put in, shows that either the drums collapsed through weakness to withstand the superincumbent weight or through being corroded through from the inside, the acid in the drums eating its way through the metal and so becoming weakened and also allowing acid to escape. At any rate, the acid did escape and corroded away the essential portions of the ship like the pumps and the main injections and did damage to the machinery or boilers to such an extent that the ship was unable to perform her voyage. The stowage was certainly insufficient, and that, or some of these causes that I have mentioned, produced the escape of acid which so affected the ship that she could not perform her voyage. On Mar. 11 she went to Gravesend, New York, anchored and took in some eighteen tons of explosives for different shippers. These explosives were stowed on a wooden platform on the top of the drum in the forward hold in the way of No. 4 hatch although only in two holds. It was boxed in by wooden bulkheads.

The particular cargo in question in this action consisted of 300 cases of gunpowder of about 13,500 lb., over 3 tons, and shipped by John Dunn, Sons & Co., and consigned to La Plata. On Mar. 13 the vessel sailed for Rio for bunkers. She started with 637 tons of bunkers, 452 tons under deck, and 185 tons on deck. It was suggested at one time, I think, that the vessel started with insufficient coal, but that point was given up. On the first night out from New York they encountered some bad weather, but it was only such ordinary weather as could be expected at that time of year in that locality. It was nothing which a properly loaded ship ought not to have withstood. The sea was somewhat heavy, she rolled, no doubt, badly and her coal on deck was washed overboard. It was not clear from the evidence whether the coal was stowed on deck with any protection against going over the side, as it was not proved whether the ship had a solid bulwark or only a rail. It rather looks from the fact that it all went over as if she had not a solid bulwark and any rolling of the ship would carry the coal overboard. Some of the drums shifted in that bad weather, not very many, according to the evidence, but some appear to have been broken and it was discovered that the drums were leaking. Further, the fore bulkhead of the box in which the explosives were stowed gave way. On Mar. 14 the acid was found leaking in the tunnel. On Mar. 17 it was found that the pumps were disabled. The pumps became disabled one after the other because the acid had eaten away the material parts ; it destroyed the oakum in the seams and the ship began to leak and the water rose steadily. The master was therefore obliged to put in to Barbados, and arrived in Bridgetown, Carlisle Bay, on Mar. 26. Bridgetown has an inner harbour—I think part of it is called the Careenage—and an inner basin or dock further in. It is situated in Carlisle Bay, which is a large bay outside the inner harbour. On Mar. 27 there was a survey of the pumps. They were found so defective that they had to be replaced. New pumps, however, were not obtainable at Bridgetown, and on April 1, there was a survey of the ship and cargo, and it was found she could not proceed without repair. The surveyors recommended the gunpowder to be discharged, but the authorities would not allow it in the harbour, and they ordered her out of the harbour because she was in a

sinking and dangerous condition, and she went out to a place near Pelican Island, which is in Carlisle Bay. She did not go out as far as the harbour-master thought she ought to go out for safety, and on April 2 she was ordered to shift further out, but her position was such that she could not get up steam to do so. Then the harbour-master wrote a letter saying:

> "In view of the present condition of your ship, the large amount of explosives that there is on board, and the consequent very great danger to this town and its suburbs, I hereby desire that you will, without loss of time, jettison all the gunpowder and also the detonators."

I think that means "you have got to jettison all your explosives." I do not think he was using "gunpowder" in that letter as merely a cargo which was technically known as gunpowder because the explosives consisted of various kinds of powder and explosives, and I think he meant to refer to the whole amount. But there was dynamite on board, and there was some question whether dynamite would float or not, and it was not until some days afterwards that the master not knowing whether he might or might not discharge the dynamite, got from the harbour-master a letter saying:

> "In compliance with your request to be allowed to jettison the dynamite now on board your ship, permission is hereby granted you to do so, but only on condition that the dynamite is taken out of the wooden cases, carried not less than three ships' lengths to the westward of your ship, and dropped quietly into the sea."

The jettison of the gunpowder was done on April 3 and 4. The jettison of the dynamite was done on April 6 and 7, and I think that what happened at Bridgetown was this, that the authorities of the harbour restrained the master from coming in with explosives in such a shape, or at any rate, staying there, unless he got rid of it, and apparently refused to allow it to be put into hulk. But for that, of course, it could have been discharged. The vessel might in the early period have been repaired and certainly gone to another port. There might have been time perhaps to save the damage to the ship so increasing as to make it impossible to continue her voyage, but there was considerable delay. The shipowners did not provide the master with funds as rapidly as they might have done, and it was not for some considerable time after she was in these difficulties that any money was sent at all. The direct cause of throwing the goods overboard as the captain did was the order of the harbour-master, which left the captain no other course open to him if he wanted to do any repairs at all. On April 23 the vessel was patched up sufficiently to go on to Martinique. There was no dock that would take her at Bridgetown, but, having got rid of her dangerous cargo of explosives, they were able to do some repair to the corroded portions of the ship sufficiently to allow her to proceed. She proceeded on, either that day or early the next morning, having got a certificate of seaworthiness to go to Martinique, where she arrived on April 24, and there discharged the cargo of acid and was more or less repaired further, and went on to Key West eventually. She was ordered to go to dry dock on June 30. She did not arrive at Key West until Nov. 18; whether there or elsewhere, I do not know, but eventually she was in such a state that she was sold and only fetched $900. That being so, the assured made a claim on the original underwriters for his loss, apparently relying on the protest that had been made at Martinique on May 28, 1920.

That protest showed that he "sustained damage to ship, cargo and machinery through bad weather and was compelled to put into Barbados in distress on Mar. 26. Repairs were there made as far as possible to pumps and machinery but the dry dock there not being large enough to take the *Hyannis*, I decided to bring her to Martinique. New pumps were ordered from New York and now on their way here. The fastenings of the injection valve and seacock having been loosened by the

A action of the acid, I had two copper plates put over them outside by divers." That was done in Bridgetown. "The explosives, gunpowder, dynamite and detonators were jettisoned by order of the harbour-master at Barbados before he would allow the ship to come sufficiently close in to allow the divers to do this work. I then proceeded to Martinique and I now declare the steamship *Hyannis* to be under general average from Mar. 26, 1920, until these matters shall be finally settled by B all parties concerned." That is a very ingenious protest as to the real facts of the case. It does not indicate very much what happened. The way it was put forward to the plaintiffs, the original underwriters, on June 8, 1921, is this: Messrs. Wilcox, Peck and Hughes writing to the plaintiffs on that date say:

> "With further reference to the above claim, we now hand you copy of the C extended protest which we have just received from your assured. The original insurance certificate and negotiable copy of bill of lading were handed you under cover of the 30th March and as all the necessary documents in connection with this claim are now in your possession, we trust that your cheque in settlement will be forthcoming in the very near future."

So that, apparently, all that was sent was the insurance certificate, copy of bill of D lading and the protest in order to put forward a claim. The underwriters say in answer to that on Aug. 22, 1921,

> "Referring to previous correspondence in this case, please note we are prepared to deal with this claim, but we will settle same in the form of a loan as it is not impossible there may be some liability on the part of carriers. As advised you E in our telephone conversation, we have only received a duplicate bill of lading, and we understand that you will take up with the assured the question of securing the two remaining negotiable bills of lading."

Then on Oct. 13 they write:

> "We are enclosing herewith subrogation, also indemnity for the missing full F set of negotiable bills of lading which the assured are requested to sign and return to us as promptly as possible. Our cheque in settlement of this claim was handed Mr. Wallen of your office this morning and was for $6,558.08 in settlement of various other claims for the above assured."

So that it seems as if the plaintiffs, having got very little material or very little G information as to what really had happened, paid this claim either without knowing or without caring to find out about the real unseaworthiness of the vessel when they were not in fact liable for it. They were re-insured, and they did not apparently —I say "apparently" because the letters may not contain all the facts—bother their heads to investigate the claim. It may be that, being underwriters of a small portion of the cargo, they thought they would pay claims and not take any point H of unseaworthiness. It is suggested that underwriters very often do that. It may be again that they thought that they would pay and subrogate the rights of the assured who would recover from the shipper. At any rate, they did pay when I think clearly they were under no liability to pay. They then put forward their claim against the re-insurers, the first letter to the re-insurers—no doubt there were telephone conversations before—being on Aug. 23, 1922. The re-insurers rather wanted to I know more about it than the original insurers. They insisted on an investigation. Eventually they got discovery of the ship's papers, which entailed apparently considerable delay, and then discovered the real facts. Now that being so, the plaintiffs brought their action in this country against the defendants, the re-insurers, the statement of claim being dated Nov. 15, 1923, alleging a loss by jettison or perils of the sea. The defendants by their original defence on Dec. 4, 1923, set up that the goods were not lost by any peril insured against by the original policy and some small point on the question of exchange, but then after that, getting more information and getting discovery, they added on Mar. 8, 1927, further pleas,

namely, that, at the commencement of the risk, the *Hyannis* was unseaworthy, and they set out in their particulars why. I have already said what the facts were. A

The particulars are in accordance with what I have stated, and, as counsel for the plaintiffs said, in substance those particulars are accurate. He took some exception, I think, to the statement that the drums of sulphuric acid were leaking when shipped. I think some of them probably were, and he also took exception to the statement that the planking enclosing the box containing the sulphuric acid was inadequately secured. I think both these points should be found in favour of the defendants because I think the facts show that the explosives were not as well secured as they ought to be, seeing how the box in which they were contained, the forward bulkhead, gave way in ordinary weather. They also took the further point that the loss was not a loss by perils of the sea but was a loss by restraint, detention or destruction in the terms of the clause in the original policy, and they said that, under the circumstances, there was not liability under the original policy. That, I think, is the real defence in this case. B C

Those being the facts, I have no doubt that the ship was so loaded and stowed with such a cargo as to effect her as a ship, and she was unfit to perform the voyage when the cargo in question was put on board. So far as the stowage was bad, it endangered the safety of the ship. So far as the cargo shipped was unfit for carriage—that is the acid—it also endangered the ship, and, as I understand the law, if the stowage is such as to endanger the safety of the ship as a ship, the vessel is unseaworthy. *Elder, Dempster & Co., Ltd.* v. *Paterson Zochonis & Co., Ltd.* (1), and *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport* (2) are really not very much more than decisions following the old case of *Kopitoff* v. *Wilson* (3), and the facts of this case bring the case within those decisions. I think a wooden ship loaded with sulphuric acid which can escape and destroy metal pumps, her injections and other parts of the machinery, and destroy the oakum in the seams so that she cannot perform her voyage in ordinary weather, is unseaworthy. Junior counsel for the plaintiffs, and I think senior counsel also, contended that bad stowage causing unseaworthiness is limited to overloading or loading the ship so as to be unstable by the cargo belonging to the assured, and they said it had never yet been extended to one parcel of innocent cargo where the ship was made unseaworthy by another portion of the cargo of a different owner. I can find no authority for this. I do not think they can. I think the principle stated in the cases is all against it, as well as the Marine Insurance Act, 1906, s. 39. Counsel for the plaintiffs made this point, that it was bad stowage and not unseaworthiness. I cannot agree. He then contended that cl. 8 in the Institute Cargo Clauses, which, broadly stated, is a clause saying seaworthiness admitted, makes it impossible for the insurers to take the point that the ship was unseaworthy. He called it estoppel or an admission of a fact. I think the answer to that is this, that the re-insurance policy is a policy covering the liability of the original insurer, the original underwriter. If there is no liability on the original underwriter, then there cannot be any liability on the re-insurer. He further said that, if he could not take this point, still the clause "to pay as may be paid thereon," made the re-insurer liable because, in fact, the original underwriter had paid and, therefore, the re-insurer was bound to pay, and he said the original underwriter could waive his right to say the ship was unseaworthy and pay, if he did so honestly and bonâ fide. I think the best answer to the waiver point is this, that, so far as the evidence goes, he never did waive that point. He does not seem to have known or cared whether the ship was seaworthy or not, and I do not think he could waive a point extending his own liability without the consent of the re-insurer. Further, it is said if the assured can prove a primâ facie case, that is all that is necessary, as the original insurer is not bound to defend, if he pays honestly, he can recover over. He cited no authority for that, except possibly a Canadian case, which I will deal with in a moment, and it certainly does not seem to be sound on any principle. Then it was said that it had never been decided that an original underwriter is bound to raise D E F G H I

A any defence for the benefit of the re-insurer. Again, there is an absence of any authority in support of that, and the absence of authority suggests to me that no one has ever taken such a point before. Then he said that it was contrary to respectable business, that a respectable underwriter did not take these sort of points against an innocent owner of a small parcel of cargo. I am afraid that that is a matter with which I have nothing to do. Further he contended that it was not B restraint, that it did not come under the clause as to restraint of princes. Counsel for the defendants' argument, which I adopt, was this, the ship was in fact unseaworthy. That I have found. He referred to *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport* (2), where the remarks of SCRUTTON, J., might almost be read as the observations on the facts in this case ([1913] 1 K.B. at p. 543). There is no ground for cutting down the meaning of the words in a policy ; "seaworthi- C ness" is the same whether it is in a policy or a contract of carriage. He referred to a passage in LORD SUMNER'S judgment in *Becker, Gray & Co.* v. *London Assurance Corpn.* (4) ([1918] A.C. at p. 114) :

> "Again, it is important that the same word should mean the same thing when used in a mercantile contract, whether that contract be of one description or D another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy ; restraints of princes do not bear a different interpretation in the one or in the other."

I think one might quite fairly go on to say that seaworthiness does not mean anything different in the one case or in the other. As I understand it, a contract of E re-insurance is a contract to indemnify against a liability and a payment. There must be both liability and payment, and the precise liability must be covered in each case. Clause 8, "seaworthiness admitted," does not prevent the re-insurer saying that the original underwriter suffered no loss for which he could be made responsible, he had a complete defence against the assured, the defence of unseaworthiness, and there is no necessity to plead unseaworthiness in this case. The F original underwriter was not liable at all, and, if he was not liable, there is nothing for which he can claim over. The contract for re-insurance is on goods limited to the liability of the original underwriter. The re-insurer's liability is limited to the original insurer's liability under the original policy. It is only a different way of saying the same thing. Another way of putting it is to say that the contract of re-insurance properly understood is a contract to indemnify against G losses which the original underwriter has suffered but not against gifts. This was a voluntary payment, so far as the original underwriter is concerned, and he did not insure himself for gifts that he might choose to make to his assured. The contract is expressed to be a re-insurance on the same terms as the original policy, to indemnify against liability for goods lost, not an insurance of the goods. The re-insurer says to the original underwriter : You have no liability, you have no loss, H you have no interest. The Institute Clause as to unseaworthiness only applies if and when the original policy contains it and if and when the original underwriter is liable for unseaworthiness. That is put in ex majore cautelæ, in case there is such a clause in the original policy. That that reasoning is sound seems clear from the decisions which were cited. *Marten* v. *Steamship Owners' Underwriting Association, Ltd.* (5), was a case where there was a partial loss on the policy in fact ; I the re-insurance was against total loss only, and it was held that the original underwriter, although he had paid over the partial loss, could recover nothing. Similarly, in *British Dominions General Insurance Co., Ltd.* v. *Duder* (6) the original underwriter only paid 66 per cent. of the loss. He made a good settlement. He sought to recover 100 per cent. against the re-insurer. It was held that he could only recover 66 per cent., that is to say, it was an indemnity against liability to the amount which he had in fact paid and no more : see also *St. Paul Fire and Marine Insurance Co.* v. *Morice* (7). Moreover, the clause "to pay as may be paid thereon" means "as legally paid," though no doubt the settlement of the amount

of the liability cannot be questioned: *Chippendale* v. *Holt* (8), where MATHEW, J., as he then was, pointed out that there must be a liability proved or admitted. BINGHAM, J., in *Marten* v. *Steamship Owners' Underwriting Association, Ltd.* (5) spoke of it as money which the original underwriter was compellable to pay. KENNEDY, J., in *St. Paul Fire and Marine Insurance Co.* v. *Morice* (7), spoke of it, "provided he is legally liable." I think it is too late to question these decisions now, at any rate in this court. Reading the two clauses together, I think they mean this: If you are liable I will indemnify you, if you have to pay on unseaworthiness under this policy I will have to pay too. Junior counsel for the plaintiffs says this gives no meaning to cl. 8. It may be that it is like many other clauses in the policy which have no application, but, if the parties wish to say that the re-insurer was liable for voluntary payments, it would be quite easy to say so, and, indeed, the clause has a value if a similar clause in the original policy had existed and it is put in to ensure that such a claim will be covered if they are covered by the original policy. I think I have dealt in the course of what I have said with senior counsel for the plaintiffs' points. A good many of his observations may be answered by this, that the original underwriter may pay, and very often does pay, in cases where a small parcel of goods has been lost, but he has a right then over against the carrier. It is unfortunate in this case that both the ship and the owners, the carriers, turned out to be practically worthless, but that is no reason for saddling the re-insurer with this misfortune. He did refer to a Canadian case, the *Fire Insurance Association, Ltd.* v. *Canada Fire and Marine Insurance Co.* (9) in the High Court of Ontario which was decided in 1882–3, but that seems to be a totally different case. It seems that there was a clear liability on the original underwriter and the so-called waiver of a trivial matter took place before the re-insurance policy was taken out. I do not think it has any application to this case at all.

Now that deals with the only matter that it is really necessary for me to decide. The second point as to restraint of princes, putting it in a short form, I need not decide. Counsel for the defendants rather pressed me to do so. I am sorry not to oblige him, but on the whole I think it is wiser not to encumber the reporters in the case or to embarass other litigants by dicta which I ought not to pronounce. The result is that the defendants succeed, and that disposes of the whole claim.

*Judgment for the defendants.*

Solicitors: *William A. Crump & Son; Parker, Garrett & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

# SCOLLICK *v.* SCOLLICK

[Probate, Divorce and Admiralty Division (Hill, J.), April 4, 1927]

[Reported [1927] P. 205; 96 L.J.P. 96; 137 L.T. 485; 71 Sol. Jo. 584]

*Variation of Settlement—Power of appointment—Extension of power to include children of second marriage—Variation in interest of child of dissolved marriage—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

By an ante-nuptial settlement the wife assigned to trustees certain funds to pay the income thereof to her for life and after her death to the husband for life and after the death of the survivor of them in trust for all or such one "of the children or remoter issue of the then intended marriage" as the husband and wife should jointly or the survivor of them appoint and in default of appointment on certain conditions set out in the settlement. A decree absolute for the dissolution of the marriage was pronounced in May, 1926. There was one child of the marriage. In May, 1926, the wife presented a petition for variation of the settlement by extinguishing all the husband's interests therein and giving her power to appoint as to a moiety of the trust fund in favour of the children of any subsequent marriage. The husband entered no appearance to the petition. In June, 1926, the wife re-married. The registrar reported that the wife had no means of her own and that the husband was not in a position to contribute anything towards the maintenance and education of the child of the marriage. The wife's second husband undertook, if the court varied the settlement by giving the wife power to appoint a portion of the trust fund among children of her second marriage, to provide out of his own resources for the education of the child of the first marriage until she reached the age of sixteen.

**Held:** on the facts of the case, and having regard to the interest of the child of the first marriage in that she would gain advantages although she might eventually be involved in some pecuniary sacrifice, the court would create a fresh power of appointment enabling children of the second marriage to share in the trust fund.

*Webster* v. *Webster and Williamson* (1), [1926] P. 198, distinguished.

**Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, has been repealed by the Matrimonial Causes Act, 1950, s. 34 (1) and Schedule. Section 192 of the 1925 Act has been replaced by s. 25 of the 1950 Act. Considered: *Newson* v. *Newson*, [1934] All E.R. Rep. 523; *Best* v. *Best*, [1955] 2 All E.R. 839.

As to variation of settlements after a decree for divorce, see 12 Halsbury's Laws (3rd Edn.) 451 et seq.; and for cases see 27 Digest (Repl.) 641 et seq. For the Matrimonial Causes Act, 1950, s. 25, see 29 Halsbury's Statutes (2nd Edn.) 412.

Cases referred to:

(1) *Webster* v. *Webster and Williamson*, [1926] P. 198; 95 L.J.P. 97; 135 L.T. 670; 27 Digest (Repl.) 642, *6047*.

(2) *Whitton* v. *Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, *6063*.

(3) *Hodgson Roberts* v. *Hodgson Roberts and Whitaker*, [1906] P. 142; 75 L.J.P. 48; 94 L.T. 621; 22 T.L.R. 395; 27 Digest (Repl.) 652, *6138*.

(4) *Blood* v. *Blood*, [1902] P. 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, *6111*.

(5) *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 651, *6134*.

**Motion** to confirm a registrar's report on a petition for variation of an ante-nuptial settlement.

The husband and wife were married on June 11, 1917, and there was one child of the marriage, a girl, born on May 20, 1918. On Oct. 26, 1925, the wife obtained

a decree nisi of dissolution of her marriage on the ground of the husband's adultery and was granted the custody of the child. On May 3, 1926, the decree nisi was made absolute and on June 2, 1926, the wife re-married. By an ante-nuptial settlement made on the marriage of the parties, the wife had assigned to trustees certain funds to which she would become entitled on the death of her parents in trust to pay the income therefrom to her for life and after her death to the husband for life and after the death of the survivor of them in trust for all or such one "of the children or remoter issue of the then intended marriage" as the husband and wife should jointly or the survivor of them appoint and in default of appointment on certain conditions set out in the settlement. The settlement further provided that, in the event of there being no child of the marriage who should attain the age of twenty-one, the husband's life interest should cease and the trustees should hold the trust fund, as to one-third in trust for the husband absolutely and as to the residue in trust for the wife absolutely, with certain provisions in the event of the wife predeceasing the husband. The husband brought no property into settlement. On May 17, 1926, the wife presented a petition for variation of the settlement by extinguishing all the husband's interests therein and by giving her power to appoint as to a moiety of the trust fund in favour of the children of any subsequent marriage. The husband entered no appearance to this petition. The registrar in his report stated that the settled fund was not yet in possession, the wife's parents being still alive, and that it was anticipated that the capital value of the fund on the death of the survivor of them would amount to £11,000, producing an annual income of £500 ; that the wife had no means of her own and that the husband was not in a position to contribute anything towards the maintenance and education of the child of the marriage. He further reported that the wife's second husband had filed an affidavit in which he undertook, if the court varied the settlement by giving the wife power to appoint a portion of her trust fund among children of her second marriage, to provide out of his own resources for the child of the first marriage an education befitting her station in life until she reached the age of sixteen. The registrar submitted that the settlement should be varied by extinguishing all rights, powers and interests of the husband in the wife's fund as though he were dead and had died in the wife's lifetime. He added that it appeared doubtful, in view of the decision in *Webster* v. *Webster and Williamson* (1), whether the court would be disposed to make any other variation. But, if the court should consider that in any circumstances there is power to add to a settlement a power to appoint in favour of children of a second marriage, he submitted that the case was one in which such power should be added and that the settlement should be further varied as follows: (i) By substituting the words "intended or any subsequent marriage" for the words "intended marriage" wherever the latter occurred in the trusts for children or remoter issue ; (ii) By inserting a proviso that in no case whether under appointment or in default of appointment should the children of any subsequent marriage take in the aggregate a larger share of the wife's trust fund than the child of the marriage which had been dissolved ; (iii) by amending the hotchpot clause in consequence ; (iv) the undertaking of the second husband to be read into and form part of the order to be made. The wife now moved the court to confirm the registrar's report in the terms of his alternative submission.

*Acton-Pile* for the wife, referred to *Webster* v. *Webster and Williamson* (1), *Whitton* v. *Whitton* (2), *Hodgson Roberts* v. *Hodgson Roberts and Whitaker* (3), *Blood* v. *Blood* (4), and *Hartopp* v. *Hartopp and Akhurst* (5).

*G. O. Slade* (*W. G. Earengey* with him) for the child.

**HILL, J.**—In this case the registrar has made an alternative recommendation. What he would like to see done is in the second part of his recommendation, but he doubts whether he could recommend such a course because of the decision in *Webster* v. *Webster and Williamson* (1). If I cannot make an order such as he would like to recommend, then he proposes in the alternative the ordinary and

A simple course of extinguishing all the rights, powers and interests of the respondent in the wife's fund as though he was dead.

I have had before me counsel for the wife and counsel for the child. There is only one child of the marriage, a girl of nine years of age. They have both presented to me able arguments and they are both—counsel for the wife no less than counsel for the child—convinced that it will be in the interests of the child that the court B should make an order as recommended and preferred by the registrar. Now that they have stated the facts, on consideration I am entirely in agreement with them. One of the alternatives presented is that the child's interests under the settlement should be preserved exactly as they are, and in that case, the respondent's interest in the fund, which is at present only a reversionary interest, having been extinguished, when this fund falls in, the wife would have a life interest and it would C pass on to this one child, subject to this, that there is a power of appointment to children or remoter issue. So that the wife would have it in her power, if she chose to overlook her child, to appoint to its children. That is a very unlikely contingency, but, at any rate, subject to that contingency, the child would ultimately on the death of the mother come into this fund. The other alternative is this. The mother has married again, and she says: "I may have other children by my second husband. D I should like a power to appoint part of my fund to them"; and the new husband says: "I am anxious for the welfare and education of the child we are considering, and if my wife has some power of appointing from her fund to children which she bears to me, I am ready to be generous in the upbringing of the child in question. If, on the other hand, the whole of the wife's fund were to pass to this child, I shall have to consider saving money for any children of my present marriage."

E That all sounds very reasonable and what a man will be likely to say. Those are the two alternatives. I am in this position. It would seem to me to be greatly in the interests of the child that some such arrangement as is so foreshadowed should be carried out. It must always be in the interests of a child that, if she has half-brothers and half-sisters, she should not be in some superior F position in her expectations than they. I do not think that is an important consideration. Unless there is some financial interest I do not think I ought to interfere on that ground taken by itself. But here it must be very much to the benefit of the child that, while she is growing up, she should be secured with proper maintenance and good education, even at the sacrifice of some portion of a fund which does not, in fact, come actually into her possession for many years. That G being so, I think it would be pedantic to pay too close a consideration to the question whether the original settlement contemplated a power of appointment such as is now sought to be introduced. It did contemplate a power of appointment. The case is unlike *Webster* v. *Webster and Williamson* (1) because in that case, apart from what has been spoken of as the sentimental side of the question, the proposed alternative would have been all money lost to the child. It was difficult H to see any real quid pro quo of any sort in that case. I doubted in *Webster* v. *Webster and Williamson* (1) whether the court had power in making a variation to insert a power to appoint to children of a subsequent marriage, when nothing of the kind is contemplated by the settlement. At the same time I then felt very fully the force of the words of LORD GORELL in *Hartopp* v. *Hartopp and Akhurst* (5). I was careful not definitely to decide the point, but to decide the case on the facts I of that case, and I am going to decide this case on the facts of this case.

Counsel for the child having been so fully satisfied that the change proposed is in the interest of the child, I shall confirm the report. The effect will be that the wife will have power to appoint a moiety of the fund in favour of the children of her second marriage, and the further changes necessary to give effect to that will be carried out as agreed, including the conversion of the interest of the child of the first marriage into a vested one by striking out the reference to remoter issue.

Solicitors: *Webster & Webster.*

[*Reported by* R. WAVELL-PAXTON, ESQ., *Barrister-at-Law.*]

A

# ATTORNEY-GENERAL *v.* METROPOLITAN WATER BOARD

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), October 28, 31, November 1, 2, 29, 1927]

[Reported [1928] 1 K.B. 833; 97 L.J.K.B. 214; 138 L.T. 346; 44 T.L.R. 135; 72 Sol. Jo. 30; 13 Tax Cas. 294]

B

*Income Tax—Annual payment—Deduction of tax—Accounting for tax deducted —Undertaking taxed on profit of previous year—Payment made out of profit of current year—Loss suffered in previous year—Right of undertaking to retain tax deducted—Income Tax Act*, 1918 (8 *& 9 Geo. 5, c. 40*), *All Schedules Rules, r.* 19, *r.* 21.

C

By virtue of stock and debentures issued by them, the Metropolitan Water Board became liable to pay large annual sums, amounting in the year ending April 5, 1923, to £1,730,000. The greater proportion of the annual sums was paid by the board after deduction of income tax at the current standard rate, and in the said year the net amount deducted and retained by the board was £409,060. The accounts of the board for the year ending Mar. 31, 1922, disclosed a loss of over £57,000, and accordingly no assessment to income tax could be made on the board for the year ending April 5, 1923, under the Income Tax Act, 1918, Sched. A, No. III, r. 3. In the year ending Mar. 31, 1923, however, the board made a profit of £2,481,085, out of which the payments to stock holders and debenture holders were made. The board claimed to retain for their own benefit the £409,060 deducted by them from the sums paid to stockholders and debenture holders.

D

E

**Held:** the board were bound to account to the Crown for the £409,060 under r. 21 of the All Schedules Rules of the Act of 1918, because the payments by the board to stock holders and debenture holders had not been made out of "profits or gains brought into charge" within r. 19 and r. 21 of those rules, notwithstanding that the payments were made out of moneys which would bear tax in the following year.

F

*London County Council* v. *A.-G.* ([1901] A.C. 26) applied.

Decision of Rowlatt, J. (1927), 43 T.L.R. 656, affirmed.

**Notes.** The Income Tax Act, 1918, All Schedules Rules, r. 19 and r. 29, were replaced by the Income Tax Act, 1952, s. 169 and s. 170, respectively.

G

Distinguished: *Salisbury House Estate* v. *Fry*, [1930] 1 K.B. 304. Applied: *Luipaad's Vlei Estate and Gold Mining Co., Ltd.* v. *I.R. Comrs.*, [1930] All E.R. Rep. 688. Considered: *Hamilton* v. *I.R. Comrs.*, [1931] 2 K.B. 495. *Neumann* v. *I.R. Comrs.*, [1934] All E.R. Rep. 398; *Fenton's Trustee* v. *I.R. Comrs.*, [1936] All E.R. 116; *Central London Rail. Co.* v. *I.R. Comrs.*, [1936] 2 All E.R. 375. Followed: *Trinidad Petroleum Development Co.* v. *I.R. Comrs.*, [1936] 3 All E.R. 801. Considered: *I.R. Comrs.* v. *Cull*, [1938] 1 All E.R. 467. Approved: *Allchin* v. *Coulthard*, [1943] 2 All E.R. 352. Referred to: *Paton* v. *I.R. Comrs.*, [1938] A.C. 341.

H

As to deduction of tax from interest, annuities, etc., see 20 Halsbury's Laws (3rd Edn.) 356, 357; and for cases, see 28 Digest (Repl.) 169 et seq.

I

Cases referred to:

(1) *Watney, Combe, Reid & Co.* v. *Berners* [1915] A.C. 885; 84 L.J.K.B. 1561; 113 L.T. 518; 79 J.P. 497; 31 T.L.R. 449; 59 Sol. Jo. 492, H.L.; 42 Digest 674, *857*.

(2) *A.-G.* v. *L.C.C.*, [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest (Repl.) 192, *791*.

(3) *Sugden* v. *Leeds Corpn.* [1914] A.C. 483; 83 L.J.K.B. 840; 108 L.T. 578;

77 J.P. 225; 29 T.L.R. 402; 57 Sol. Jo. 425; 11 L.G.R. 662; 6 Tax Cas. 211, H.L.; 28 Digest (Repl.) 193, *800*.

(4) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790*.

(5) *R.* v. *Income Tax Special Comrs., Ex parte Shaftesbury Homes and Arethusa Training Ship*, [1923] 1 K.B. 393; 92 L.J.K.B. 152; 128 L.T. 463; 39 T.L.R. 99; 8 Tax Cas. 367, C.A.; 28 Digest (Repl.) 322, *1415*.

(6) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, *315*.

**Appeal** by the Metropolitan Water Board from an order of ROWLATT, J., made on an information by the Attorney-General.

The following facts were agreed between the Crown and the Metropolitan Water Board: "The Metropolitan Water Board (hereinafter called 'the board') are a body corporate established by the Metropolis Water Act, 1902, for the purpose of acquiring by purchase and of managing and carrying on undertakings of various companies mentioned in the Act and generally for the purpose of supplying water within the area laid down in that Act. In acquiring the undertakings of those companies the board were required (s. 2 (1) of the Act) to assume the obligations and liabilities of the companies whose undertakings were so acquired, including the redeemable debentures issued by those companies. By s. 15 of the Act a water fund is established to which all receipts of the boards have to be carried, and out of which all payments by the board have to be made. By s. 16 (1) of the Act the board have power to borrow money for the objects therein specified, and by s. 16 (2) it is provided that all money borrowed under this section shall be raised by means of the issue of water stock under the Act, unless the Local Government Board consent to some other mode of raising the money, and, where the Local Government Board so consent, any money raised and the interest thereon shall be charged on the water fund or on such property or revenues of the water board, and in such manner as the Local Government Board may sanction. For the purposes of enabling the board to raise money, which they are authorised to borrow under their Acts, they have powers to create and issue stock known as the Metropolitan Water Stock, the principal and interest whereof are charged on the water fund and on the revenues of the water board. Under the provisions of s. 17 of the Act of 1902 the board have issued water stock, and at Mar. 31, 1923, there were issued and outstanding the following amounts of such stock: 'A' Stock, £6,060,164 17s. 1d., bearing interest at the rate of 3 per cent. per annum; 'B' Stock, £34,469,087 13s. 11d., bearing interest at the rate of 3 per cent. per annum; 'C' Stock, £4,873,754 18s. 11d., bearing interest at the rate of 5½ per cent. per annum. In the course of that year £126,000 of the 'B' stock had been redeemed and cancelled, but the interest on that stock payable before the dates of cancellation is included in the sum of £1,701,695 15s. 8d. below mentioned. The accounts of the board are made up to Mar. 31 in every year. The 'B' and 'C' stock is managed and the interest thereon is paid by the Bank of England for account of the board.

In addition to the stocks above-mentioned, the board have (pursuant to s. 2 (1) of the Act) assumed liability to pay interest on certain redeemable debentures which had been issued by the companies whose undertakings had been acquired by the board to the total amount of £7,217,838 and bearing interest as follows:

| £ | | | | |
|---|---|---|---|---|
| 49,950 | 2¾ | per cent. | Redeemable | Debenture Stock |
| 7,067,888 | 3 | ,, | ,, | ,, |
| 100,000 | 3½ | ,, | ,, | ,, |
| £7,217,838 | | | | |

The total of the board's water stock and of the debentures was £52,620,845 9s. 11d., and the interest charge for the year ending Mar. 31, 1923, in respect thereof was £1,701,685 15s. 8d. In addition to the interest payable on the stock and debentures, there are also certain annual payments due from the board which, in the year ended Mar. 31, 1923, amounted to £29,066 1s. 2d. The interest paid on such stock and debentures and the annual payments made for the said year amounted to £1,730,751 16s. 10d., made up as follows:

| | £ | s. | d. |
|---|---|---|---|
| 'A' Stock ... ... ... ... | 181,804 | 19 | 0 |
| 'B' Stock ... ... ... ... | 1,034,914 | 1 | 1 |
| 'C' Stock ... ... ... ... | 268,056 | 10 | 5 |
| Redeemable debentures ... ... | 216,910 | 5 | 2 |
| Other annual payments ... ... | 29,066 | 1 | 2 |

It was agreed between the Inland Revenue Commissioners and the board that the figures above set out should, for the purposes of this case, be taken to represent the actual amount of interest paid on such stock and debentures, and the other annual payments made during the year ending April 5, 1923. Part of the said sum of £1,730,751 16s. 10d. was paid gross (without deduction of income tax) by the Bank of England, while as to the sum of £1,668,351 0s. 7d. (the remainder) the board or the Bank of England (as to the interest on the 'B' and 'C' stock) deducted therefrom on payment the sum of £435,617 3s. 0d. as the sum representing the tax thereon at the rate or rates in force during the period through which the interest and other annual payments of which the said sum of £1,668,351 0s. 7d. is composed was accruing due. Income tax at the rate of 5s. in the pound being the rate in force during the year ending April 5, 1923, on £1,668,351 0s. 7d. amounts to £417,087 15s. 2d. The profits of the board are assessable under Sched. A in accordance with Sched. A, No. III, r. 3, Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. For the year to Mar. 31, 1923, the board's accounts relating to the said undertaking showed (after adjustment for income tax purposes) a profit of £2,481,085, out of which the board paid the interest referred to. This figure formed the basis for an assessment under Sched. A, No. III, made on the board for the year ended April 5, 1924, against the amount of which assessment an allowance (including sums carried forward from the previous years) in respect of wear and tear of plant and machinery fell to be made to the amount of £798,328, leaving a net figure of £1,682,757 for that year. The accounts relating to the undertaking of the board for the year to Mar. 31, 1922, disclosed (after adjustment for income tax purposes) a loss of £57,366 3s. 2d., and, therefore, no assessment was due to be made or was made on the board under Sched. A, No. III, for the year ending April 5, 1923. The increase in the profit made in the year to Mar. 31, 1923, is due to the fact that the board were enabled to raise their charges to the public in consequence of the passing of the Metropolitan Water Board (Charges) Acts, 1921, which came into force on April 1, 1922. The board for the year ending Mar. 31, 1923, paid income tax or suffered tax by deduction in respect of other income to the extent of £8,027 12s. 3d. on the amount of £32,110 9s. made up as follows:

| | Amount. | | | Tax paid or Deducted. | | |
|---|---|---|---|---|---|---|
| | £ | s. | d. | £ | s. | d. |
| Rent receivable (Schedule A) ... ... ... ... | 7,293 | 3 | 1 | 1,823 | 5 | 9 |
| Property owned and occupied by the board (Sched. A) | 11,849 | 14 | 0 | 2,962 | 8 | 6 |
| Interest on investments (excluding investments of accumulating redemption fund) ... ... ... | 12,967 | 11 | 11 | 3,241 | 18 | 0 |
| | £32,110 | 9 | 0 | £8,027 | 12 | 3 |

The board also suffered tax by deduction for the year on £5,019 interest on investments of an accumulating redemption fund, but for the purposes of this case it is agreed that this interest is not to be taken into account and except as aforesaid the board did not become liable to pay by deduction or otherwise any income tax in the year ending Mar. 31, 1923."

The Attorney-General contended that for the year ended April 5, 1923, the board were liable to account to the Inland Revenue Commissioners under r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, for the sum of £409,060 2s. 11d., made up as follows:

| | £ s. d. |
|---|---|
| Tax at the rate of 5s. in the £ in respect of interest and annual payments ... ... ... ... ... ... ... ... ... | 417,087 15 2 |
| Less tax on taxed income, £32,110 9s. ... ... ... ... | 8,027 12 3 |
| | £409,060 2 11 |

The board contended: (a) that the interest on the water stock and on redeemable debentures and the annual payments referred to paid by the board for the year 1922–23 were payable wholly out of profits or gains brought into charge to tax within r. 19 of the Rules; (b) that the profits or gains of the board brought into charge to tax for the year 1922–23 were the profits of the board of that year (viz., the said £2,481,085), though the liability to income tax for that year was to be measured by the amount of the profits of the preceding year and this was so whether there were profits of the preceding year or not; (c) that the profits or gains of the board brought into charge to tax for the year 1922–23 were sufficient in amount to meet the said interest and annual payments payable for that year, and the said interest was in fact paid, and the said annual payments were in fact made out of those profits or gains; (d) that the fact that no assessment was or could be made on the board for the year 1922–23 was irrelevant; (e) that the board were entitled under r. 19 of the aforesaid Rules to retain for themselves the income tax deducted on payment of the said interest and annual payments; (f) that r. 21 of the Rules had no application to this case.

ROWLATT, J., held that the Crown was entitled to succeed.

*Sir John Simon, K.C., A. M. Latter, K.C., Cyril King*, and *F. Grant* for the Metropolitan Water Board.

*The Attorney-General* (*Sir Douglas Hogg, K.C.*) and *R. P. Hills* for the Crown.

*Cur. adv. vult.*

Nov. 29. The following judgments were read.

**LORD HANWORTH, M.R.**—The Metropolitan Water Board appeal from a judgment given by ROWLATT, J., on June 29, 1927, in favour of the Crown on this information. It was brought to recover from the board a sum of £409,060 2s. 11d., which was the balance in their hands after adjustment, in respect of sums deducted at the rate of 5s. in the pound by them from a total of £1,668,351 0s. 7d., distributed by them by way of interest on stocks of the appellants in the year of assessment 1922-23. No question arises on the figures. The question is one of principle—whether the board can rightly claim to hold this sum of £409,060 2s. 11d. against the claim made to it by the Crown. The facts are fully set out in the statement of facts. It is only necessary to recapitulate some of them for the purpose of this judgment.

For the purpose of the income tax the undertaking of the board falls to be assessed as "waterworks," i.e.—according to the statement of facts:

> "The profits of the board are assessable under Sched. A in accordance with Sched. A, No. III, r. 3, Income Tax Act, 1928, by reference to the profits of the year preceding the year of assessment. For the year to Mar. 31, 1923, the board's

accounts relating to the said undertaking showed (after adjustment for income-tax purposes) a profit of £2,481,085 out of which the board paid the interest referred to. This figure formed the basis for an assessment under Sched A, No. III, made on the board for the year ending April 5, 1924, against the amount of which assessment an allowance (including sums carried forward from previous years) in respect of wear and tear of plant and machinery fell to be made to the amount of £798,328 leaving a net figure of £1,682,757 for that year. The accounts relating to the undertaking of the board for the year to Mar. 31, 1922, disclosed (after adjustment for income-tax purposes) a loss of £57,366 3s. 2d. and therefore no assessment was due to be made or was made upon the board under Sched. A, No. III, for the year ending April 5, 1923. . . . The Attorney-General contends that for the year ending April 5, 1923, the board is liable to account to the Inland Revenue Commissioners under r. 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, for the sum of £409,060 2s. 11d. The board contends: (a) That the interest on the water stock and on the redeemable debentures and the annual payments referred to paid by the board for the year 1922–23 were payable wholly out of profits or gains brought into charge to tax within rule 19 of the said rules. (b) That the profits or gains of the board brought into charge to tax for the year 1922–23 were the profits of the board of that year (namely the said £2,481,085), though the liability to income tax for that year was to be measured by the amount of the profits of the preceding year, and this was so whether there were profits of the preceding year or not. (c) That the said profits or gains of the board brought into charge to tax for the year 1922–23 were sufficient in amount to meet the said interest and annual payments payable for that year and the said interest was in fact paid and the said annual payments were in fact made out of those profits or gains. (d) That the fact that no assessment was or could be made on the board for the year 1922–23 is irrelevant."

The point, therefore, to be determined is whether the sum claimed is included within the words "Payable out of profits or gains brought into charge" in r. 19 so as to justify its retention by the board. Are those words to be interpreted as meaning "profits or gains that have in fact actually been brought into charge," or do they mean "profits and gains that are subject to charge and will in due course become factors in the assessment of the liability of the appellants to tax"? By reason of the trading in the previous year 1921–22 resulting in a loss, the board pay no income tax for 1922–23, for the assessment on them works out at nil; yet they claim that the substantial profits of £2,481,085 for the year 1923, out of which the interest referred to was in fact paid are to be treated as brought into charge for this same year, and so form the fund contemplated in r. 19 as the source out of which the interest of £1,668,351 0s. 7d. was paid and £409,060 2s. 11d., part of the latter sum, was retained by the board.

Rule 19 and r. 21 do not contain new matter. They reproduce s. 102 of the Income Tax Act, 1842, s. 40, of the Act of 1853, together with s. 24 (3) of the Customs and Inland Revenue Act, 1888. We have to construe the Rules which have the force of the statute in which they are found, regardless of the curiosities in taxation which ingeniously may be suggested to arise as the result of a particular rendering of the statute. I respectfully agree with what LORD SUMNER said in *Watney, Combe, Reid & Co.* v. *Berners* (1) ([1914] 3 K.B. at p. 297): "We are not entitled to make any assumptions about the policy of the sections, but have simply to construe them." This sum of £409,060 2s. 11d. has been stopped in the board's hands because they were required to be tax collectors for the Crown—to use LORD LOREBURN'S phrase in *A.-G.* v. *L.C.C.* (2) ([1907] A.C. at p. 133). That duty is imposed on them. It is an obligation that has been imposed on those who make payments of any interest of money or annuities charged with income tax under Sched. D since s. 24 (3) of the Customs and Inland Revenue Act was passed in 1888.

That section embraces what is now split up into r. 19 and r. 21. Its terms make it plain that the person who is told to deduct the income tax chargeable on the payee to whom the interest of money is paid in certain events, must render an account of the amount so deducted. If the whole of the interest has not been paid out of profits or gains brought into charge, then the account must be of the whole amount deducted. If part only of the interest has not been paid out of profits or gains brought into charge, then the account must cover that part. The section makes it clear that the collector for the Crown will have to pass on the sum collected, either by the means of his profits and gains brought into charge, or by rendering an account of the sum deducted which will not be subjected to charge in the collector's hands.

Looking then at the Rules in the consolidating Act of 1918, there is, in my judgment, good ground for the Attorney-General's argument that in r. 19 the words "payable wholly out of profits or gains brought into charge to tax" do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid. So that in an account between the Crown, the board, as tax collectors for the Crown, and the stock holders it would be clearly seen that the sum deducted from the payments to the stock holders was passed on to and reached the Crown. The board pay income tax. But their assessment is measured by annual value, and that annual value is "understood to be the profits of the preceding year." See Sched. A, No. III, r. 3. That was in fact nil for 1923. True, income tax, charged under the respective schedules, is the same tax. But the board have to justify the retention by them of this sum collected for the Crown by deduction. That can be done where the yearly interest of money is payable wholly out of profits or gains brought into charge to tax. The board cannot alter their assessment to this tax which stands for this same year at nil, and for the purpose of the Rule rely on a charge which does not exist for this year. No tax for this year 1923 has been paid by the board to the Crown. This reading of the rule is, in my judgment, confirmed by the passage in the speech of Viscount Haldane in *Sugden* v. *Leeds Corpn.* (3) ([1914] A.C. at p. 491):

> "In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax he has already paid."

See also per Lord Mersey (ibid., at p. 509). On this principle it is no answer to the Crown to say that the profits of this year will in the next year "be understood to be" the annual value on which we will pay tax.

The case of *L.C.C.* v. *A.-G.* (4) has a close application to the present case. Lord Macnaghten's observations ([1901] A.C., at p. 39 and p. 40) are in point. Dealing with the Act of 1888, which left the deduction of income tax no longer optional, he said (ibid. at p. 40):

> "He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty."

I do not think that he intends to lay emphasis on the word "paid"; for it may well be that chronologically the tax is deducted from a yearly payment, or half-yearly payment, when the tax charged on the person who deducts would not fall to be actually paid till a few months later; "which has already paid the duty" may be treated as equivalent to brought into charge for the payment of duty upon it. Lord Davey's words are to the same effect. Inter alia he says (ibid. at p. 46): "But the mortgagor cannot of course retain against the Crown more income tax

than he has paid". Both LORD MACNAGHTEN and LORD DAVEY intended that the right to retain was co-extensive only with the liability to tax of the fund out of which the interest is paid. For these reasons, I think that the judgment of ROWLATT, J., was right. The appeal must be dismissed with costs.

**SARGANT, L.J.**—The sum involved in this appeal is a large one. But the facts on which our decision depends are extremely simple, since we have not to deal with any question of precise figures, but only to decide a point of general principle. Under the Act by which the appellants, the Metropolitan Water Board, were established, viz., the Metropolis Water Act, 1902, provision was made for the establishment of a water fund to which all receipts of the board have to be carried and out of which all payments by the board have to be made. The board had power to borrow money and to create and issue water stock the principal and interest whereof are charged on the water fund and on the revenues of the board. By virtue of the issue of such water stock, and also by virtue of the assumption by the board of liability under debentures issued by water companies whose undertakings had been acquired by the board, there became charged on and payable out of the water fund large annual sums, which in the year ending on April 5, 1923, amounted to some £1,730,000. Much the greater portion of these sums, amounting to over £1,668,000 was paid by the board, after deducting therefrom income tax, which at the then rate of 5s. in the £ amounted to over £417,000. But as against this sum there has to be set off a sum of over £8,000 in respect of income which the board received after the deduction of income tax. And ultimately the net amount of income tax deducted by the board in respect of the balance of the payments made by the board less income tax, over the payments received by the board less income tax has been agreed in these proceedings at the sum of £409,060 2s. 11d. The accounts relating to the undertaking of the board for the year ending on Mar. 31, 1922, disclosed (after adjustment for income tax purposes) a loss of over £57,000; and therefore under the Rules relating to the assessment of waterworks no assessment was due to be made or was made on the board under Sched. A, No. III, for the year ending April 5, 1923. The large profit made by the board in that year was due to the board having been empowered under the Metropolitan Water Board (Charges) Act, 1921, to raise their charges to the public.

The question to be determined in these proceedings is whether the board are entitled to retain the above-mentioned sum of £409,060 2s. 11d. for their own benefit, or are bound to account for it and pay it to the Inland Revenue Commissioners. The solution of this problem depends almost entirely on the meaning of the phrase "brought into charge" in r. 19 of the General Rules applicable to the Schedules of the Income Tax Act, 1918. The Crown contends that in the year in question, though profits and gains had in fact been made and would no doubt in ordinary course be "brought into charge" in the succeeding year, no profits and gains at all were brought into charge in the year in question, since for purposes of assessment they were based on the previous year and were assessed at nil. The board contend that the phrase profits and gains "brought into charge" means profits and gains of a kind which is liable to be brought into charge, and accordingly that the actual profits and gains in the year of assessment are those to be considered for the purposes of deduction, since they will in their turn be brought into charge in the following year. It is curious that the precise point has never been decided, but this is probably due to the fact that in ordinary cases, where there is but little variation in the profits and gains in two succeeding years, it is of comparatively little importance which standard is adopted. And it may be that the practice of different surveyors of taxes has not been uniform. In *Sugden* v. *Leeds Corpn.* (3) it appears that the figure taken for the purpose of deduction was that derived from the assessable figures based on previous years. In *Re Income Tax Special Comrs., Ex parte Shaftesbury Homes and Arethusa Training Ship* (5) it would seem from an examination of the affidavit of the secretary, Mr. Coupland, that for a year or

two the figure taken was that of the actual profits or gains in the year of assessment, but that subsequently the figure taken was that of the assessment based on previous years. In the result little, if any, assistance is to be derived from previous practice. The question has to be decided as a fresh question, and on the words of the statute.

In my opinion, the words "brought into charge" are more naturally and satisfactorily satisfied by the meaning placed on them by the Crown. The past participle "brought" naturally refers to something that has been completed in the year in question if not by actual payment at any rate by accrued liability to pay. It is only in a looser sense that it can be applied to a payment or liability to pay in respect of a succeeding year. And this latter construction would involve the anomaly that, if the undertaking ceased at the end of the year of assessment, a deduction would be allowed to the board for which they would never have to account at all. Further, I think that the Attorney-General was right in his submission that, when once you have ascertained under the Income Tax Act, 1918, the annual value of the undertaking of the board for the year 1922–23, you must use the basis of that value for the other purposes of income tax for that year. The board here are claiming on the one hand to escape any direct assessment of tax on the undertaking on the ground that their profits are to be taken as nil for 1922–23, and on the other hand to escape the obligation to hand over the income tax deducted from the holders of water stock on the ground that profits were brought into charge for that year to an extent exceeding the amount of the interest on the water stock. This involves using one basis of ascertainment for one purpose, and another basis for another purpose, and seems to me to involve an inconsistency. This inconsistency is not cured, though in many cases its results may be minimised, by the consideration that there may be compensating inconsistencies in other years which may ultimately prevent any considerable loss on balance to the Revenue. *L.C.C.* v. *A.-G.* (4) tends strongly in the same direction. It is not conclusive against the board here, because the actual decision was that the income tax paid under any of the various statutory schedules was essentially a single tax, and that, in calculating the amount of the deductions in respect of dividends on their stocks, which the London County Council were entitled to retain for their own benefit, the London County Council could take into account any income tax paid either under Sched. A or under Sched. D. But it is impossible to read the judgments in that case and particularly those of LORD MACNAGHTEN and LORD DAVEY (see particularly [1901] A.C. at p. 39, p. 40, p. 42 and pp. 45–6) without observing that attention is throughout directed to the actual sums paid in or for the year of assessment whether under Sched. A or under Sched. D. No doubt there are certain slight differences between the Income Tax Act then in force and the present Act, and the earlier Act is somewhat clearer on the point than the present. But this fact does not aid the board and indeed may be slightly against them. For the differences between the two Acts are in respect of arrangement only and not of substance, and it cannot be seriously suggested that the present Act was intended to make any alteration of the earlier Act with regard to the substance of the matter now in question.

Finally, the attitude adopted by the board is, in my judgment, inconsistent with the view of the legislation so clearly recognised in *L.C.C.* v. *A.-G.* (4) that in making compulsory deductions from the dividends due to their stockholders and handing these deductions to the Crown the taxpayer is acting merely as a tax collector for the Crown. If that is so, it is strange that his obligation to pay what he has collected should be cancelled to any extent exceeding his actual payment of income tax (including an accrued obligation to pay) for the same period. A statutory set-off would naturally be of like against like, not of a deduction or accrued right to deduct against an expectation merely of an obligation to pay income tax in a future period. In my opinion, therefore, the learned judge was quite right, and the appeal should be dismissed.

**LAWRENCE, L.J.**—The validity of the claim of the appellants to retain against the Crown the sum which they have deducted in respect of income tax from the interest paid by them to their stockholders during the year of assessment 1922–23 depends on whether they are right in their contention that the expression "profits or gains brought into charge to tax" in r. 19 of the All Schedule Rules in the Income Tax Act, 1918, means the profits or gains actually earned in the year of assessment, and not, as the Crown maintains, the profits or gains in respect of which income tax for that year has been assessed and charged on the board by virtue of the Act.

To determine what is the true meaning of the expression "profits or gains brought into charge to tax" in r. 19, it is necessary to refer shortly to the relevant provisions of the Act. Section 1 of the Act provides (so far as material for the purposes of this case) that income tax shall be charged in respect of all property described or comprised in Sched. A in accordance with the Rules applicable to that schedule. Schedule A provides that tax under that schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom for every twenty shillings of the annual value thereof. Part No. III of the Rules applicable to Sched. A. provides (inter alia) by r. 3, that in case of waterworks the annual value shall be understood to be the profits of the preceding year, and, by r. 4, that tax under the preceding Rule shall be assessed and charged on the body of persons carrying on the concern. The effect of these provisions as applied to the facts of the present case is that income tax for 1922–23 is assessed and charged on the board in respect of the annual value of their undertaking in that year, and that the factor for ascertaining that annual value is the profits made by the board in 1921–22. In other words, the practical result is that the taxable income of the board for 1922–23 is the income of the board for 1921–22. This is plain and not disputed: it is the basis on which the board have returned their taxable income for 1922–23 at nil.

Rule 19 and r. 21 are mere machinery for facilitating the collection by the Crown of the income tax imposed by the Act, and it would be a singular thing to find that in such Rules there had been introduced for the first time, and without any explanation, a reference to profits or gains calculated on a basis entirely different from the basis laid down in the earlier provisions of the Act and Rules; moreover, without any provision enabling the Crown to demand a return of or otherwise ascertain such profits or gains. In the circumstances I should have thought that it was not really open to doubt that the qualifying words "brought into charge to tax" in the expression "profits or gains brought into charge to tax" in r. 19 were inserted expressly to denote that the profits or gains there referred to were the profits or gains in respect of which a charge to income tax had been imposed on the board by virtue of the Act, that is to say, the taxable income and not the actual income. Counsel for the board, however, strenuously contended that so to construe the expression was to confuse the subject-matter of the operation of assessment with the result of the operation of assessment, and that the real subject-matter of assessment was the actual income earned in the year of assessment, although that income had to be computed for the purpose of the charge to tax by reference to the income of the preceding year. In my judgment this contention is not well founded. Regard being had to the scheme of the Act and Rules, and particularly to the provisions to which I have referred, the words "brought into charge to tax" would be wholly inept as applied to the profits actually earned by the board during the year of assessment. Such profits form no factor in ascertaining the taxable income for the year of assessment, and the Act imposes no charge to tax on the board in respect of them; they do not constitute the annual value of the board's works within the meaning of the Act, and are in no way "brought into charge" under any of the provisions of that Act.

Counsel for the board placed considerable reliance on the introductory words of r. 19: "Where any yearly interest of money, annuity or other annual payment . . .

A is payable wholly out of." His contention was that this phrase necessarily carried with it the implication that the profits or gains brought into charge which immediately follow were the actual profits or gains earned in the year of assessment, as no annual payments could properly be said to be payable out of income computed on an artificial basis. The phrase so relied on is, perhaps, not very happily worded, but in my judgment its meaning is plain. It is used for the purposes of defining B the character of the annual payments to which r. 19 is applicable, and not for the purpose of donating the moneys out of which the annual payments will in fact be made. The words "payable out of" are there used as equivalent to "properly chargeable against." The meaning and effect of the Rule is that, in order to come within its scope, the annual payments must be of such a character that they can properly be charged against the taxable income, e.g., if the taxable income consists C of the profits of a business, the annual payment must be one that is charged on the profits of that business, and not a payment unconnected with it. That this is the correct reading of the Rule is, I think, borne out by the remarks of LORD WATSON and of LORD HERSCHELL in *Gresham Life Assurance Society* v. *Styles* (6) ([1892] A.C. at p. 320 and p. 324), and of LORD DAVEY in *L.C.C.* v. *A.-G.* (4) ([1901] A.C. at p. 46). In the latter case, LORD DAVEY, after stating that it is not necessary that D the interest or annual payment should be exclusively charged on or payable out of profits or gains brought into charge, proceeds in these words: "It is enough if the interest is charged on or payable out of taxable income though there may be other subjects of charge," which words, in my opinion, show that LORD DAVEY read the phrase relied on by counsel for the board in the sense in which I have E endeavoured to explain that it ought to be construed.

Some stress was laid by counsel for the board on the fact that the actual profits for 1922–23 would form the basis of taxation for the following year 1923–24, as showing that in this and all similar cases matters will ultimately be adjusted, and that, therefore, no weight ought to be attributed to the argument of the Crown that on the board's construction of r. 19 the board would, in the events which have F happened, become tax collectors for their own benefit. The plain answer to this, however, is that income tax is a tax for a year, and that it is immaterial to consider what may or may not happen in the year or years following the year of assessment. The words "brought into charge" cannot properly be held to refer to profits which are only liable to be brought into charge in the future, and in my opinion they mean profits brought into charge in the year of assessment.

G In the result I have arrived at the conclusion that the expression "profits or gains brought into charge to tax" in r. 19 means the taxable and not the actual profits or gains in the year of assessment. It follows that under the provisions of r. 19 and r. 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year. This construction, besides giving proper H effect to the particular language of the Rules in question, seems to me entirely to accord with the intention of the legislature as appearing from the Act and Rules as a whole. It avoids the incongruity which would result from the construction contended for by the board, of a taxpayer using one basis for the ascertainment of his taxable income, and then turning round and using another basis when confronted with a claim by the Crown under r. 21. It also avoids the anomaly of a taxpayer, whose I taxable income for the year of assessment is nominal, but whose actual income for that year is substantial, becoming entitled to retain for his own benefit income tax collected by him from the persons to whom he has made annual payments, and who, but for the provisions of r. 19, would have had to pay their income tax to the Crown direct. It also avoids the further anomaly of a taxpayer whose taxable income for the year of assessment is substantial, but whose actual income during that year is nominal, from being exposed to a double charge of tax in respect of the annual payments he has had to make during that year. For the reasons stated, I

think that the decision of ROWLATT, J., is right, and that the appeal should be dismissed with costs. A

*Appeal dismissed.*

Solicitors: *C. A. Hunt; Solicitor of Inland Revenue.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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## INLAND REVENUE COMMISSIONERS *v.* YORKSHIRE AGRICULTURAL SOCIETY

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.), November 8, 9, 10, 1927]

[Reported [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 44 T.L.R. 59; 72 Sol. Jo. 68; 13 Tax Cas. 58] D

*Income Tax—Charity—Promotion of agriculture—Society providing benefits for members—Establishment "for charitable purposes only"—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37 (1) (*b*).

In 1837 a society was formed pursuant to a resolution that ". . . a society be formed . . . the object of which shall be to hold an annual meeting for the exhibition of farming stock, implements, etc., and for the general promotion of agriculture." Membership of the society carried some privileges such as free admission to shows, special railway facilities, and the right to have manures and foodstuffs analysed at reduced fees. The society accumulated funds and invested them. Income tax was claimed on the income produced by those investments. E F

**Held:** notwithstanding the privileges afforded to members, the society was established for a charitable purpose only, viz., the promotion of agriculture, and, therefore, its income was exempt from tax under the Income Tax Act, 1918, s. 37 (1) (b).

**Notes.** The Income Tax Act, 1918, s. 37, was replaced by the Income Tax Act, 1952, s. 447. G

Applied: *Geologists Association* v. *I.R. Comrs.* (1928), 14 Tax Cas. 271. Distinguished: *Foreign Bondholders Corpn.* v. *I.R. Comrs.*, [1944] 1 K.B. 63. Considered: *Tennant Plays, Ltd.* v. *I.R. Comrs.*, [1948] 1 All E.R. 506; *Crystal Palace Trustees* v. *Ministry of Town and Country Planning*, [1951] Ch. 132; *I.R. Comrs.* v. *City of Glasgow Police Athletic Association*, [1953] 1 All E.R. 747. H Referred to: *Midland Counties Institution of Engineers* v. *I.R. Comrs.* (1928), 14 Tax Cas. 285; *Keren Kayemeth Le Jisroel, Ltd.* v. *I.R. Comrs.*, [1931] 2 K.B. 465; *Peterborough Royal Foxhound Show Society* v. *I.R. Comrs.*, [1936] 1 All E.R. 813; *Hugh's Settlement, Ltd.* v. *I.R. Comrs.*, [1938] 4 All E.R. 516; *Royal Choral Society* v. *I.R. Comrs.*, [1943] 2 All E.R. 101; *Lord Nuffield* v. *I.R. Comrs.*, *Goodenough* v. *I.R. Comrs.* (1946), 175 L.T. 465; *Baddeley* v. *I.R. Comrs.*, [1953] 2 All E.R. 233; *Dreyfus Foundation Inc.* v. *I.R. Comrs.*, [1954] 2 All E.R. 466. I

As to the meaning of charity for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 603 et seq.; and for cases on the subject, see 28 DIGEST (Repl.) 314 et seq.

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

(2) *Re Gray, Todd* v. *Taylor*, [1925] Ch. 362; 94 L.J.Ch. 430; 133 L.T. 630; 41 T.L.R. 335; 69 Sol. Jo. 398; 8 Digest (Repl.) 347, *281.*

(3) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

(4) *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty* v. *A.-G.*, [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 60 Sol. Jo. 141; 14 L.G.R. 171; 8 Digest (Repl.) 351, *308.*

(5) *Re Dutton, Ex parte Peake* (1878), 4 Ex.D. 54; 48 L.J.K.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenaeum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, *1281.*

(6) *Carne* v. *Long* (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur. N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, *1278.*

(7) *R.* v. *Income Tax Special Comrs., Ex parte Headmasters Conference, Same* v. *Same, Ex parte Incorporated Association of Preparatory Schools* (1925), 41 T.L.R. 651; 69 Sol. Jo. 780 D.C.; 28 Digest (Repl.) 315, *1375.*

(8) *Re Clark's Trust* (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 437, *1280.*

(9) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344.*

(10) *Re Pleasants, Pleasants* v. *A.-G.* (1923), 39 T.L.R. 675; 8 Digest (Repl.) 331, *125.*

(11) *Royal Agricultural Society of England* v. *Wilson* (1924), 132 L.T. 258; 40 T.L.R. 763; 9 Tax Cas. 62; 28 Digest (Repl.) 50, *188.*

(12) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(13) *Miley* v. *A.-G. for Ireland*, [1918] 1 I.R. 455.

(14) *Re Macduff, Macduff* v. *Macduff*, [1896)] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879.*

(15) *A.-G.* v. *National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley, A.-G.* v. *National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, *892.*

(16) *R.* v. *Income Tax Special Comrs., Ex parte Ranks Trustees* (1922), 91 L.J.K.B. 662; 127 L.T. 651; 38 T.L.R. 603; 66 Sol. Jo. 472; 8 Tax Cas. 286, C.A.; 28 Digest (Repl.) 318, *1401.*

**Appeal** by the taxpayer from a decision of ROWLATT, J.

The facts of the case are stated in the judgment of LORD HANWORTH, M.R. The Special Commissioners held on the facts, though with some hesitation, that the society was established for charitable purposes only, and granted the exemption claimed. The Crown having appealed, ROWLATT, J., reversed this decision.

*Gavin Simonds, K.C.*, and *Raymond Needham* for the taxpayer.

*The Solicitor-General (Sir Thomas Inskip, K.C.), J. H. Stamp*, and *Reginald P. Hills* for the Crown.

**LORD HANWORTH, M.R.**—This is an appeal from a decision of ROWLATT, J., who refused to allow the claim of the Yorkshire Agricultural Society to exemption from income tax under the Income Tax Act, 1918, s. 37 (1) (b). By his judgment he reversed the opinion of the Special Commissioners, who had allowed the application of the Yorkshire Agricultural Society. It is important, in my view, to state the facts on which this claim is based, and I will summarise a certain number of those facts as stated in the Case.

The society was formed at a meeting at York held on Oct. 10, 1837. We have

attached to the Case the notes of some of the minutes of that meeting. The first resolution that was passed was : A

> "That a society be formed called the 'Yorkshire Agricultural Society,' the object of which shall be to hold an annual meeting for the exhibition of farming stock, implements, &c., and for the general promotion of agriculture."

Under resolution No. 4, donations were asked for, for the purpose of forming a fund to carry into effect the views of the society. Under No. 11 a committee was formed for the purpose of defining the duties of the society and settling all other matters required for the arrangement of the society. By No. 12 it was declared : "That no subject connected with any legislative enactment be ever introduced at any meeting of this society"; and in No. 13 "that all prizes shall be open to competition to the United Kingdom." Those resolutions are all that I need refer to. B C

There are and always have been certain privileges attached to membership of the society. Shortly they are : free admission to the shows and to parts of the grand stands at the shows, the opportunity of going to a reading and writing room on the show ground, a right to have manures and foodstuffs analysed at reduced fees, special railway facilities, and similar benefits. I think that ROWLATT, J., is right in his judgment when he sweeps aside those benefits as really not assisting in the determination of the case one way or the other. In a recognised charity, such as a hospital, many subscribers receive tickets for in-patients or out-patients and have privileges reserved to them which in no way militate against the main purpose of the hospital, which is charitable. That society has now been going on for some three generations. Quite recently, in 1923, it annulled the rule made under the resolution to which I have referred, resolution No. 12, that no legislative enactment be ever introduced at any meeting of the society, and adopted this as one of its objects : D E

> "The watching and advising on legislation affecting the agricultural industry and the improvement, assistance and promotion of agriculture generally." F

ROWLATT, J., sets that aside, and I think rightly, as not being a serious factor in the consideration of whether or not the main object of the society is charitable. As the objects of the society now stand, I think it would be fair to describe them as being for the assistance and promotion of agriculture generally, and in particular certain objects are specified by which that general object, the improvement and promotion of agriculture, may be attained. It is said also that certain privileges are granted not merely to what I might call consistent members, but to some members who become members for a single year. That feature also, I think, may be set aside. They obtain such privileges as they do as members, and the fact that they are members for one year only does not in any way alter the general nature and purpose of the society as a whole. G

That being the society, it makes the claim to exemption from income tax in respect of any interest, annuities, dividends, or shares forming part of their income inasmuch as they claim to be a body of persons established for charitable purposes only, and so far as that income is applied to charitable purposes only. In the long course of its history of some ninety years the society has gathered together some funds. That course gives stability to it, and it is in respect of the receipts from those funds, which are said by the inspector to be liable to income tax, that they claim exemption under this clause. If they are to have exemption, it has to be decided in their favour that they are a body of persons established for charitable purposes only. H I

The definition of what is a charity is one which is not the definition that it would probably receive in ordinary parlance. In the case that one always refers to on such a subject—*Income Tax Special Purposes Comrs.* v. *Pemsel* (1)—LORD MACNAGHTEN sets out his catalogue of what are the different kinds of charities

intended to be recognised as charities for the purposes of this or its preceding section. He says ([1891] A.C. at p. 583):

> "Charity, in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

That fourth division is of a somewhat wide and indefinite nature. What is a purpose beneficial to community? It has long been established that mere benevolent intention is not necessarily for the benefit of the community. We have examined once more, and rightly examined, a large number of cases; and it may be said that it has now been determined in such cases as *Re Gray* (2) that where the main object was the physical efficiency of the Army, that was a purpose beneficial to the community. Equally the activities of the Anti-Vivisection Society, whether in the form of an attempt to secure legislation or otherwise, are held also to be within that wide term in *Re Foveaux* (3). Also in *Re Verrall* (4) it was held to be a charitable purpose to try to secure the maintenance of places of historic interest or natural beauty. On the other side it has been determined that where the purpose of the association is rather for the benefit of the members themselves, than a wider outlook, then such institutions as are so established are not within the purview of purposes beneficial to the community. Illustrations of that can be found in *Re Dutton* (5), in *Carne* v. *Long* (6), the case of the Penzance Library, and again in the *Headmasters' Conference Case* (7), the Friendly Society in *Re Clark's Trust* (8), and again in *Cunnack* v. *Edwards* (9).

Having given those illustrations on the one side and the other, one comes back to consider whether or not the benefit of agriculture generally, without a limit of range, is an ultimate object beneficial to the community, and thus within the fourth division of Lord Macnaghten's table. Rowlatt, J., in the present case, says:

> "If this society was formed for the general improvement of agriculture, then I should say that that would be a charity,"

following *Re Pleasants* (10), before Russell, J., when Rowlatt, J., said that he did no more than confirm the view that he had already expressed in *Royal Agricultural Society of England* v. *Wilson* (11) for although it had not to be determined whether the Royal Agricultural Society was a charity or not, inasmuch as for the purposes of the case it was admitted that it was, and the decision of the case did not turn on that, yet Rowlatt, J., said in that case: "Now it is perfectly clear that a body like this, which is a charity, may trade."

It seems to me that the right interpretation to be given to this society is that it has been formed for the purpose of the improvement of agriculture as a whole, and not in any narrow sense, not for any confined purpose of benefiting its particular members, but in search of general improvement in which not merely members of the society or those resident in the locality to which its name attached it, are to share, but one which may bring advancement and improvement as a whole to the benefit of the community at large. I think that that general purpose remains in spite of the matters to which I have already referred, viz., the benefits which are catalogued in the case, and the alteration of one of the objects of the society in the matter of legislation.

Having come, therefore, to the conclusion that this society is primâ facie established for what may be considered to be a charitable purpose, one then has to discover whether or not it can satisfy other portions of the test of the section. Has it been "established for charitable purposes only"? With regard to the last word, "only," inasmuch as, for the reasons I have given, I have set aside the matter of the benefits I have mentioned, there does not seem to my mind to be anything against the main purpose in this criticism. The purpose seems to be the advancement of agriculture, undiminished by what has been alleged against the purpose as

indicating material benefits to the members of the society only. It must, therefore, have been established. ROWLATT, J., again holds that it is established. I have said that I do not think that there is a want of the element of permanency so as to prevent the society being established. The fine record over the three generations for which this society has been in being, seems to justify its being called an established society. On the other hand, it is necessary to remember if a society has a purpose which does not come within the definition of "charitable," then it would fail to get exemption, because it is not established for charitable purposes only.

Illustrations of cases where there has been a failure on the part of societies to get that exemption, are to be found in the authorities to which our attention has been called: *Morice* v. *Bishop of Durham* (12), the Irish case of *Miley* v. *A.-G. for Ireland* (13), where there were alternatives, the case of *Re Macduff*, *Macduff* v. *Macduff* (14), and *Tetley's Case* (15) (*A.-G.* v. *National Provincial and Union Bank of England*). In those cases where there is a gift "to a patriotic purpose," or where there is a power of appointment reserved so that the trust will be fulfilled even if there was not a devotion to the particular charitable purpose, it cannot be said that the words, "established for charitable purposes only," have been fulfilled. A good illustration of that is *Ex parte Ranks' Trustees* (16).

Council for the Crown have therefore argued that on the facts of this case, if attention is given to the objects of the society which are cited, the six of them, it is not right to hold that there is an establishment for charity. But even, say the law officers, if there has been an establishment for charity, and even admitting that agriculture may be a charitable purpose, this society is not, within the meaning of the section, established at all. It appears to me, for the reasons that I have given, that the society was originally established and has been continued during its long existence as a society intended to benefit and promote the advancement of agriculture, and looking at the main purpose, it appears to me that it has been made out that agriculture can be, and in this case is, a charitable purpose. The criticism that is based on the other objects of the society as catalogued, or the advantages to members, and so on, does not prevent the finding that this society is established for an object beneficial to the community, within the fourth division of LORD MACNAGHTEN'S catalogue.

Dealing with the second point argued on behalf of the Crown, that it is not established at all, it appears to me that s. 37 itself contemplates persons who are not connected by a trust deed or incorporation in any way, for it gives this exception to the income of any body of persons or trust, and "body of persons" is defined in s. 237 to mean

> "any body politic, corporate or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate."

It seems to me clear, therefore, that s. 37 (1) (b) is intended to embrace within its terms a mobile or shifting body, one that has not got a clearly defined basis recorded in a trust deed, but which may nevertheless be one of such permanence that it could be found as a fact to be a body of persons established. The consideration of this point, not less than the previous point that I have discussed, leads me to say this. It is obvious that the facts in each case must be the basis on which one finds whether or not there is a body of persons established, and whether or not they are established for a charitable purpose ; and if it is a question of degree, then it is a question of fact, and if it is a question of fact, it is a matter within the sphere of the commissioners. This court and the previous court cannot upset a finding of fact. It appears to me that there was evidence on which the commissioners could find on this question of degree that this was a body of persons established, and established for a charitable purpose only. I should regret very much to interfere with what is undoubtedly the duty of the commissioners, and they have held, in para. 6, though with some doubt, that the society was a society established for charitable purposes. ROWLATT, J., came to the conclusion that the

A object of this society was not to promote agriculture, but it was rather a matter of the taste and pleasure of the persons who were associated together. That view might have been taken by the commissioners, but it was not. They have held, and to my mind rightly held, that the continuity of this society, the original establishment of it, the resolutions as framed to start it, all connoted a society intended to be established not for the ephemeral purposes of the members' own pleasure, but for B the longer and more permanent object of importance to the community, of the advancement and improvement of agriculture, even though one of the means of that advancement was by holding a show at which some of the members would reap personal advantages.

Lastly, I want to refer to the Finance Act, 1924. It has been determined, in the case of the *Royal Agricultural Society of England* v. *Wilson* (11), that the C society was assessable to income tax in respect of the profits of the annual show which they inaugurated, inasmuch as, in carrying on that show, they were engaged in a concern in the nature of trade. In a number of cases it has been held that what is a charity for the purposes of exemption, may yet carry on a trade and not be exempt in respect of the profits of that trade. It was indeed, I agree with the Solicitor-General, quite unnecessary to decide whether the society was a charity or D not for the purposes of that case, but even if it was admitted to be a charity, it might still be liable under Case I of Sched. D. in respect of the profits of the business in which it engaged. But I cannot fail to observe that ROWLATT, J., expresses the opinion to which I have already referred, and that the effect of that case was altered by s. 23 of the Act of 1924. The terms of the section are as follows:

E

> "(1) Any profits or gains arising to an agricultural society from an exhibition or show held for the purposes of the society shall, if they are applied solely to the purposes of the society, be exempt from income tax. (2) The expression 'agricultural society' in this section means any society or institution established for the purpose of promoting the interests of agriculture. . . ."

F Those words, "if they are applied solely to the purposes of the society," are difficult to understand, indeed they are not easy to give a true meaning to, unless they were intended to be based on the fact that the society for the promotion of the interests of agriculture was a charity. If so, then if the profits are applied solely to the purposes of the society, they are applied solely for the purposes of a charity, and the whole system works well together, it is a charitable society which reaps certain G gains and devotes those gains to the cause of charity. Without saying that that is intended to be a legislative interpretation of the meaning of "charity," I cannot help feeling that some weight must be given to it, as indicating that there are cases where an agricultural society which is established for the purpose of promoting the interests of agriculture may well be held to be a charity within the meaning of the definition of that term. I think that there was evidence on which the H commissioners could come to the conclusion that this was a society established for charitable purposes only, and thus, if and so far as they received any interest or dividend or shares or the like, those receipts are entitled to exemption, if and so far as the same are applied to charitable purposes only. For these reasons the appeal must be allowed and the decision of the commissioners restored.

I **ATKIN, L.J.**—This case arises in respect of the income of the Yorkshire Agricultural Society derived from investments belonging to the society and forming part of its income. The question is, under the Income Tax Act, 1918, s. 37 (1) (b), whether these sums form part of the income of a body of persons established for charitable purposes only. The question is of some importance because the chief issue is whether the Yorkshire Agricultural Society is established for charitable purposes, and such a matter has always admitted of some debate in the courts. It is a matter of considerable importance, because for a long time the conception of what is charitable in the Income Tax Acts has been held to be governed by the

conception of what is deemed to be charitable within the Mortmain Act and Charitable Trusts Act. It is important to see, therefore, that no body of persons improperly escapes taxation and at the same time that nothing is laid down which improperly obstructs the flow of charitable bequests.

There are three expressions in the statute which have to be considered in this case. We have to deal with a body of persons (i) established, (ii) established for a charitable purpose, and (iii) established for a charitable purpose only, and I propose to deal with each of those matters, which I think will cover the whole of the argument addressed to us on either side. The first question is whether this is a body of persons established. In respect of that it has to be remembered that the definition of "body of persons" which is given by s. 237 of the Act is that it

> "means any body, politic, corporate, or collegiate, and any company, fraternity, fellowship or society of persons, whether corporate or not corporate";

and it therefore includes a voluntary association of persons. I do not propose to consider to what extent it is necessary to find some degree of permanence contemplated in the bond of association of persons to enable one to say that the association or the society is established. For my part, I am not prepared to say that there is much difference between established or formed. It may be that a mere ephemeral association could not be said to be established; indeed, it would hardly be relevant to this particular section, which only deals with annual payments coming to such a society, and therefore it must be a society in existence for at least a year, or possibly for more than a year. In this case we have a society which was formed in 1837, obviously intended to be in existence for some time and in fact continuing up to the present time for ninety years. Therefore it appears to me that here we have a body of persons established.

The next question is whether they are established for a charitable purpose. The purpose is found by the commissioners, who accept the view of the purpose which is expressed in the original resolution forming the society and has been amplified in the rules and objects of the society as now formulated. When I say "amplified" it appears to me that the main purpose, which is the general promotion of agriculture, still remains the main purpose of the society; and so far as I can see—and I think it has been so found—it is the only purpose of the society. But the definition of the objects as now formulated by the society goes into more detail and is more specific than it was originally, and it appears to me that the general purposes of the society include education in agricultural matters, the improvement of stock and agricultural products generally, and certainly include, therefore, a form of technical education. Undoubtedly it is a purpose which promotes to an important degree the public interest, and while I quite agree that the mere statement that the society is formed for the promotion of objects of public interest will not in itself show it to be charitable only, nevertheless when you have to deal with a specific purpose and specific ways in which you are to promote the public interest it becomes very difficult to see that such a purpose falls short of that which makes it charitable. You are to act by analogy to the instances—I treat them merely as instances—given originally in the statute of Elizabeth and now incorporated in the Mortmain Act, 1888, the statute of Elizabeth, which is constantly referred to, being now as dead as Queen Elizabeth herself, because it was repealed by that Act. Dealing with cases which have been held to be charitable either in the form of bequest or for the purpose of taxation, one finds such a case in that of *Re Verrall* (4), the express objects of which were for the preservation of buildings of historic interest or in the case of lands for the preservation of their natural beauty and animal and plant life; it extends to the physical training of the officers and men of the carbineers (*Re Gray* (2)), it extends to anti-vivisection purposes (*Re Foveaux* (3)), it extends to the encouragement of horticulture, and a variety of other purposes. I myself have no doubt at all that if the question had to be considered with regard to a charitable bequest for the general improvement of agriculture, including, if you please, specific

A mention of the encouragement or holding of an agricultural show, that such a bequest would be held to be a charitable bequest. I, therefore, have no doubt that in this case this society was established, and was established for charitable purposes.

The next question is whether it was established for charitable purposes only. The attack on that is made in threefold manner. First of all it is said: This society B was in fact formed for the purpose of giving benefit to its members; it is nothing but a club for the mutual advantage of the members of the club. If that were so, I agree that the claim of the society would fail, both because it could not be said to be established for a charitable purpose, and because it certainly could not be said to be established for a charitable purpose only. There can be no doubt that a society formed for the purpose merely of benefitting its own members, though it may be C to the public advantage that its members should be benefited by being educated or having their æsthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to members is only given to them with a view of giving encouragement and carrying out the main purpose D which is a charitable purpose, then I think the mere fact that the members benefit in the course of promoting the charitable purpose would not prevent the establishment being for charitable purposes only. That I imagine to be this case. You may form a society for the purpose of getting contributions and in order to get contributions you may have to make some reduction to a member, something less than his contribution. That does not, to my mind, prevent the object of the society E being still for a charitable purpose. As I said in argument, in order to get a contribution of 9d. you may have to give your member benefits to the value of 4d. but you are still 5d. to the good for your charitable purpose, and if you are giving that benefit for the purpose of getting the 5d. and devoting it to charitable purposes, it seems to me your purposes are still exclusively charitable.

F There is plenty of evidence in this case that the operations of the society are general and extend to the promotion of agriculture generally and not merely to the benefit of the members. I attach no importance at all, therefore, in this case to the mere fact that the members of the society are induced to become members by giving them advantages at the show in respect of charging them a smaller fee or that in respect of their membership they get perhaps a copy of the Journal, G or that they get facilities for having their products analysed, and so forth. It appears to me as a matter of fact which is accepted and found by the commissioners that all those matters are not inconsistent with a society being established for charitable purposes only. The other contention that was made which is only an instance of what I have been dealing with, is the statement that one of the objects of the society is watching and advising on legislation affecting the agricultural industry. It is H said that if that stood by itself it plainly would not be a charitable purpose; and I can imagine that a society which was formed solely for the purpose of watching and advising on legislation affecting agriculture would not be a society formed for a charitable purpose. But that does not seem to me at all to affect the matter. It is perfectly consistent with the main object of the society being one for the promotion of agriculture generally, that if that is its object, in order to carry out I its object it should watch and advise on legislation affecting agriculture. Supposing a society formed for an admittedly charitable purpose, for the purpose of promoting education, or for the purpose of promoting relief of the sick and poor, it appears to me impossible to suggest that it might not be well within the charitable objects of such a society to watch and advise on legislation, in the one case affecting education and in the other case affecting the relief of the sick and poor. Therefore, it appears to me that there is no reason for picking upon that particular object so defined as being something so inconsistent with the main charitable purpose as to amount to something different, so that there are two purposes and not one.

The other attack that was made on the society was this. It was said that this is a voluntary society, there are no rules and by-laws limiting its activities, and, therefore, at any moment it may devote its funds to a non-charitable purpose. It might, it is said, distribute its funds amongst its members or in relief of its members and that would not be a charitable purpose, and, therefore, it is to be deemed to be not a society for a charitable purpose. That is a non sequitur. The question one has to consider is whether at the relevant time one is dealing with the income of a society established for charitable purposes only, and in respect of that income also one has to consider whether the income is applied in fact to charitable purposes only. It may be said of every voluntary society that, as it voluntarily came into existence, so it may voluntarily cease to be in existence; as it voluntarily associated, so it may voluntarily dissolve. The mere fact that it may dissolve at any time and come to an end seems to me to have nothing to do with this particular problem. As it may dissolve itself, so I think it is fairly plain that it may, if it chooses, re-associate itself for other purposes, either by dissolving itself and forming itself into a society for another purpose, or it may be by adding to its objects, objects which are non-charitable, or by substituting for its objects an object which is non-charitable instead of a charitable object. But if it does so, then it appears to me to cease to be a society established for a charitable purpose, and its funds will not be presumably devoted to charitable purposes only. And until it does do so it appears to me to be the same question whether it was established for a charitable purpose and whether it is still operating in that sphere. It seems to me immaterial to consider what the precise remedies are either to the Attorney-General as representing the public, or to the individual members, for the purpose of establishing that obligation, but the obligation plainly exists, and, to my mind, is plainly enforceable. In this particular case the society has not changed its constitution, it has not adopted non-charitable purposes, and its investments and income remain quite plainly, to my mind, bound by the obligation to apply them to charitable purposes and to charitable purposes only.

The result is that this society falls within the definition in the Act, and that the finding of the commissioners was right. It is very largely a question of fact, but, so far as it is law, I agree with them, and so far as it is fact, if it were before me, I should agree with their findings.

The only other matter that I need refer to is the suggestion by the Crown that we should be very careful in coming to this conclusion because serious consequences might follow to the revenue, and there might be an extension of the principle now adopted which would be very far-reaching. I must say that I am not alarmed. I do not think this decision goes further than the other cases, or, indeed, as far as some of the other cases which have decided what is a charitable purpose. But one has to remember that the Inland Revenue Commissioners themselves, in 1924, admitted that the Royal Agricultural Society, whose objects are set out in the case and are defined by charter, was a charity, and those objects, it appears to me, differ in no material respect from the objects of this society. On June 28, 1924, ROWLATT, J., decided that the profits of the Royal Agricultural Society, derived from its show, were subject to income tax (*Royal Agricultural Society of England* v. *Wilson* (11)), and that it was irrelevant that it was a charity, that they were profits made from trading, and as they were not annual payments within the section they were subject to tax. By the Finance Act, 1924, the legislature introduced a section to this effect:

> "(1) Any profits or gains arising to an agricultural society from an exhibition or show held for the purposes of the society shall, if they are applied solely for the purposes of the society, be exempt from income tax. (2) The expression 'agricultural society' in this section means any society or institution established for the purpose of promoting the interests of agriculture."

It certainly does not seem to me to be an alarming result that, whereas in the

case of this society the proceeds of the show, amounting to some £2,000, devoted to the purposes of the society, are exempt from income tax, all the income from investments, amounting to some £300, devoted also to the purposes of the society, should also be exempt from income tax, and, presumably, for the same reason that the legislature exempted the proceeds of the shows. For these reasons I think the appeal must be allowed, and the decision of the commissioners restored.

**LAWRENCE, L.J.**—I agree, and will only add a few observations of my own without attempting to cover the whole ground which has already been covered by the judgments of my Lords.

In my judgment, the crucial question in this appeal is whether the appellant society was established for the promotion of agriculture generally or was what has been conveniently called a members' society, established for the promotion of the interests of its members in their respective businesses. If the former be the case I am clearly of opinion that the society was established for charitable purposes only within the legal acceptation of that expression. Agriculture is an industry not merely beneficial to the community but vital to its welfare. The fact that the operations of the society may be confined to Yorkshire—a matter on which I desire to express no opinion—is, in my opinion, immaterial, as it is well settled that the benefit in point of local area need not extend to the public at large and that the benefit of the inhabitants of a particular district will suffice (see per CHITTY, J., in *Re Foveaux* (3)), a proposition which the Solicitor-General did not dispute. It is plain to my mind that the general improvement of agriculture is a charitable purpose falling within the fourth class of the well-known classification of legal charities by LORD MACNAGHTEN in *Pemsel's Case* (1). In expressing this conclusion I must not be understood as asserting that every purpose of public general utility is necessarily charitable in the legal sense. Although I know of no case where a trust for a specific purpose which is shown to be of public general utility has been held to be void, yet I recognise that a general trust for purposes beneficial to the community, without specifying any particular purpose, would in all probability be held to be void, because there might be some purposes of public general utility which were not charitable: see *Re Macduff* (14). Dealing, however, with the general promotion of agriculture, which is the particular purpose here, and without going through the numerous cases decided on other purposes, I have arrived at the clear conclusion that it comes within the spirit and intention of the statute of Elizabeth as interpreted by many eminent judges, and probably much more within that spirit and intention than many other purposes which have been held to be charitable on the sole ground that they are for the benefit of the community. In my opinion, it would require a bold advocate to contend that a bequest of a legacy or share of residue on trust for the general promotion of agriculture was void for perpetuity or uncertainty, and the Attorney-General would, in my opinion, have an easy task in defeating the claims of the residuary legatees or next of kin to the fund devoted to that purpose and in obtaining an order for the settlement of a scheme for the administration of the trust.

I now come to the question which, in my opinion, is the real question in the case. Counsel for the Crown have strenuously contended that this society is a members' society in the sense I have mentioned; and if this contention be well founded it is clear that the society is not one established for charitable purposes only, even although it might embrace some charitable objects. This contention is based mainly on two grounds: first, on the ground that the society was originally founded for the main purpose of holding an annual show primarily for the pleasure and benefit of its members; and, secondly, on the ground that the society does in fact confer privileges and personal benefits on its members. The first ground depends, in my opinion, entirely on the true meaning of the first resolution passed at the meeting of Oct. 10, 1837, which lays down the sole object for which the society was founded. Construing that resolution in the light of the subsequent

resolutions, and having regard to the nature and character of the society then founded, it is plain to me that the only object for which it was founded was not for the purpose of promoting the interests of its members and their businesses, but for the purpose of promoting agriculture generally. The holding of an annual show which was to be open to all-comers, both as exhibitors and as visitors, was no doubt to be a permanent feature in aid of the real object of the society, but it was not intended as a device for the special benefit of its members. In my judgment, the real meaning of this resolution is that the object for which the society was established was the general promotion of agriculture by holding an annual show and otherwise. The second ground, in my opinion, involves a confusion of thought. The objects of the society and the inducements in the shape of personal benefits held out to persons in order to procure their membership and to obtain their subscriptions are two entirely different things. It is a common thing for a charitable institution to offer all kinds of privileges and benefits which are in no sense charitable in order to obtain funds for the purpose of carrying out its objects. As an instance I might mention the giving of dinners, dances, and theatrical entertainments, all of which entail an expenditure of money on non-charitable objects incurred for the purpose of obtaining funds to be applied for the charitable objects of the institution. Many charitable institutions, in return for annual subscriptions or donations offer special benefits to the persons who become its members. None of the operations of this kind result in making the purposes of the institution non-charitable. So here the fact that members obtain certain privileges in no way militates against the proposition that the purpose of the society was a charitable purpose only. In my judgment, the contention that this society is a members' society is not well founded and fails. I, therefore, agree that this appeal should be allowed and the decision of the commissioners restored.

Solicitors: *Trower, Still & Keeling; Solicitor of Inland Revenue.*

[*Reported by* H. Langford Lewis, Esq., *Barrister-at-Law.*]

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## Re PARKER'S SETTLED ESTATES. PARKER *v.* PARKER

[Chancery Division (Romer, J.), November 9, 10, 11, 17, December 8, 1927]

[Reported [1928] 1 Ch. 247; 97 L.J.Ch. 161; 138 L.T. 360; 71 Sol. Jo. 981]

*Settled Land—Trust for sale—Whole subject-matter of settlement not subjected to trust—Term to support rentcharge and portions.*

Land stood limited under the will of a testator who died in 1888 in trust for the plaintiff for life, with remainder to his eldest and other sons in tail. In 1901 the plaintiff, under a power given to him by the will, charged the land with a jointure rentcharge in favour of his wife, without power of anticipation if she should survive him, and he also charged the lands with portions and limited a term of 1,000 years after his death to trustees to support the rentcharge and portions. On Sept. 28, 1914, the eldest son disentailed, and on Sept. 29, 1924, the plaintiff and his eldest son, by a deed in which the plaintiff's wife and the trustees of the term joined, conveyed the land to trustees for sale. By a second deed of the same date trusts of the proceeds of sale were declared in re-settlement.

**Held:** the words "trust for sale," when used with reference to land subject to a prior equitable interest, were not confined to cases where the trustees for

sale could overreach that interest, and so in the present case there was a trust for sale affecting the legal estate in fee simple vested in the trustees of the first deed of Sept. 29, 1924; but the legal estate in the term of 1,000 years could not be disposed of under the trust for sale, and, therefore, the whole legal estate which was the subject-matter of the settlement was not subjected to a trust for sale and the case did not fall within s. 1 (7) of the Settled Land Act, 1925 (as added by the schedule to the Law of Property (Amendment) Act, 1926); the land was settled land within the meaning of the Settled Land Act, 1925, under a compound settlement consisting of the will, the indenture of 1901, the disentailing assurance, and the two deeds of Sept. 29, 1924, of which settlement the plaintiff was the tenant for life; and the vesting deed should be made in his favour.

**Notes.** Referred to: *Re Gaul and Houlston's Contract*, [1928] 1 Ch. 689; *Re Norton, Pinney* v. *Beauchamp*, [1928] All E.R. Rep. 301; *Re Sharpe's Deed of Release, Sharpe* v. *Fox*, [1938] 3 All E.R. 449.

As to settled land generally see 29 HALSBURY'S LAWS (2nd Edn.) 668 et seq., and for cases see 40 DIGEST (Repl.) 790 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427, and for Settled Land Act, 1925, see ibid., vol. 23, p. 12.

Cases referred to:

(1) *Re Munday and Roper's Contract*, [1899] 1 Ch. 275; 68 L.J.Ch. 135; 79 L.T. 583; 47 W.R. 226; 43 Sol. Jo. 151, C.A.; 40 Digest (Repl.) 866, *3384*.

(2) *Re Leigh's Settled Estates*, [1926] Ch. 852; 95 L.J.Ch. 511; 136 L.T. 395; 70 Sol. Jo. 758; 40 Digest (Repl.) 804, *2834*,

(3) *Re Leigh's Settled Estates (No. 2)*, ante p. 166; [1927] 2 Ch. 13; 96 L.J.Ch. 423; 137 L.T. 378; 71 Sol. Jo. 369; 40 Digest (Repl.) 793, *2753*.

(4) *Re Ryder and Steadman's Contract*, ante p. 506; [1927] 2 Ch. 62; 96 L.J.Ch. 388; 137 L.T. 281; 43 T.L.R. 578; 71 Sol. Jo. 451, C.A.; 40 Digest (Repl.) 847, *3235*.

(5) *Re Goodall's Settlement, Fane* v. *Goodall*, [1909] 1 Ch. 440; 78 L.J.Ch. 241; 40 Digest (Repl.) 793, *2744*.

**Originating Summons.**

By the will of the testator, the plaintiff's father, who died in 1888, certain lands at Ware, in the county of Hertford, were devised, in the events which happened, to the use of the plaintiff during his life, with remainder to the use of his first and every other son successively according to seniority in tail, with certain remainders over. By deed dated Nov. 12, 1901, executed on the occasion of the marriage of the plaintiff, and made between the plaintiff, of the first part, his wife, of the second part, and certain trustees, of the third part, the plaintiff, in exercise of powers in that behalf given to him by the will, appointed to his wife as her separate property, without power of anticipation during her life in case she should survive him, a yearly rent by way of jointure of £400 to be charged on such lands, and he charged the lands, subject to the jointure rentcharge, with payment to the younger child or children of the intended marriage of certain portions. For the purpose of securing such portions he appointed the land to the trustees for a term of 1,000 years commencing from his death. The plaintiff's wife was still living, and there had been issue of her marriage with the plaintiff, two sons, both of whom had attained the age of twenty-one years. On Sept. 28, 1924, the elder of those two sons, with the consent of the plaintiff as protector of the settlement, disentailed, with the result that, subject to the plaintiff's life interest, his mother's jointure, and his younger brother's portion, the elder son became entitled to the land in fee simple. On Sept. 29, 1924, two documents were executed. By the first, which was made between the plaintiff, of the first part, his elder son, of the second part, his wife, of the third part, the trustees of the deed of Nov. 12, 1901, of the fourth part, and certain persons therein called "the trustees," of the fifth

part, the plaintiff and his elder son, according to their respective interests, conveyed, and the wife, as the owner of the jointure rentcharge, purported thereby to release and confirm to the trustees all the lands devised by the will of the testator then remaining unsold to the trustees in fee simple, and the trustees of the 1,000 years term purported (although they had no express power under the deed of 1901) to surrender and assign the said lands to the trustees to the intent that the same should be thenceforth discharged from the portions charged by the indenture of 1901, and that the said term of 1,000 years thereby limited should be absolutely merged and extinguished in the freehold and inheritance thereof. By the same indenture it was declared that the trustees should stand seised of the said lands thereby conveyed upon trust, at the request in writing of the plaintiff during his life and afterwards at the discretion of the trustees, to sell the same, and that the trustees should stand possessed of the net proceeds of sale and of the rents and profits of the lands upon the trusts and subject to the powers and provisions declared and contained in and by the other indenture of Sept. 29, 1924. By that other indenture, which was made between the plaintiff, of the first part, the elder son, of the second part, and the trustees, of the third part, it was in effect declared that the trustees should hold the proceeds of sale upon trust during the joint lives of the plaintiff and his elder son to pay out of the income, in the first place, the sum of £500 per annum to the plaintiff, and in the next place the sum of £300 per annum (liable to increase or diminution as therein mentioned) to the elder son, and subject thereto upon trust to pay the income to the plaintiff during his life. The trusts, after the death of the plaintiff, were in effect to raise the portions sum under the deed of 1901, and then out of the income of the residue to pay to the plaintiff's wife should she survive him £600 per annum during her life in substitution for her jointure of £400 per annum under the deed of 1901, and to pay the balance of the income to the elder son during his life and after his death to hold the capital for his children and issue as therein mentioned, and, in default of such children and issue, for the younger son and his issue as therein mentioned. Pending a sale, the net rents and profits of the lands were to be paid to the persons, and for the purpose to and for which the income of the proceeds of sale would be payable or applicable.

The plaintiff took out the present summons asking (i) that it might be determined whether the lands were subject to a trust for sale within the meaning of s. 2 (2) of the Law of Property Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926, Sched.), any equitable interest or power having priority to the trust for sale was (under the sub-section) capable of being overreached by the exercise or execution of such trust for sale by trustees approved or appointed by the court; (ii) if the answer to the question should be in the affirmative, then that it may be determined whether the jointure and portions sum charged by the indenture of Nov. 12, 1901, and the term of one thousand years supporting the same thereby limited, were equitable interests capable of being overreached under sub-s. (2); (iii) if the answers to questions (i) and (ii) should be in the affirmative, then that the plaintiff and the defendants, the trustees of the indenture of Nov. 12, 1901, on trust for sale and of the indenture of settlement of even date therewith might (under sub-s. (2) as amended) be approved as the trustees for exercising or executing the trust for sale by the indenture of conveyance on trust for sale declared; (iv) if the answer to question (ii) be in the negative, then that it might be determined whether the land was settled land within the meaning of the Settled Land Act, 1925 (as amended by the Law of Property Act, 1926) now standing settled under a compound settlement consisting of (a) the will, (b) the indenture of Nov. 12, 1901, (c) the disentailing assurance of Sept. 28, 1924, (d) the indenture of conveyance on trust for sale of Sept. 29, 1924, and (e) the indenture of settlement of Sept. 29, 1924, or a compound settlement consisting of the will and any, and if so, which of the instruments respectively; (v) if it should be determined that the land was settled land, then whether the plaintiff alone, or the plaintiff and

the defendant, J. W. Parker (the plaintiff's elder son) together, was or were the person or persons having the powers of a tenant for life under the Settled Land Act, 1925, and in whose favour the vesting deed or deeds ought to be made; (vi) if it should be determined that the land was settled land, then whether in the event of an order being made, while the land remained settled land, approving or appointing (within the meaning of s. 2 (2) of the Law of Property Act, 1925) the plaintiff and the trustees of the indenture of conveyance on trust for sale of Sept. 29, 1924, and the indenture of settlement of the same date, the land therefore ceased to be settled land."

*Nicholson Combe* for the plaintiff.

*Guest Mathews* for the trustees for sale.

*Walter Banks* for the trustees of the settlement.

*Cur. adv. vult.*

Dec. 8. **ROMER, J.,** read a judgment in which he stated the facts and continued: It will be observed that inasmuch as the wife was restrained from anticipation, the first indenture of Sept. 29, 1924, was inoperative to release the land from her jointure. The trustees of the portions term, moreover, had no power to surrender or assign the lands discharged from the portions and to merge the term of one thousand years in the freehold. That term would not, therefore, have been treated as merged in equity, and was not, therefore, merged in law. In these circumstances it might have been open to the plaintiff and his elder son to claim that the consideration for their joining in the deeds had failed. They have not, however, taken up this attitude, but desire that the deeds should operate upon their own interests. What in that case may be the trusts affecting the proceeds of sale declared by the second indenture after the death of the plaintiff it is difficult to say. But in these circumstances I cannot regard the trusts declared by the first deed as being anything more than a trust to sell the interests of the plaintiff and his elder son, subject to the jointure rentcharge and the portions term. The result, therefore, was that the legal estate on fee simple in the land was vested in the trustees upon trust to sell, but subject to the wife's jointure rentcharge, which was not yet an interest in possession, and subject to the portions term to secure portions not yet raisable. The land was, accordingly, the subject of a compound settlement consisting of the will, the deed of 1901, the disentailing deed, and the two deeds of Sept. 29, 1924: *Re Munday and Roper's Contract* (1). Under this settlement the plaintiff had, by virtue of s. 58 (1) (ix), of the Settled Land Act, 1882, the powers of a tenant for life [see now Settled Land Act, 1925, s. 20 (1) (viii)], though, so far as the two indentures of Sept. 29, 1924, were concerned, inasmuch as the only interests in the land affected by them were subject to an immediate trust for sale, the plaintiff would only be deemed to be tenant for life of the settlement of those interests deemed to exist by virtue of s. 63 of the Act of 1882.

This was the state of affairs when the provisions of the Settled Land Act, 1925, came into force, and the object of this summons is to ascertain how they have affected the interests of the parties, and, in particular, in what person or persons the legal estate in fee simple in the land became vested under these Acts. For this purpose it is necessary to refer, in the first place, to paras. 3 and 5 of the transitional provisions contained in Part II of Sched. I to the Law of Property Act, 1925. Paragraph 3 is, so far as material, in these terms:

> "Where immediately after the commencement of this Act any person is entitled . . . to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereafter provided."

Paragraph 5 is, so far as material, as follows:

> "For the purposes of this Part of this Schedule, a tenant for life shall be deemed to be entitled to require to be vested in him any legal estate in settled land . . . which he is, by the Settled Land Act, 1925, given power to convey,"

If, therefore, the plaintiff is by the Settled Land Act, 1925, given power to convey the legal estate in fee simple in the land, then such legal estate will vest in him: see Sched. I, Part II, Law of Property Act, 1925, para. 6 (c). It is, accordingly, necessary to ascertain whether the land is settled land within the meaning of the Settled Land Act, for, if it is not, the plaintiff has not been given power to convey the legal estate.

As to this, it seems quite clear that the land, is settled land within the meaning of sub-s. (1) (i) of s. 1 of the Act, unless the land is held on trust for sale within the meaning of sub-s. 7 of that section (as amended). "Trust for sale" is defined as meaning, in relation to land, an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and it was contended before me that the land is not held upon an immediate binding trust for sale within the meaning which it was said had been given to those words by TOMLIN, J., in *Re Leigh's Settled Estates* (2). In that case the learned judge came to the conclusion that where the subject-matter of a settlement is the whole unincumbered fee simple, "the land" is not "subject to an immediate binding trust for sale" so long as there is not a trust for sale which is capable of overriding all charges having, under the settlement, priority to the trust for sale. At the time that this decision was given the Law of Property (Amendment) Act, 1926, had not been passed so that the learned judge was not dealing with sub-s. (7) of s. 1 of the Settled Land Act. He was merely dealing with s. 20 (1) (viii), of the Act. But I feel some little doubt whether the learned judge held that "the land" in the case before him was not subject to any trust for sale, inasmuch as the subject-matter of the trust was merely the fee simple subject to the incumbrance, or whether he held that no land can ever be subject to a binding trust for sale unless the trustees have power to overreach prior equitable interests. If the latter be the real reason of his decision, I find myself, with the greatest respect, unable to follow it. For it means that there cannot be, within the meaning of the Settled Land Act, any trust for sale of land that is subject to equitable interests unless the trustees have a legal estate and are either two or more individuals approved or appointed by the court, or the successors in office of such individuals, or a trust corporation. "Trust for sale" in relation to land has the same meaning in the Law of Property Act, 1925, the Trustee Act, 1925, and the Administration of Estates Act, 1925, as it has in the Settled Land Act, and in these Acts the expression "trust for sale" appears in a number of sections which must, in my opinion, be carefully considered before one arrives at the conclusion that a trust for sale in relation to land means a trust under which prior equitable interests can be overreached. It is, indeed, expressly stated in the Settled Land Act that "trust for sale" and "trustees for sale" have the same meaning as in the Law of Property Act. Let me begin with s. 2 (2) of the Law of Property Act as it now stands. The words "trust for sale" in that section clearly do not bear that meaning, as pointed out by TOMLIN, J., in *Re Leigh's Settled Estates* (*No. 2*) (3). There would not otherwise, he said, be any point in the sub-section. He, therefore, treated it as being one of the cases when the context "otherwise requires" within the meaning of the general definition clause. Passing over s. 16 (6), s. 18 (1), and s. 22 (2) of that Act, in which the context would again seem to require otherwise, I turn to the clauses that are grouped together under the heading "Dispositions on trust for sale." The expression "trust for sale" in those sections surely cannot bear the meaning in question. It seems impossible to suppose, for instance, that the protection given to purchasers by ss. 23, 26 and 27, and to the beneficiaries by s. 26 (3) and s. 30, or the provisions of s. 24, or the power to postpone given by s. 25, only apply in cases where the trustees can overreach prior equitable interests, more especially having regard to the fact that many of the sections in terms apply to a trust for sale created before the Act came into operation at all, and, therefore, before trustees for sale had obtained the statutory means of overreaching such interests. In this connection reference must also be made to the transitional provisions dealing with land held just before the Act came into

force in undivided shares. These provisions, according to s. 39 (4) of the Act, are to have effect for subjecting such land to "trusts for sale." But by para. 1 (2) of Part IV of Sched I, when

> "the entirety of the land (not being settled land) is vested absolutely and beneficially in more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts."

The provisions of Part IV of the schedule are described as being "provisions subjecting land held in undivided shares to a trust for sale," and s. 35 of the Act provides that land held upon the statutory trusts shall be held upon trust to sell the same. It seems quite clear, therefore, that the legislature treated the statutory trusts as being "trusts for sale." But where, in a case falling within para. 1 (2) of Part IV, the entirety of the land is subject to an equitable incumbrance, the land does not vest free from such incumbrance, and the former tenants in common are not in a position to sell free from it. This indicates that the legislature did not attach to the words "trusts for sale" the meaning in question. I have referred in particular to the case of land which is within the provisions of para. 1 (2) of Part IV, but is subject to an equitable charge affecting the whole, as it was precisely a case of this description that was considered by the Court of Appeal in *Re Ryder* v. *Steadman's Contract* (4). It seems clear from the judgment of SARGANT, L.J., that he treated the land in that case as having become vested in the former tenants in common upon trust for sale within the meaning of the Act. I need not refer in detail to the other sections of the Law of Property Act, such as s. 36 (1), in which the words "trusts for sale" or "trustees for sale" are used. It is sufficient to say that I am unable to come to the conclusion that in any section of the Act the words, when used in relation to land that is subject to an equitable incumbrance, refer exclusively to trusts of which the trustees have a legal estate in the land and are two or more individuals, or the successors of individuals approved or appointed by the court, or a trust corporation.

Turning now to the Trustee Act, I would call attention to s. 12 (1), s. 14 (2), s. 20 (3) (c), s. 27 (1), s. 32 (2) s. 34 (1), (2), and s. 35 (1), in all of which the expression "trust for sale" appears. I cannot think that in any one of them the expression when used in relation to land is used in the restricted sense mentioned above. Section 14 (2), indeed, shows that in the view of the legislature there may be a trust for sale of land of which there is a single trustee, not a trust corporation, and s. 35 (3) indicates that there may be a trust for sale within the meaning of the Act of an equitable interest in land. In the Administration of Estates Act, 1925, the expression occurs, I think, in only two sections—in s. 39 (1) (ii) (where, oddly enough, it is preceded by the word "effectual"), and in s. 41 (6). The former of these throws no light upon the matter to be decided. But in the latter it would be absurd to give it the restricted meaning. It may also be observed that if "trust for sale" be given that meaning, the personal representatives of the intestate owner of real estate subject to an equitable charge, though directed to hold such estate upon trust to sell, would not, unless a trust corporation, hold it upon a "trust for sale." The Land Charges Act, 1925, does not, I think, throw any light upon the matter.

The conclusion, however, that I come to as a result of a consideration of all the Acts is that the words "trust for sale," when used in reference to land that is subject to a prior equitable interest, are not confined to cases where that equitable interest can be over-reached by the trustees. It may be said that in that case no effect is given to the word "binding." But the word may quite conceivably have been inserted to meet a case of a movable trust for sale such as existed in *Re Goodall's Settlement* (5) and, even if this be not so, I should prefer to treat the word as mere surplusage, inserted ex majore cautela, rather than give it a meaning

that would exclude from being trusts for sale innumerable trusts which are indubitably trusts for sale as that phrase has always been understood by lawyers hitherto, and which would either exclude them without any apparent reason from a very large number of the general provisions of the Acts relating to "trusts for sale," or would necessitate the court holding that the context required some other meaning to be attributed to that expression. There is, therefore, in my opinion, a trust for sale in the present case affecting the legal estate in fee simple vested in the trustees of the 1924 deed.

But is there a trust for sale that brings the present case within the exception to s. 1 of the Settled Land Act introduced by the new sub-s. (7)? In my opinion, there is not. It is, I think, reasonably clear that that sub-section only applies when "the land" that would otherwise be the subject of a settlement under sub-s. 1 is held upon trust for sale. In *Re Leigh's Settled Estates* (2) TOMLIN, J., in dealing with s. 20 (1) (viii), of the Settled Land Act, said that in his opinion the expression "unless the land is subject to an immediate binding trust for sale" meant, unless the land that is the total subject-matter of the settlement is subject to a trust for sale which operates in relation to the whole subject-matter of the settlement. Inasmuch as it appeared, at the time his decision was given, as if the trustees for sale could not over-reach the family charge which had priority to the trust for sale, but which had been created in pursuance of a power contained in the compound settlement, he held that "the land" was not subject to an immediate binding trust for sale, although, as I have already stated, I am not altogether sure whether that was because there was, in his view, no binding trust for sale affecting any land or because there was not a trust for sale that affected the whole subject-matter of the settlement. The trust for sale in that case did, however, affect the whole legal estate in the land that was the subject-matter of the alleged settlement, and if "trust for sale" means what I think it does, it may well be that, in view of the subsequent enactment of sub-s. (7) of s. 1, the land was excluded from the definition of settled land, even though the trustees, for the moment, had not power to override the family charge: see as to this the observations of SARGANT, L.J., in *Re Ryder and Steadman's Contract* (4). For although by virtue of s. 117 (1) (ix), of the Settled Land Act, land includes an interest in land not being an undivided share, it is impossible to read what are commonly called the "curtain" provisions of the Settled Land Act and the Law of Property Act without seeing the importance attached to the possession of the legal estate ; and it would, I think, be proper and in accordance with the general spirit of the Acts, to regard all cases in which the whole legal estate, that would otherwise be comprised in a settlement, is vested in trustees for sale as coming within sub-s. (7) of s. 1. But in the present case there is a legal estate in the term of 1,000 years which cannot be disposed of under the trust for sale, and which, upon the coming into force of the Law of Property Act, 1925, would seem to have vested in the trustees of the portions term by virtue of para. 3 of Part II of Sched. I to that Act. The whole legal estate which is the subject-matter of the settlement is not, therefore, subjected to a trust for sale, and, in my opinion, sub-s. (7) has no application to the case. I, therefore, hold that the land in question is settled land within the meaning of the Settled Land Act under a compound settlement consisting of the will, the indenture of Nov. 12, 1901, the disentailing assurance, and the two deeds of Sept. 29, 1924. Of this compound settlement the plaintiff is tenant for life, and the vesting deed ought to be made in his favour. As from the date of this vesting deed the term of 1,000 years will take effect only in equity.

It only remains to deal with the last question contained in the originating summons. That question is as follows: "If it should be determined that the said land is settled land as aforesaid, then whether in the event of an order being made, while the said land remains settled land as aforesaid, approving or appointing (within the meaning of sub-s. (2) or s. 2 of the Law of Property Act, 1925) the plaintiff and the defendants John Wromford Parker and Christopher Haworth Burne,

or other the trustees for the time being of the said indenture of conveyance on trust for sale of Sept. 29, 1924, and the said indenture of settlement of even date therewith, the said land, therefore, ceases to be settled land as aforesaid." The answer is obviously in the negative, and for more than one reason. It is sufficient to say that, being settled land, the legal estate in fee simple is vested in the plaintiff as tenant for life and not in the trustees, so that s. 2 (2) of the Law of Property Act would not be applicable.

Solicitors: *Lawrence, Graham & Co.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

## Re CLIFF'S CONTRACT

[Chancery Division (Astbury, J.), April 1, 1927]

[Reported [1927] 2 Ch. 94; 96 L.J.Ch. 278; 137 L.T. 372; 71 Sol. Jo. 389]

*Settlement—Trust for sale—Land held in undivided shares vested in possession—Land held under will—Effect of transitional provisions—Appointment of trustees in place of Public Trustee—"Persons interested in the land"—Trustees for sale under will—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. I Part IV, para.* 1, *cl.* 4 (*iii*).

"Persons interested in . . . the land" in cl. 4 (iii) of para. 1 of Part IV of Sched. I to the Law of Property Act, 1925, does not mean only persons beneficially interested, and, therefore, where undivided shares of land were, before Jan. 1, 1926, vested under wills in trustees for sale, these trustees are "persons interested" in the land within cl. 4, and, under sub-para. (iii), may appoint trustees of the land in place of the Public Trustee.

Per Astbury, J.: Part IV of the Act of 1925 does not have the effect, in cases coming within its scope, of destroying all the provisions contained in wills under which the property was previously held.

**Notes.** Followed: *Re Hayward, Merson* v. *Hayward*, [1928] 1 Ch. 367.

As to the transitional provisions under the Law of Property Act, 1925, see 27 Halsbury's Laws (2nd Edn.) 619 et seq., and for cases see 40 Digest (Repl.) 858–863. For Law of Property Act, 1925, see Halsbury's Statutes (2nd Edn.) 859.

**Adjourned Summons** issued under s. 49 of the Law of Property Act, 1925, by the vendors of certain land for the decision of the question whether, where land was held in undivided shares on Jan. 1, 1926, the trustees for sale of some of the undivided shares were "persons interested" in the land so as to be able to join in appointing trustees of the entirety of the land under cl. 4 of para. 1 of Part IV of Sched. I to the Act.

By a deed of Mar. 1, 1910, certain land was conveyed to William Dewhirst Cliff, Joseph Cliff, Walter Cliff, and Stephen Cliff in fee simple in equal shares as tenants in common. Joseph Cliff died on June 9, 1914, having by his will dated Oct. 3, 1911, appointed Joseph Tertius Talbot Cliff and Richard Borrough Hopkins executors and trustees thereof, and, after giving certain legacies, devised and bequeathed the residue of his real and personal estate to his said trustees upon trust to sell and convert the same and to stand possessed of the proceeds upon trust to divide the same into eight equal portions and to hold the same upon certain trusts. Walter Cliff died on Mar. 1, 1917, having by his will dated Dec. 22, 1916, appointed Richard

Borrough Hopkins and Thomas Wardrop Griffith executors and trustees thereof, and having devised the residue of his real and personal estate to his trustees upon certain trusts. William Dewhirst Cliff died in 1917, having by his will appointed his wife Elizabeth Cliff, his sons Harold Edward Cliff, William Percy Cliff and Joseph Tertius Cliff, and Richard Borrough Hopkins executors and trustees thereof, and devised and bequeathed the residue of his real and personal estate to his trustees upon certain trusts. Elizabeth Cliff, Harold Edward Cliff, and Joseph Tertius Cliff were all dead, and by a deed of Oct. 1, 1924, Oliver Scatcherd Hopkins was appointed a trustee of the will. By a deed of Sept. 1, 1926, Oliver Scatcherd Hopkins was appointed an additional trustee of the will of Walter Cliff. Stephen Cliff, who was entitled to an undivided fourth share in the land, was still living.

On Jan. 1, 1926, the entirety of the land, being held in undivided shares, became vested in the Public Trustee upon the statutory trusts until trustees should be appointed in his place by persons interested in a half or more of the entirety of the land. By an agreement dated Sept. 6, 1926, Stephen Cliff, William Percy Cliff, Joseph Tertius Talbot Cliff and Richard Borrough Hopkins agreed to sell the land to the English Electric Co. in fee simple. By a deed dated Oct. 1, 1926, and made between William Percy Cliff, Richard Borrough Hopkins, and Oliver Scatcherd Hopkins—the trustees of the will of William Dewhirst Cliff—of the first part, Joseph Tertius Talbot Cliff and Richard Borrough Hopkins—the trustees of the will of Joseph Cliff—of the second part, Richard Borrough Hopkins and Thomas Wardrop Griffith—the original trustees of the will of Walter Cliff—of the third part, Oliver Scatcherd Hopkins, of the fourth part, Stephen Cliff, of the fifth part, and Stephen Cliff, William Percy Cliff, Joseph Tertius Cliff, and Richard Borrough Hopkins, of the sixth part, the parties thereto of the first five parts in exercise of the power conferred on them by the Law of Property Act, 1925, appointed the parties thereto of the sixth part to be trustees in place of the Public Trustee of the land comprised in the contract for sale for all the purposes of the Act. This appointment, if valid, enabled the vendors under the contract to make a good title, as the land was vested in them upon the statutory trusts for sale, but the English Electric Co. objected that the parties of the first four parts to the appointment being trustees for sale were not "persons interested" in the land within the meaning of cl. 4 of para. 1 of Part IV of Sched. I to the Law of Property Act, and that, therefore, the appointment was not made by persons interested in a half or more of the land, and that the vendors could not make a good title. By arrangement the vendors issued this summons to decide the question. By the Law of Property Act, 1925, Sched. I, Part IV, para. 1:

> "Where immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect . . . (4) In any case to which the foregoing provisions of this Part of this schedule do not apply, the entirety of the land shall vest (free as aforesaid) in the Public Trustee upon the statutory trusts: Provided that—(i) the Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until requested in writing to act by or on behalf of the persons interested in more than an undivided half of the land or the income thereof; (ii) After the Public Trustee has been so requested to act, and has accepted the trust, no trustee shall (except by order of the court) be appointed in place of the Public Trustee without his consent; (iii) Subject as aforesaid, any persons interested in more than an undivided half of the land or the income thereof may appoint new trustees in the place of the Public Trustee, with the consent of any incumbrancers of undivided shares (but so that a purchaser shall not be concerned to see whether any such consent has been given) and vest the land in the persons so appointed (free as aforesaid) upon the statutory trusts; or such persons may (without such consent as aforesaid) at any time whether or not the Public Trustee has

accepted the trust, apply to the court for the appointment of trustees of the land, and the court may make such order as it thinks fit, and if thereby trustees of the land are appointed, the same shall, by virtue of this Act, vest (free as aforesaid) in the trustees as joint tenants upon the statutory trusts ; (iv) If the persons interested in more than an undivided half of the land or the income thereof do not either request the Public Trustee or (whether he refuses to act or has not been requested to act) apply to the court for the appointment of trustees in his place, within three months from the time when they have been requested in writing by any person interested so to do, then and in any such case, any person interested may apply to the court for the appointment of trustees in the place of the Public Trustee, and the court may make such order as it thinks fit, and if thereby trustees of the land are appointed the same shall by virtue of this Act vest (free as aforesaid) in the trustees upon the statutory trusts."

*Topham*, *K.C.*, and *Dyne* for the vendors.
*Sir Arthur Underhill* and *Walter Banks* for the purchasers.

**ASTBURY, J.**—This is a vendor and purchaser summons for the interpretation of Part IV of Sched I to the Law of Property Act, 1925, in respect of land, forming part of a larger amount of land, conveyed in 1910 to four persons as tenants in common, one of whom is still living, while the other three are dead, having made wills dealing with their undivided shares in the property. The contract in question is dated Sept. 6, 1926, and is made between four persons called the vendors and the purchaser, and is an agreement in ordinary form to sell part of the larger estate. The vendors were appointed trustees by a deed of Oct. 1, 1926, by which the surviving tenant in common and the three sets of trustees for sale purported, under the powers of Part IV, to appoint the vendors trustees holding upon the statutory trusts in place of the Public Trustee, in whom the property comprised in the contract had become vested upon the Law of Property Act, 1925, coming into effect.

The sole question is whether or not the vendors were validly appointed trustees within the meaning of Part IV. Part IV begins :

"Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect."

Clauses 1, 2, and 3 do not apply to this case, but cl. 4 is applicable. [His Lordship read the material parts of cl. 4 and continued :] There is no doubt that the land in question vested in the Public Trustee under para. 4, and that the legal estate vested in him. But, under sub-s. (i), he could not act as trustee unless requested so to do "by or on behalf of the persons interested in more than an undivided half of the land or the income thereof." Subsection (iii) is relied upon by the vendors. Under sub-s. (iv) parties interested may apply to the court for the appointment of trustees in place of the Public Trustee. That has not been done and the persons interested here wished to be spared the necessity of so applying to the court. The question appears to turn on whether these three sets of will trustees and the surviving tenant in common are or are not together "persons interested in more than an undivided half of the land or the income thereof." If they are so interested, then the appointment of the vendors as trustees is good; if they are not then it is invalid.

Counsel for the purchasers suggest that "persons interested" within the meaning of cl. 4 mean "persons beneficially interested," the effect of which contention, if correct, would be that persons beneficially interested under these complicated wills must be found, who, with the surviving tenant in common, can make up the necessary "persons interested." This does not trouble the purchasers, as they say that, if this is impossible, application must be made to the court to appoint trustees. The vendors contend that cl. 4 must be read as meaning what it says,

and that it is impossible to say that these trustees for sale are not persons interested. There may be a difficulty in saying that they are now interested in the land, after it has vested in the Public Trustee, but there can be no question that they are interested in the proceeds. It is very likely that the draftsman intended the words "persons interested" to mean the same as they do in s. 35, after the land has been sold. I am inclined to think that "persons interested" must have been intended to mean persons who were so interested before Part IV took effect. I think that the persons making the appointment of the vendors as trustees were undoubtedly interested in the income of the land to a greater extent than one half.

There is one matter to which I must refer. It is contended by the purchasers that the effect of Part IV is not only to vest the legal estate in the land in the persons made trustees upon the statutory trusts, but that it takes away from the trustees for sale under the wills all their rights. I cannot think that the framers of the Act meant anything of the kind. It seems to me most alarming to suppose that Part IV has the effect, in cases coming within its scope, of destroying all the provisions contained in wills under which the property was previously held. Fortunately, I have not to consider that question, but only whether the vendors have been duly appointed trustees within the meaning of Part IV, para. 1, cl. 4. In my opinion, they were duly appointed, and the purchasers' objection fails.

Solicitors: *Linklaters & Paines*, for *Scatcherd Hopkins & Brighouse, Leeds.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

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## BRITISH AND NORTH EUROPEAN BANK, LTD. *v.* ZALZSTEIN

[King's Bench Division (Sankey, J.), February 18, March 1, 1927]

[Reported [1927] 2 K.B. 92; 96 L.J.K.B. 539; 137 L.T. 127; 43 T.L.R. 299]

*Bank—Passbook—Credit entry—Evidence of payment into account—Conclusiveness.*

A customer's account at a bank was overdrawn. The manager, in order to deceive the bank and also the auditors, inserted fictitious credit entries into the account, showing an apparent credit or reduced overdraft. Neither the bank nor the customer had any knowledge at the time of the entries, but later the customer accepted the account in which they appeared. In an action by the bank against the customer to recover the amount of the overdraft.

**Held:** although primâ facie a credit entry in a customer's passbook was an admission by the bank in his favour, in every case where a mere book entry could be treated as a payment some other circumstance must be present, e.g., some communication of circumstances to the customer and some acting on it by him and alteration in his position; in the circumstances of the present case the defendant was not entitled to regard the credit entries as payments into his account and ignore the debit entries; and, therefore, the bank were entitled to succeed.

**Notes.** As to the effect of entries in a passbook see 2 Halsbury's Laws (3rd Edn.) 209 and for cases see 3 Digest 243.

Cases referred to:

(1) *Marriot* v. *Hampton* (1797), 7 Term. Rep. 269; 2 Esp. 546; 101 E.R. 969; 12 Digest (Repl.) 630, *4858.*

(2) *Eyles* v. *Ellis* (1827), 4 Bing. 112; 12 Moore, C.P. 306; 5 L.J.O.S.C.P. 110; 130 E.R. 710; 3 Digest 303, *974.*

(3) *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K.B. 465; 73 L.J.K.B. 742; 91 L.T. 175; 52 W.R. 670; 20 T.L.R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281; 3 Digest 240, *677.*

(4) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry. K. 401; 107 E.R. 1064; 12 Digest (Repl.) 612, *4735.*

(5) *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K.B. 1010; 78 L.J.K.B. 964; 100 L.T. 516; 25 T.L.R. 402; 53 Sol. Jo. 337; 14 Com. Cas. 116; 16 Mans. 234; 3 Digest 232, *636.*

(6) *Holt* v. *Markham*, [1923] 1 K.B. 504; 92 L.J.K.B. 406; 128 L.T. 719; 67 Sol. Jo. 314, C.A.; 12 Digest (Repl.), 612, *4736.*

**Action** tried before SANKEY, J., as a short cause.

The plaintiffs claimed the sum of £2,392 8s. 6d. (subject to certain adjustments) as due to them in respect of an overdrawn account of the defendant at the plaintiff's bank. The defendant contended that in law the overdraft had been paid off to the extent of £2,000. Towards the end of 1923 the defendant had two accounts with the plaintiff bank, being overdrawn on No. 1 to the extent of £600, and in respect of No. 2 to the extent of some £2,300. One Wizotzky had guaranteed the defendant's overdraft up to £2,000, and so the defendant's account was in debit to the extent of £900 in excess of his allowed overdraft. The manager, of the bank, one Kiaer, was anxious about the account, but could not get Wizotzky to put it in credit. Kiaer did not want his company or the auditors to see that the account was overdrawn, and, therefore, he set about to think how he could get the account put in apparent credit. He had at that time a power of attorney of a Mr. Rist, his brother-in-law, and in September, 1923, he put £2,000 from Rist's account to the apparent credit of defendant's No. 1 account. The result of his doing so was to put that account into apparent credit, while No. 2 account showed a debit of £2,260 19s. 6d. On Oct. 11, 1923, Kiaer transferred the £2,000 from No. 1 account to No. 2 account. In giving evidence, he admitted that he carried out this manœuvre in order, in his own interest, to deceive the auditors of the bank. The defendant never knew about it for weeks afterwards, but in a letter to him dated Nov. 14, 1924, his account was enclosed showing the book entries above referred to. Subsequently Rist's account was altered by transferring a credit of £2,000 to him. The net effect of these transactions was to leave the position of the defendant exactly as it had been. The defendant was repeatedly pressed for payment of the overdraft and copies of the account were sent to him. He did nothing to liquidate the overdraft and at last a writ was issued.

*D. N. Pritt* for the plaintiffs.

*S. O. Henn Collins* for the defendants.

*Cur. adv. vult.*

Mar. 1. **SANKEY, J.,** read the following judgment.—The plaintiff bank claim the sum, subject to adjustment, of £2,392 8s. 6d., being a balance alleged to be due by the defendant to them in respect of the defendant's account with them for money lent, bank charges and interest—in other words, for a sum due in respect of an overdrawn account. In fact the sum in question is the amount of the overdrawn account. The defendant himself has not paid anything in respect of it, and the plaintiffs are entitled to recover unless, as the defendant alleges, the circumstances of the case permit him to say that in law the overdraft has been paid off. Those circumstances are as follows. [His Lordship set out the facts as already stated and continued:] In the proceedings under Ord. 14 the defendant filed an affidavit in which he had alleged that his guarantor Wizotzky had paid the sum of £2,000 on his behalf, and the case was remitted for trial. Subsequently, as I was informed, the defendant obtained an adjournment in order that he might prove

these facts. The adjournment was granted, but he would never have been able to prove such facts, for Wizotzky had never paid it at all. All that had taken place had been, as above stated, that certain book entries had been made. When the matter came before me the defendant was unable to prove that Mr. Wizotzky had paid the money, nor was he able himself to go into the witness-box, but for the first time the point was taken for him that he was entitled in law to rely upon the facts which had occurred as constituting payment. The way the case was put for him was as follows: It was said: (i) That when the £2,000 was placed to his credit in the way above mentioned, that £2,000 was a payment to him and became his and his overdraft was liquidated to that extent. (ii) That the bank had no right or authority to make the subsequent debit, and, therefore, their act in doing so was void and he was entitled to rely upon the £2,000 as a payment to him and to his credit and to disregard the debit.

The question for decision is whether he is so entitled. I was referred on the defendant's behalf to the cases collected in SMITH'S LEADING CASES (12th Edn.), vol. II, p. 403, under *Marriot* v. *Hampton* (1) with regard to money paid under mistake and also to *Eyles* v. *Ellis* (2). Before discussing the matter it is necessary to find or to emphasise certain facts. (i) The defendant never knew anything about these transactions at the time they took place, and the first time he knew anything about the book entries was after both the credit and debit had been made, and when the account showed the sum (subject to adjustment) now sued for. (ii) The defendant never objected to the accounts as delivered to him and never took this point till the hearing of the case. (iii) The manager of the bank made the book entries for his own purpose to deceive the auditors. (iv) The bank itself knew nothing about these transactions. I am of opinion that the cases which have been decided on mistakes of fact have very little to do with the present case. Indeed, the defendant contended that there was no mistake here, for the bank manager did what he intended to do and did not do it in consequence of any mistake or misapprehension, the main argument for him being that he was entitled to treat the entry as payment, and he cited *Eyles* v. *Ellis* (2) as being in his favour. In my view, that case is wholly distinguishable. There the plaintiff and defendant each kept an account with the same banker. The plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote stating that he had caused the amount to be transferred to his account, and the banker wrote to the plaintiff to the same effect. At the time the transfer was made in the books of the banker, the defendant's account was overdrawn. The bank having stopped payment, it was held that the transfer was equivalent to payment by the defendant to the plaintiff. BEST, C.J., said:

> "Though no money was actually transferred, yet as the bankers gave the plaintiff credit for the amount, that was equivalent to an acknowledgment by them that they had received the rent from the defendant on account of the plaintiff. The plaintiff might then have drawn for the sum thus transferred."

See HART ON BANKING (3rd Edn.) p. 214. It is true that the entries were made by clerks in that case, but it was not suggested that the clerk had no authority to make them or that they were making them for their own purposes only. In the present case the manager was making the entries in fraud of his employers and for his own purposes.

The law applicable to the subject is, in my view, rather to be found in that branch which deals with the effects of entries in passbooks, and the real question is: Has there been payment in this case? The present position of the law is said to be most unsatisfactory: see PAGET ON BANKING (4th Edn.) p. 344. I do not think that it can be dogmatically asserted that an entry made in a passbook is in all cases conclusive and binding on the bank, or conclusive or binding upon the customer, but each case must be judged on its own particular facts, although the customer in whose favour the entry stands starts with the advantage that primâ facie it is

an admission by the bank in his favour which cannot in some cases be rebutted. BIGHAM, J., has said that statements in a passbook are statements on which a customer is entitled to act: see *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank* (3). That may be so in certain events, but if a customer after some months examines his passbook and sees a credit of £2,000 and a debit of a similar amount immediately after and knows nothing about either entry, is he entitled to say: I will act on the credit and disregard the debit? Is he entitled to regard and accept the credit as a payment and to disregard and repudiate the debit? In my opinion, he is not. I think, too, that in every case where it is sought to treat a mere book entry as a payment, some other circumstance must be present and relied upon to enable the customer in whose favour it is made to succeed, either some express previous authority to pay or some communication of the circumstance to the customer, and some acting on it by him: see *Eyles* v. *Ellis* (2), and *Skyring* v. *Greenwood* (4). There must be something in the nature both of a payment by one party and a receipt by the other, or some alteration by the customer, in whose favour the book entry was made, in his position to induce the court to say that the entry was payment and the money cannot be recovered from him.

In the present case the defendant never knew of the entry or alleged payment till after a debit of a similar amount had been made, never altered his position because of it, and although it cannot be said that mere acquiescence in the debit entry binds him: see *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* (5), there is ground for saying there was no payment at all in this case: see *Holt* v. *Markham* (6) per SCRUTTON, L.J., [1923] 1 K.B. at p. 514. I find (i) that the bank manager never meant the entry to be a payment or to appropriate it as such; (ii) that the defendant himself eventually knew of it and never regarded the entry as a payment. In these circumstances I am of opinion that the entry was not a payment nor can it be relied upon as such. In the result, the plaintiffs are entitled to judgment, the exact figures of which I was told would be adjusted by the parties.

*Judgment for plaintiffs.*

Solicitors: *Guedalla, Jacobson & Spyer; Stephenson, Harwood & Tatham.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

# PURNELL *v.* ROCHE AND ANOTHER

[CHANCERY DIVISION (Romer, J.), March 23, 24, April 13, 1927]

[Reported [1927] 2 Ch. 142; 96 L.J.Ch. 434; 137 L.T. 407; 71 Sol. Jo. 452]

B

*Limitation of Action—Mortgage—Foreclosure—Commencement of period of limitation—Extension in case of disability—Disability arising after beginning of limitation period—Real Property Limitation Act*, 1833 (3 *& 4 Will. 4, c.* 27), *s.* 3—*Real Property Limitation Act*, 1874 (37 *& 38 Vict., c.* 57), *s.* 3.

The right of a mortgagee to commence proceedings for foreclosure first accrues at the date fixed for the redemption of the mortgage, and not at that of the last payment of interest. A mortgagee becoming of unsound mind after the former date is not within the protection of s. 3 of the Real Property Limitation Act, 1874.

C

**Notes.** The Real Property Limitation Acts, 1833, 1837, and 1874, were repealed by the Limitations Act, 1939, of which see now ss. 18 and 22.

As to the limitation of foreclosure actions see 24 HALSBURY'S LAWS (3rd Edn.) 272, and as to the extension of limitations periods for disability see ibid. 293. For cases see 32 DIGEST 460, 471. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

D

Cases referred to:

E

(1) *Doe d. Jones* v. *Williams* (1836), 5 Ad. & El. 291; 2 Har. & W. 213; 6 Nev. & M.K.B. 816; 5 L.J.K.B. 231; 111 E.R. 1175; 32 Digest 406, *848*.

(2) *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; 32 Digest 406, *848i*.

(3) *Pugh* v. *Heath* (1882), 7 App. Cas. 235; 51 L.J.Q.B. 367; 46 L.T. 321; 30 W.R. 553, H.L.; 32 Digest 474, *1385*.

F

(4) *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547; 9 L.T.O.S. 175; 11 Jur. 458; 153 E.R. 1307; affirmed sub nom. *De Beauvoir* v. *Owen* (1850), 5 Exch. 166; 19 L.J.Ex. 177; 14 L.T.O.S. 490; 14 J.P. 174; 155 E.R. 72, Ex.Ch.; 32 Digest 429, *1041*.

**Adjourned Summons** by a mortgagee for foreclosure or sale of certain freehold hereditaments at Cheltenham.

G

The premises were assured to the plaintiff, the mortgagee, by James Roche, the mortgagor, by an indenture of mortgage dated Sept. 27, 1902, for securing payment to the mortgagee of the principal sum of £350 and interest, subject to redemption on payment on Mar. 27, 1903. The premises had remained since the date of the mortgage in the undisturbed occupation of the mortgagor and those claiming under him. On Feb. 23, 1907, the mortgagee became of unsound mind, and she had ever since continued to be of unsound mind, but no receiver of her estate was appointed until Jan. 28, 1926, when her husband, Robert John Purnell, was appointed as receiver. The last date on which a payment in respect of interest was made prior to the mortgagee's becoming of unsound mind was Jan. 31, 1907, when the mortgagor paid to her husband, as her agent, the sum of £17 10s. in respect of interest for the year ending Sept. 27, 1906. A further payment was made to the husband on May 25, 1907, on account of interest due on Mar. 27, 1907, but since that date there had been no payment of interest under the mortgage, and there was no evidence of any acknowledgment in writing of the mortgagee's title having been given by the mortgagor since the date of the mortgage. The mortgagor died in 1923, and this summons was issued in 1926.

H

I

*Owen Thompson, K.C.*, and *Jolly*, for the mortgagee.

*G. O. Slade* (*Earengey* with him), for the representatives of the mortgagor.

*Cur. adv. vult.*

April 13. **ROMER, J.,** read the following judgment.—This is a summons by a mortgagee to enforce a mortgage by foreclosure or sale. The question that I have to determine is whether or not the mortgagee's rights are barred by the Real Property Limitation Acts. The defendants, claiming through the mortgagor, who died on Aug. 31, 1923, contend that the mortgagee's rights have been barred by virtue of the Real Property Limitation Acts, more than twelve years having elapsed since the date of the last payment of interest, whether that date be taken as Jan. 31, 1907, or May 25, 1907. It is, on the other hand, contended on behalf of the mortgagee that, having regard to the fact that at the last-mentioned date she was —and still is—of unsound mind, her rights under the mortgage have been preserved by virtue of s. 3 of the Real Property Limitation Act, 1874. That section, so far as material, is as follows:

> "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land . . . shall have first accrued as aforesaid such person shall have been under [the disability of] unsoundness of mind, then such person . . . may, notwithstanding the period of twelve years . . . hereinbefore limited shall have expired, make an entry . . . or bring an action or suit, to recover such land . . . at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability."

The mortgagee alleges that having regard to the Real Property Limitation Act, 1837, her right to bring this action for foreclosure, which is "an action to recover land" within the meaning of the statutes, must be deemed, for the purposes of s. 3 of the Act of 1874, to have first accrued on May 25, 1907. The defendants, on the other hand, contend that the payment of interest on May 25, 1907, was not such a payment of interest as is mentioned in the Act of 1837, inasmuch as Robert John Purnell had no authority to receive the money on behalf of his wife, and that such payment must, for the present purposes, be treated as a nullity.

The defendants further contend that, even if such payment was a payment of interest secured by the mortgage within the meaning of the Act of 1837, yet that the mortgagee's right to make her entry or bring her action first accrued either at the date of the mortgage, or, at latest, at the date (Mar. 27, 1903) when the estate of the mortgagee became absolute at law. This second contention of the defendants raises a question of some difficulty which has never been the subject of judicial decision. After giving the matter the best consideration I can, I have come to the conclusion that the defendants are right in this second contention. It is unnecessary, therefore, to consider whether or not the payment on May 25, 1907, was a payment of interest of which the mortgagee could have availed herself for the purposes of the statute of 1837.

My reasons for coming to that conclusion are as follows: By s. 1 of the Act of 1874, which replaces s. 2 of the Real Property Limitation Act, 1883, it is provided (so far as material) that no person shall make an entry or bring an action or suit to recover any land but within twelve years next after the time at which the right to make such entry or to bring such action or suit shall have first accrued to the person making or bringing the same. By s. 3 of the Act of 1833 (which applies equally to the Act of 1874), it is provided that in the construction of the Act the right to make an entry or bring an action shall be deemed to have first accrued at the times therein mentioned. The only times mentioned that are material to the present are the following, which I will designate A and B.

> "A: When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt,

then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument. B: When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

When the Act of 1833 came into force, considerable doubt was felt as to its effect upon mortgagees of land. For whether their right to make an entry or to bring their action accrued within the meaning of s. 2 of the Act at the date of the mortgage, or was to be deemed to accrue at that date by virtue of provision A in s. 3, or whether it was deemed to accrue at the date of the estate of the mortgagee becoming absolute at law by virtue of provision B in that section, the mortgagee's right would at the end of twenty years, and assuming there was no acknowledgment under s. 14, have been barred, even though interest had been regularly paid to him by the mortgagor. For the statute contains no exception to meet the case of payment, and the fact that the possession of the mortgagor was not adverse to the mortgagee was no longer a material consideration. Such doubts were expressed by PATTESON, J., in *Doe d. Jones* v. *Williams* (1) both in the course of the argument and in giving judgment. In the course of the argument he said:

"If the legislature meant to except the payment of interest, it is very odd that they did not do so in express terms."

In the course of his judgment he said:

"How far, under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all."

This last observation must, I think, have been intended to apply exclusively to the case of a mortgagee to whom payments had been made in respect of interest or principal. If no such payment be made for twenty years from the date of the mortgage or the day of default the learned judge could not, I think, have been in doubt that the mortgagee would be barred under ss. 2 and 3 of the Act. Indeed, in *Wrixon* v. *Vize* (2) LORD ST. LEONARDS said this:

"Now although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly falls within the second section. This admits of no doubt and was decided by the case of *Doe d. Jones* v. *Williams* (1) . . . The second section having provided the twenty years as a limitation of time, the third section declares from what period the time shall run in the several cases provided for. The only provision in this section which could apply to mortgages is the last part of it."

He then read the provision B to which I have referred and quoted the observation of PATTESON, J., that if the third section was intended to comprehend the case of a mortgagee it was ill penned.

I am not sure whether LORD ST. LEONARDS intended to express any concluded opinion whether any part of s. 3 applied to a mortgagee. But if it does not, then, inasmuch as according to him a mortgage is within s. 2, the mortgagor would, in the absence of any payment, be barred at the end of twenty years from the date of the mortgage. For it was laid down by LORD CAIRNS in *Pugh* v. *Heath* (3) that s. 3 of the Act in defining when the right shall be "deemed to have accrued" is not necessarily exhaustive. Where, therefore, a mortgagor remains in occupation without payment on account of interest or principal, then in the absence of written acknowledgment of the mortgagee's title, the mortgagee would be barred by the statute of 1833 either after the expiration of twenty years from the execution of the mortgage deed or at the expiration of a like period from the date fixed by the

deed for redemption. The doubt was as to what was the effect of a payment of principal or interest within the period. In order to remove this doubt, the Real Property Limitation Act, 1837, was passed. That Act, as amended by s. 9 of the Real Property Limitation Act, 1874, is as follows:

> "Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled 'An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed: It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding."

It will be observed that this Act does not provide that the right to make an entry or bring an action or suit shall be deemed to have first accrued at the time of the last payment. It differs in this respect materially from s. 14 of the Act of 1833 dealing with acknowledgments in writing. As pointed out by LORD ST. LEONARDS in *Wrixon* v. *Vize* (2), the Act of 1837 left the former Act still to indicate when the right first accrued. If then, as I think is the true view, the mortgagee's right in the present case first accrued or must be deemed to have first accrued at the latest on Mar. 27, 1903, at which time she was not of unsound mind, she cannot get any assistance from s. 3 of the Act of 1874. That section, according to its terms, only applies if the mortgagee was of unsound mind when the right "first accrued as aforesaid." It follows, I think, from *Owen* v. *De Beauvoir* (4) that these words are equivalent to "first accrued or must be deemed to have first accrued." In the case, therefore, of an acknowledgment in writing made while a mortgagee is of unsound mind, the mortgagee could maintain an action at any time within six years after ceasing to be under disability. Between an acknowledgment in writing and a payment of interest, which is also an acknowledgment, though not in writing, there would seem to be but little difference in principle. But I do not see how, in the face of the express words of the statute, I can hold that a disability beginning after the date when the right first accrued or must be deemed to have first accrued entitles the mortgagee to the protection given by s. 3 of the Act of 1874. The action must be dismissed.

Solicitors: *Smiles & Co.*, for *Steel & Broom*, Cheltenham. *McKenna & Co.*, for *W. H. Russell*, Cheltenham.

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

A

# RUAPEHU (OWNERS) *v.* R. AND H. GREEN AND SILLEY WEIR, LTD. THE RUAPEHU

[House of Lords (Viscount Haldane, Lord Sumner, Lord Atkinson, Lord Wrenbury and Lord Blanesburgh), January 31, February 1, April 4, 1927]

B

[Reported [1927] A.C. 523; 96 L.J.P. 99; 137 L.T. 353; 43 T.L.R. 402; 71 Sol. Jo. 330; 32 Com. Cas. 323; 17 Asp. M.L.C.]

*Dock—Limitation of owners' liability—Negligence of servant within dock area—Dock owned by ship repairers—Damage to ship during repair—Merchant Shipping (Liability of Shipowners and others) Act*, 1900 (63 & 64 *Vict.*, *c.* 32), *s.* 2.

C

The plaintiffs claimed to limit, under s. 2 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, their liability for damage by fire sustained by the defendants' steamship while she was being repaired by the plaintiffs in the plaintiffs' dry dock. The damage, which was caused without the plaintiffs' "actual fault or privity" within s. 2, resulted from the negligence of the plaintiffs' servants while performing the repairs.

D

**Held:** by Viscount Haldane, Lord Sumner, and Lord Atkinson (Lord Wrenbury and Lord Blanesburgh dissenting), the right to limitation given by s. 2 (1) depended on whether or not the act giving rise to the claim for damages was done within the area of a dock, as was the fact in the present case, and, therefore, the plaintiffs were entitled as dock owners to limit their liability under the sub-section although the damage was caused while they were acting as ship repairers.

E

*London & South-Western Rail. Co.* v. *James* (1) (1872), 8 Ch. App. 241, applied.

*The City of Edinburgh* (2), [1921] P. 274, distinguished.

Decision of the Court of Appeal, [1927] P. 47, affirmed.

F

**Notes.** Referred to: *Goss Millard* v. *Canadian Government Merchant Marine, Ltd.*, *American Can Co.* v. *Same*, [1927] 2 K.B. 432; *The Ruapehu No.* (*2*), [1929] P. 305; *Nicholson & Co.* v. *Humorist*, *The Humorist*, [1946] P. 198.

As to the limitation of the liability of shipowners and dock owners see 30 Halsbury's Statutes (2nd Edn.) 940 et seq., and for cases see 41 Digest 914 et seq. For Merchant Shipping Act, 1894, and Merchant Shipping (Liability of Shipowners and others) Act, 1900, see 23 Halsbury's Statutes (2nd Edn.) 395 and 780 respectively.

G

Cases referred to:

(1) *London and South Western Rail. Co.* v. *James* (1872), 8 Ch. App. 241; 42 L.J.Ch. 337; 28 L.T. 48; 21 W.R. 151; 1 Asp. M.L.C. 526, L.C. & L.JJ.; 41 Digest 917, *8076*.

H

(2) *The City of Edinburgh* [1921] P. 70; 90 L.J.P. 106; 125 L.T. 375; 37 T.L.R. 148; affirmed [1921] P. 274; 90 L.J.P. 304; 125 L.T. 375; 37 T.L.R. 468; 15 Asp. M.L.C. 234, C.A.; 41 Digest 917, *8082*.

**Appeal** from an order of the Court of Appeal (Bankes, Atkin, and Sargant, L.JJ.), reported [1927] P. 47, in an action for limitation of liability.

I

The plaintiffs, R. and H. Green and Silley Weir, Ltd., claimed under s. 2 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, to limit their liability in respect of damage caused to the defendants' steamship *Ruapehu* by fire while the plaintiffs were carrying out repairs to the *Ruapehu* in their dry dock at Blackwall in May, 1923. The plaintiffs had been held liable for the damage sustained by the *Ruapehu*, but it was conceded that that damage was done without their actual fault or privity. The plaintiffs claimed to limit their liability to the sum of £69,067 being £8 per ton of the tonnage of the largest vessel using their

dry dock in the preceding five years. By s. 2 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900:

"(1) The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, [s. 742], shall not where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding £8 for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty, or exercises any power . . . (4) For the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks . . ."

The Court of Appeal held, reversing the decision of HILL, J., that s. 1 (1) should not be read subject to a limitation in respect of the nature of the act done, but that the proper limitation was in respect of the area in which the act was done. Thus, notwithstanding that the negligent act of the plaintiffs had been done in their capacity as ship repairers, they were entitled to limit their liability, since the act was done within the area of their dock. The defendants appealed.

*Jowitt, K.C.*, and *G. St. C. Pilcher* for the appellants.

*Macmillan, K.C.*, *Langton, K.C.*, and *Carpmael* for the respondents.

The House took time for consideration.

April 4. The following opinions were read.

**VISCOUNT HALDANE.**—This is an appeal from a judgment of the Court of Appeal which reversed a judgment of HILL, J., in an action brought by the respondents as plaintiffs in which they sought to limit their liability for damage and loss arising out of a fire to £69,067 7s. 2d. with interest. This limitation was claimed under s. 2 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, which enacts that (inter alios) the owner of docks of various kinds, which include dry docks, is not to be liable for loss or damage to any vessel, where the loss or damage is caused without this actual fault of privity, beyond a statutory limit. It is conceded that there was neither actual fault nor privity in this case. The respondents are the owners of a dry dock at Blackwall, and they carry on there the business of ship repairers. In May, 1923, the steamship *Ruapehu* was lying in the respondent's dry dock at Blackwall undergoing repairs which they were carrying out. A fire took place in her hold and the vessel was seriously damaged. The owners commenced an action for such damage before HILL, J. He gave judgment for the owners against the present respondents. The Court of Appeal affirmed his decision. The respondents then commenced the present action for a declaration, under the Merchant Shipping (Liability of Shipowners and others) Act, 1900, of limitation of liability. The question was raised whether the respondents were dock owners within the meaning of s. 2 of that Act, a preliminary point which was disposed of adversely to the respondents by HILL, J., as trial judge, but in their favour by the Court of Appeal. The only question now before the House on this appeal is whether the decision of the Court of Appeal in the respondents' favour on this point was right.

[HIS LORDSHIP read s. 2 (1) of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, and continued:] Sub-section (3) enacts that s. 504 of the Merchant Shipping Act, 1894, shall apply to s. 2 of the Act of 1900 as if the words "owner of a British or foreign ship" included a harbour authority and a conservancy authority, and the owner of a canal or of a dock. Sub-section (4) declares that for the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties. It is

clear that the respondents' dry dock at Blackwall was, at the material period, within the section. A

The real question which we have to determine is whether the Act means that the respondents, who were repairers as well as dock owners when doing the work which resulted in damage, are entitled to invoke the language used, or whether the limitation of liability is confined to acts done or omitted to be done by those whose function is that of dock owners only, and not, as in this particular case, of repairers also who are carrying out the repairs. HILL, J., the trial judge, thought that the negligence for which the present respondents had been held liable had nothing to do with docking, or the arrangements of shorers or blocks, or the pumping out or letting in of water, or other matters necessary to the proper management of a dry dock or of a ship in relation to a dry dock. The work of the respondents was done, he thought, in the capacity of ship repairers, and not in that of dry-dock owners. If shipowners were to hire space in a dry dock belonging to a public authority, and to employ ship repairers to do repairs to a ship while she lay there, and the repairers incurred liability by negligence, it would be clear that the liability as repairers did not amount to liability as dock owners. When liability is incurred by exactly the same kind of negligence, he was of opinion that the fact that the ship was in a dry dock did not turn the work into work done in the capacity of dock owners, for the mere circumstance that the ship was in the repairer's dry dock could not have that effect. Suppose that the negligence gave rise to a fire in the sheds belonging to the yard of those claiming limitation of liability and that the fire spread to the ship, no one could say that this was negligence of the claimants in the capacity of dry dock owners, or that the liability was incurred in that capacity. This illustration, and other analogous illustrations which the learned judge gave, seemed to him to show that the liability in the present case did not arise from negligence from work done in the capacity of dock owners. B C D E

The first observation which occurs on this reasoning is that the question of what liability arises must be determined by the words used in the section, and not from what might reasonably be expected in the actual circumstances of a case such as this. The legislature has, on grounds which may seem good or seem bad, employed certain language. With the special grounds which influenced it we have nothing to do. The only question is whether the words are clear. Now, turning to these, I cannot find any ambiguity in the language. It declares that the owner of a dry dock is not to be liable in excess of the statutory limit, and the conditions defining the limit are to be sought for within the area over which the dock owner performs any duty or exercises any power. There is not a word about the capacity in which the dock owner has acted. It may well be that Parliament desired to encourage the construction of docks even by professional repairers. The expressions used in the statute are indistinguishable from those used in the Merchant Shipping Act, 1894, and in earlier Acts of which that statute took the place. The dock owner is put in the same position as was a shipowner. If we turn to the case of a shipowner, a question analogous to that which arises in this case was settled as long ago as 1872, not, it is true, by this House, but by the full Court of Appeal in Chancery, constituted of LORD SELBORNE, JAMES, L.J., and MELLISH, L.J., in *London and South-Western Rail. Co.* v. *James* (1). The railway company, who were also shipowners, contracted to carry passengers and goods through from London to Guernsey. The passengers and goods were taken under the through contract by railway from London to Southampton, and were there put on board a ship which belonged to the railway company. The ship, on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. On claims for damages in respect of loss of goods and of life, it was held that the railway company was entitled to the limitation on liability imposed by the then Merchant Shipping Act, 1862, s. 54, the terms of which were for present purposes completely similar to those as regards ships of the Act of 1894. It was argued that the limitation had no application to the case of persons and goods F G H I

carried by the shipowner when he was not merely shipowner but also carrier. But LORD SELBORNE, L.C., and the lords justices held that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief given by the statute. The case I have cited presents only an analogy, but I think that the analogy is a very close one, especially for the reasons given in some detail, not only by LORD SELBORNE, L.C., but by MELLISH, L.J. The court refused to entertain a distinction founded on the capacities in which the railway company contracted. It was held that the words of the enactment were so free from ambiguity as not to admit of any such distinction being drawn. Liability for what happened by the loss of the ship was specifically limited. I cannot find that this decision was noticed in the courts below or in the arguments here, but I think that the principle adopted in it comes very close to that of the present case.

In the Court of Appeal, where the judgment of HILL, J., was reversed, BANKES, L.J., held that some restriction must be put on the generality of the words in the section enacting the limitation. He thought that this was the result of the decision in *The City of Edinburgh* (2). That was a case in which by the negligence of the servants of a firm of ship repairers a vessel and its cargo were damaged by fire. The repairs were being done in a dock belonging to the Mersey Docks and Harbour Board. The ship repairers sought to limit their liability on the ground that they were owners of a dry dock at Garston, some distance away. It was held by HILL, J., who also tried that case, that they were not entitled to a limitation of their liability under the section we have to construe, for the section, in restricting the liability of the dock owner, had, in his view, regard to the area over which he "performs any duty or exercises any power." The liability was one incurred by the ship repairers as such at a distance and not as dock owners or at or near their dock. The Court of Appeal—LORD STERNDALE, M.R., SCRUTTON, L.J., and YOUNGER, L.J.—affirmed this judgment, but expressions were used by the two former which point to a somewhat different reason from that of HILL, J., having been in their minds. LORD STERNDALE, M.R., thought that the words must refer to a limitation of liability of the dock owner as such, that is, "in respect of something in some way connected with his dock." SCRUTTON, L.J., considered that the very wide words, if interpreted in their widest sense, would lead to absurdity, and it was an absurdity to limit the liability of a person who owned a dock for anything he chose to do in another capacity. Thus, while HILL, J., made area or geographical restriction the basis of his judgment, the Court of Appeal, or at any rate the majority there, determined the case rather on the principle of distinguishing the capacity in which the repairer acted. I am not sure that HILL, J., in his judgment in the present case, was not influenced, contrary to his own opinion, towards the view of capacity rather than geographical area that appears to have been adopted by the Court of Appeal, which differed from his opinion on the point in *The City of Edinburgh* (2). Anyhow, in reversing his judgment in the case now before us, the Court of Appeal, differently constituted, reverted to the principle that the basis of the limitation was area and not capacity. BANKES, L.J., expressly says so. He doubted whether *The City of Edinburgh* (2) decision was really based on any different principle, although he admits the ambiguity of some of the expressions used in giving it. He held that to introduce a limitation which depends on the nature of the act done was to create unnecessary confusion. It was simpler to read the limitation as confined to area. ATKIN, L.J., agreed. He considered that to read the words of the section literally and to apply them to the circumstances of the present case, gave rise to no such absurdity as was contended for in *The City of Edinburgh* (2). Moreover it would often be impossible to determine whether particular work was done by a person as repairer or as dock owner. SARGANT, L.J., agreed. He held that there was no such absurdity in the repairer's contention as would justify a departure from the grammatical and ordinary interpretation of the words used in the statute. I, also, think that the words of the statute are too plain to admit of any other restraint being put on their operation than that of geographical area.

I think that this is the result of the interpretation placed on the statute in 1872 in *London and South-Western Rail. Co.* v. *James* (1). That interpretation appears to me to be the true one, and I am of opinion that this appeal should fail.

**LORD SUMNER.**—The respondents, the plaintiffs in the limitation action, carry on business as ship repairers at Blackwall, where they own a dry dock. While they were repairing the appellants' steamship *Ruapehu* in their dry dock, fire broke out, without their actual fault or privity, and great damage was done to ship and cargo, for which at common law they were responsible. The evidence in the damage action was to the effect that the same negligence would have caused the same fire if the repairing work in question had gone on while the ship was afloat. No further evidence now material was given in the limitation action, but it was common ground that the respondents' business is to repair ships, and that at the time in question they were using their dry dock for the *Ruapehu* in the ordinary course of business. I think we must take this state of facts as the basis of this appeal. True we do not know whether the respondents have a wet dock or any other submerged ground than such as may be necessary for docking and undocking ships in connection with the dry dock ; we do not know whether they also do repairs to ships afloat within their premises or to ships elsewhere whether afloat or not ; we do not know whether they have any other business than that of ship repairers, but it seems to me that, if any of these questions could have affected the solution of the problem which arises on the primâ facie case for limitation of liability, the appellants should have provided the materials for such answers as might have served to modify or to negative that right. For present purposes the respondents are dry-dock owners ; the damage was done in their dry dock and by their servants in the course of their employment ; and we know of no business carried on by the respondents except that of ship repairers who use their dry dock for that purpose.

The language of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, is clear enough. "Dock owners," which includes dry-dock owners, without any specification of the use to which they put their docks, are expressly empowered, when liable for damage to ship and cargo occurring without their actual default or privity, to limit their liability as the respondents claim to do. The appellants' argument really is that the respondents are nevertheless not within the Act, because they are dry repairing dock owners, and themselves use their dry dock for one of the main purposes for which dry docks exist, namely, ship repairing. To adopt this argument is practically to strike dry docks out of sub-s. (4). The short answer is that the Act says nothing of the kind. The respondents fall within the description of those persons on whom the right of limitation is conferred. What is there in the words to restrict this description, so as to exclude them?

*The City of Edinburgh* (2) does not, in my opinion, touch this case. What had to be decided and what was decided there was how far, if at all, was the right to limitation available, where the ownership of the dock and the use of that dock had no connection whatever with the damage or with the injured ship or cargo. The answer was: Not at all. A contrary conclusion would have made the Act confer a personal immunity, at the expense of owners of ships and cargoes whom they had wronged, upon persons who happened to own a dock somewhere else. The policy of the Act, beyond an intention to protect dock owners from being crushed by liabilities for accidents, which they cannot always avoid, is not declared on its face and would only be a subject of speculation now, but it certainly was safe to say, as Lord Sterndale, M.R., said, that the section refers to a limitation of liability of the dock owner in respect of something in some way connected with his dock. This is the true ground of this decision, which, as a decision, cannot be questioned. I do not think it is either accurate or helpful to argue that this is a "docks clause" not a "repairers' clause," or that the action, which leads to the liability, must have been action by a dock owner "as such"—except in the sense of the above words—or must have consisted in "dock-owning activities." If a dry-dock owner

or a graving-dock owner is within the section, or whether or not—so far as the words go—he repairs ships in his dock or only hires it to others, I cannot see why he is not acting as a dry-dock owner "as such" when he repairs a ship in his own dock in the ordinary course of business. The appellants' argument really begs the question and further introduces criteria for distinguishing one case of damage from another almost infinitely complex, almost impossible to apply, and most arbitrary in their operation. The Act says nothing about them. They would not have been even plausible but for the notion that there is something in this kind of limitation, which public policy requires us to restrict, but this, as it seems to me, is purely a matter for the legislature. True, there is a rule that those who claim exemption from a common-law liability must bring themselves within it, but this depends on the language of the Act. Here the right to the limitation is clear, provided the respondents are dock owners, as they are.

The question is asked, à propos of Lord Sterndale's canon in *The City of Edinburgh* (2): "What connection is there in this case between the dry dock and the fire in the ship's hold?" The answer is: "The ship was in the respondent's dry dock and it was because she was in that dry dock that their careless workman was employed upon her at that time." True, he might equally have been employed on the *Ruapehu* if she had been lying afloat at buoys in the Thames and might have been equally careless there, but these were not the facts. It is true also that, if independent repairers had been at work on the *Ruapehu* in the respondents' dock and had been liable for the fire, they would have been liable in full, but that is because they would not be dock owners in any way connected with the damage. Just as we cannot, as a matter of construction, extend the section to them when they are not dock owners, so we cannot exclude the respondents from it when they are. The proposition is not "necessarily connected" or "inevitably connected" with the dock, but actually connected with it in some way. On the appellants' argument, in half the cases of fire on board ship, the shipowner would lose the benefit of the statutory limitation, because, as fire will break out equally on shipboard as on shore if one upset lighted lamps or flung lighted matches among inflammable merchandise, there would be none but a casual connection between the burning of the cargo and the ownership of the vessel. This would revolutionise what is well settled under the Act of 1894 and many earlier Acts. I see no reason for treating the amending Act of 1900 in any different way. It may be that the section fastens on ownership because the ground of limitation may be supposed to be the great inroad upon the property owned by the judgment debtor if he were cast in damages without statutory limit, though this would have been an argument for deciding *The City of Edinburgh* (2) the other way; but it throws no light on the question before us, or, if it does, the light favours the respondents, for the judgment debtors are equally liable for their servants' wrong-doing to the full extent of their property, whether the servants were heating rivets or fixing shores.

I think further that nothing can be founded upon the specification of the parties, who are to enjoy the benefit of limitation of liability, or on the reference to the "area," over which they "perform any duty or exercise any power." These expressions form part of the context, but they neither add to nor take anything from the main operative words. The parties are four, dock owners—with a statement of what the word "dock" includes; canal owners, with no such statement; harbour authorities; and conservancy authorities, both of these last as defined in the Merchant Shipping Act, 1894, s. 742, and not primâ facie as owners of docks in any sense of the word. I find nothing here that excludes the respondents from being "dock owners" or that restricts the kind of operation in the course of which the liability that is to be limited is to arise. The reference to an "area" is inserted primarily in order to show where the appropriate measure of the amount of the limited liability is to be found, but in any case the *Ruapehu* was within the respondents' "area" when she was burnt. The words "performs any duty or

exercises any power" are, it is true, odd words to apply to a private company using its own business premises and are suggestive of public authorities and undertakers; but, unless they have the effect of excluding private owners from the category of dock owners, which they clearly have not, they carry the present issue no further. As for the observation that the section, by including wharves and jetties in docks, may raise some difficult questions, when we come to consider whether in such cases the damage is "connected with" the dock, I agree that they may, and will consider them when they do, but I need say no more about them now. The only sound way of construing such a section is to follow its exact words and give effect to them, unless some plain necessity can be found for implying some limitation. There is no absurdity, no repugnance, no inconsistency produced by reading the words in their plain grammatical sense, and, so read, the conclusion must be that at which the Court of Appeal arrived. With that I agree. I think the judgment of the Court of Appeal should be affirmed and that this appeal should be dismissed.

**LORD ATKINSON.**—The facts have already been fully stated and it is unnecessary to repeat them. The parties are practically agreed as to the question which arises for decision in this appeal. The appellants in the seventh paragraph of their Case state it as follows:

> "It was agreed, as appears from the correspondence passing between the parties previous to the trial of the action before HILL, J., that the question raised by para. 3 of the amended defence whether the respondents were dock owners within the meaning of s. 2 of the Merchant Shipping Act, 1900, and whether they were entitled to limit their liability as such in the special circumstances of the present case, should be tried as a preliminary point and this is the only question for decision upon the present appeal."

The third paragraph of the amended defence runs as follows:

> "The defendants deny that the plaintiffs are dock owners within the meaning of the Merchant Shipping (Liability of Owners and others) Act, 1900, and further say that the said liability of the plaintiffs was incurred by them as ship repairers and not as dock owners."

The respondents in the second paragraph of their Case state it as follows:

> "The sole question which arises on this appeal is a preliminary point of law, namely, whether the respondents (plaintiffs in the action), who are owners of a dry dock at Blackwall, are entitled by virtue of s. 2 of the Merchant Shipping (Liabilities of Shipowners and others) Act, 1900, to limit their liability in respect of a fire caused by the negligence of their servants on board the steamship *Ruapehu* at a time when the said steamship was lying within the respondents' said dry dock."

A reference to a most helpful authority, not cited in argument, but appealing to one's common sense, as least in my view, shows that the contention of the parties is based upon a false principle. That authority is *The London and South-Western Rail. Co.* v. *James* (1). I shall refer to the case in detail presently, but I think I may at once say that it appears to me to determine that the right of the owners of a ship which has been lost or has met with an accident depends not so much on what was the nature of the thing which met with the accident causing damage as upon what that particular thing was engaged in doing at the time the accident happened. The particular thing in that case was a ship, and the work she was engaged in doing was carrying passengers and goods from Southampton to Guernsey. Repairs, even substantial repairs, may be executed on a ship while she is in a wet dock belonging to certain owners, such as putting new boilers or engines into her while she is afloat, just as they may be possibly in a graving dock belonging to the same owners. In both cases she is in the hands of repairers, the only difference being that she rests upon and is upborne by the water in the one case,

and rests upon mechanical supports in the other, but the owners of the docks, the harbour authority, or conservancy authority, exercise control over the graving dock as they do and claim to do over the floating dock. I think it is a mistake to suppose that in the case of the graving dock this authority of the owners, the harbour authority or the conservancy authority, is entirely superseded by that of the repairers, who happen to be executing repairs upon the ship, which they would not be if the repairs were effected in a floating dock. In *London and South-Western Rail. Co.* v. *James* (1), through tickets were purchased by passengers from the company in London covering the whole journey by sea and land from London to Guernsey. No other kind of tickets were issued to them in London, and no tickets of any kind were issued to them in Southampton. When they arrived there they straightway embarked in a steamship bound for Jersey, in this case named the *Normandy*. Goods were loaded in this vessel to be carried to the same destination. In the course of the voyage the steamship *Normandy* collided with another steamship named the *Mary*, and sank. Many of the *Normandy's* passengers and their luggage and effects were lost and all her cargo was lost. In cross suits between the owners of the two vessels the *Normandy* was held alone to blame. Several actions were brought against the company, some by passengers for loss of luggage, injury, and delay ; some, under Lord Campbell's Act, by the administrators of the passengers who were lost. A case for limitation of liability was instituted in the Court of Admiralty, and an order was made by that court restraining all these actions on payment by the company into court of the sum of £6,376, being £15 per ton on the gross tonnage of the *Normandy* plus interest. On Jan. 27, 1872, the Court of Exchequer, in an action instituted by one John James, one of the *Normandy's* passengers, decided that a writ of prohibition should issue to prohibit the judge of the Court of Admiralty from enforcing the injunction issued by him. This judgment was affirmed by the Court of Exchequer Chamber. This decision left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, free to proceed with them. The company thereupon filed a bill against the owners of the steamship *Mary*, and against the several persons who had actually instituted or threatened to institute actions against the company, stating the above facts, and also stating that the collision had occurred without the actual fault or privity of the company, and claiming that the company and the owners of the *Normandy* were entitled to such limitation of their liability as was in that behalf provided by the Merchant Shipping Act, 1854, and the Merchant Shipping Amendment Act, 1862, and alleging that the company for the purposes of the suit admitted their liability to the extent and to the amount mentioned in these Acts, and were willing to pay £15 per ton on the gross tonnage of the *Normandy* and interest thereon. The bill prayed for a declaration that the company were, as owners of the *Normandy*, entitled to the benefit of the limitation of liability under the Merchant Shipping Acts, and that the losses and damages in respect of which they were answerable might be determined as the court should direct, and that the defendants might be restrained from proceeding further in this suit or actions against the company. John James, one of the passengers, denied that he had any notice of a byelaw or any notice of the vessel by which he was to travel. The company allowed judgment to go by default in each of the actions which had been brought against them, but the damages had not been assessed. The Master of the Rolls granted an injunction against all the litigants except James. The other litigants were to be at liberty to have their damages assessed, but not to levy them. The company appealed. The appeal was heard by a full court. The principal point made upon the appeal was that the company were in this case acting as carriers of persons and goods, and that the Merchant Shipping Acts had no application to such cases.

Lord Selborne, L.C., in giving judgment, said (8 Ch. App. at p. 250) that "the ordinary case was not excluded, and that every case where the owner would be liable whether he was a carrier or not was intended to be within the

relief intended to be given to the owner, nor was that inference rebutted by the subsequent repeal of this section (i.e., s. 50 of the Act of 1854)." A

MELLISH, L.J., delivered a most helpful judgment. He said (ibid., at p. 252):

"I think that the case clearly comes within the words of the Act. The London and South-Western Railway Co. were the owners of the ship *Normandy*. They are sued by Mr. James for damages on account of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held within the Act unless it is clearly not within what was the scope and intention of the legislature in passing the Act. But what was the scope and intention of the legislature in passing the Act? Ever since the reign of George II there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting their liability to be incurred by the loss of goods, and this, previous to Lord Campbell's Act, was the principal liability. It was thought expedient to limit the liability because a ship might carry gold or goods of great value and then, from some trifling act of neglect on the part of the master or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the legislature thought it was for the public advantage that there should be this limit on the liability of the owner. Why should that not apply to the case before us? The London and South-Western Rail. Co. are encouraged by that limitation to embark as shipowners in the trade of carrying passengers and goods between Southampton and Jersey, and I do not understand what the grounds are upon which it is said they are not to avail themselves of this limitation. The ground put by the Master of the Rolls is simply that the passengers took a through ticket from London to Jersey. It was admitted that if the passenger had taken a ticket from London to Southampton instead of from London to Jersey, and when he got to Southampton had walked on board the ship and gone as a passenger to Jersey, then he would be subject to the limitation. But what possible object can there be in holding that in order that the company may avail themselves of the limitation, it shall be necessary to deprive all the passengers of the convenience of paying for their tickets at one time instead of paying on two different occasions. Such a decision would not deprive the company of the benefit of the Act and would only put the passengers to inconvenience. In my opinion the case comes both within the words of the Act and within what I think was the spirit of the Act." B C D E F G

The words of this judgment apply as appropriately to the owner of a dock as they do to the owner of a ship. Are not the owners of docks encouraged by the right of limitation of liability to embark as dock owners in the trade of affording facilities to ships to load and unload, and to be repaired in their dry dock? It is admitted that the words of s. 2 of the Merchant Shipping Act, 1900, must be construed, if they are to be at all reasonably construed, so as to put some limit on its general language. This must, I think, be so, because the liability which is to be limited is the liability which would fall upon the dock owners if sued at common law for injury done to a ship in their dock by reason of the negligence of their servant. If the dock owners had docks at Leith and also docks at Southampton, and a ship was injured in the docks at Leith by reason of the negligence of the owner's servant, then if the dock owner was sued at common law in respect of the injury done at Leith, everything connected with the dock at Southampton would primâ facie be held to be irrelevant and could not be gone into. Yet, as I understand it, it is contended that when the question of what liability is to be imposed, the condition, value, or management of Southampton Docks, though at common law irrelevant, becomes relevant for the purpose of fixing liability. This inquiry as to the limitation of liability must, in my view, be confined to the condition of things, and the occurrences in the docks in which the accident took place. BANKES, H I

L.J., said that the second section of the Act of 1900 should be construed as if the words "whilst being at or upon the dock or canal" were, as I understand, inserted after the words "vessel" and before the words "be liable to damages beyond an aggregate amount not exceeding ——." These words will effect the just and desired object of confining the liability which is to be limited to damages inflicted in the docks or canal mentioned earlier in the section. On that construction, which, in my view, is necessarily the right one, the appeal fails and should be dismissed with costs.

**LORD WRENBURY**.—The question to be decided is as to the nature of the acts in respect of which a dock owner is, by virture of s. 2 of the Merchant Shipping (Liability of Owners and others) Act, 1900, entitled to limit his liability. If he carries on the business, not of a dock owner only, but of a ship repairer also, is he entitled to limit his liability in respect of acts done by him as a ship repairer? I have to assume that such events have happened as that the dock owner has come under a common law liability in damages for some act done by his servants without his actual fault or privity. The section is one by virtue of which he is not to be liable in full for the damages which he is at law liable to pay. He is to be liable, so to speak, for less than he owes. It would be a material assistance if some principle could be suggested for this remission of liability, but it would seem to be the fact—and I accept it as being the fact—that the only ground for it is that a ship is a chattel of so great a value and full liability for damage to it would be so heavy that the construction and ownership of docks would be discouraged unless limitation of liability were sanctioned. This does not give much assistance towards determining what the extent of the concession is to be in order to achieve the object in view, but it does give some assistance towards saying that it is to the dock owner qua dock owner that the privilege is given. The question is entirely one of the true meaning of s. 2 of the Act, and I prefer, in the first instance, to endeavour to ascertain that meaning for myself by a careful perusal of the section without reference, for the moment, to any authority, applying the usual principle of scrutinising the language used, regarding in every case the context, bearing in mind the object indicated by the words, and thus settling the true meaning of the section in the particular circumstances of this case.

A dock owner, let us say, who is also a ship repairer, does acts in reference to a ship in the dock which he owns, but they are acts which are referable not to his character of dock owner but to his character of ship repairer. Is he entitled to limit his liability? That is the question. Purposely I assume that acts as dock owner and acts as ship repairer are capable of being discriminated. If they are not, and all the acts may be taken as being done as dock owner, the question under debate does not arise. The first guidance I obtain in reading the section is, that the dock owner is one of a group of four persons or bodies who are grouped together and form the common nominative to the verb which follows. They are: (i) the owners of any dock ; (ii) the owners of any canal ; (iii) harbour authorities ; and (iv) conservancy authorities. The latter three of these four are not bodies likely to be contemplated as carrying on the business of ship repairers. I am entitled, I think, to say that the legislature when it mentions the dock owner is thinking of a dock owner comparable with the other three bodies, and not of a dock owner who may be carrying on other business in connection with ships, for example, ship repairers or persons who supply ships' tackle. Further, I find that by virtue of the definition in s. 2 (5), the owner of a wharf or pier or jetty is, for the purposes of the Act, a dock owner. Many repairs may be done without going into dry dock. Suppose a ship repairer who undertakes the repair of a ship afloat, builds or buys for the purposes of his business a pier or jetty and moors the ship there while he is executing the repairs, is he a dock owner entitled to limit his liability in respect of acts done as a ship repairer? It is truly said, I think, that it would be a cheap mode of insurance for such a ship repairer to become a dock owner by building or

buying a pier. The Court of Appeal measured the dock owner's right to limit his liability in respect of acts done as a ship repairer by geographical considerations, impressed, seemingly, by the fact that the section attributes importance to the area of the dock in that in measuring the limit of liability, the ship whose tonnage is to determine the limit is to be the largest which, within a certain time, has been within the area. But there is nothing in the section to convey that the right to limit liability, as distinguished from the measure of the liability, is to be governed by the relative positions of the ship and of a dock which the ship repairer happens to own. If *The City of Edinburgh* (2) was rightly decided—and I think it was—in my judgment it governs this case—not, of course, that it binds this House, but that in material facts it is not distinguishable. A decision is indistinguishable when, not the facts, but the material facts, are the same. *The City of Edinburgh* (2) differs from this case only in the one fact that the dock owner who was repairing the ship was repairing it in a dock which was not his own. The dock he owned was some miles away. In the present case the dock owner was "at home"; he was repairing the ship in a dock which he owned. I fail to see any ground upon which he should be entitled to limit his liability in the one case and not in the other. As a dock owner he either is or is not entitled to limit his liability in respect of acts which he does in a business other than that of dock owner. He must succeed in claiming limited liability, if at all, by reason of the fact that he is a dock owner, not by reason of the fact that he is a dock owner "at home." I agree with LORD STERNDALE, M.R., that the liability in respect of which he claims limited responsibility must be a liability of the dock owner as such, that is, in respect of something in some way "connected with his dock," and with SCRUTTON, L.J., that his limited liability as a dockowner does not extend to "anything which he chooses to do in any other capacity."

In *The London and South-Western Rail. Co.* v. *James* (1) a similar question arose upon the Act, but the facts were inverted. The railway company were, as shipowners, entitled by virtue of the statute to limit their liability. The question was whether they had forfeited that right because they were also a railway company and contracted with the passenger to carry him on a journey which, commencing with a journey by rail, included a passage by sea. It was held that they had not. Here the question whether the ship repairer has acquired a right to limit his liability by reason of the fact that he is a dock owner and is repairing a ship in his own dock. *London and South-Western Rail. Co.* v. *James* (1) would have been in point if the accident had happened on the railway and the company had contended that their immunity as shipowners extended to the railway journey. That, of course, was not the case. I fail to see that that decision has any bearing upon the present case.

Everyone is agreed that some limitation must be placed upon the very general words of the section because there would otherwise be included cases in which the application of this section would lead to an absurdity. The proper limitation is, I think, to read the section as if it contained the words "as such" so that the dock owner as such will enjoy the benefit in respect of acts done by him as dock owner. In my opinion, the appeal should be allowed.

**LORD BLANESBURGH.**—That the actual decision of the Court of Appeal in *The City of Edinburgh* (2) was not only right but inevitable no one at your Lordships' Bar has been bold enough to suggest. Any other result on the facts of that case would have been absurd. Nevertheless, the dock owners there, on the grammatical and ordinary construction of the words of s. 2 (1), of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, seemed entitled to claim a decision in their favour. The words of the section so construed appeared to cover their case exactly. Yet they failed, and, as is now agreed on all hands, they rightly failed. And for one of two reasons, either of which was, in that case, adequate. They failed, either because it was, as is suggested, the opinion of the

A Court of Appeal that the section is only operative to limit the liability—say of the owner of a dock—in respect of a claim within the section which is made against him in that character ; or they failed, as is suggested by the respondents, because the damage there sued for was sustained by the *City of Edinburgh* when she was outside the area of the repairers' dock, and the Court of Appeal was of opinion that the section is, on construction when a dock is in question, confined to cases B where the vessel is actually within the dock at the critical moment. I was myself a party—albeit a silent party—to that decision of the Court of Appeal. I have my own views of what the court intended to decide. A statement of them might not have been irrelevant when this case was in the Court of Appeal. It would be of no moment now. The whole question is at large in this House, and, it being conceded that the section, if absurd results are not in many cases to ensue, must C be held to be limited either in the one way or in the other, the duty is now cast upon this House to choose between these two alternatives. The choice is vital. In the present case everything turns upon it. If the appellants' limitation be accepted—I may compendiously describe it as a "limitation by function"—their appeal will, I think, succeed. If the respondents' be adopted—their limitation may be termed a "limitation by area"—then even more inevitably the appeal must D fail. Some of the considerations to which your Lordships will have regard in making your choice between these two alternatives are not, I should suppose, open to controversy. The House would hesitate to accept a form of limitation calculated to lead to absurdities only less numerous and serious than those from which the unqualified section has thereby been rescued. A limitation again would be at once suspect if, as its result, it excluded from the benefit of the section cases for E which, having regard to its whole frame and tenor, it must be presumed the legislature intended to provide. Still another consideration occurs to me as apposite. The benefit of the section is extended to four classes of beneficiary compendiously described as, the owner of a canal ; the owner of a dock ; a harbour authority ; a conservancy authority. To each of these classes, various as they are in responsibility and status, the section extends a privilege in terms identical. It F would seem to follow that any proper modification introduced into it must also with equal appropriateness apply to every case, and as the selection made will, when promulgated, apply to each member of every class benefited, it should owe nothing to the accidental circumstances of the case in which it was called for. In other words, while your Lordships, in making your final choice, will not forget the position of the owner of a dry dock who repairs vessels within it, neither will you G fail to have regard to the position under the section of the other beneficiaries, for example, that of a harbour authority, to which I will allude later.

Real assistance in this most important inquiry is, I think, supplied by an examination of the terms in which the classes to be benefited are by the section defined. The aspect in which each of them is being regarded by the legislature is on such examination brought into full relief. A significance concealed by the compendius H words of description employed in sub-s. (1) of s. 2 of the Act of 1900 itself is thereby revealed. The only one of these descriptive terms which is not subsequently expanded is the term "canal." Every other is the subject of a definition. I begin with the word "owner." The "owners of a dock or canal" are defined to include

> "any person or authority having the control and management of any dock or I canal as the case may be" : sub-s. (5).

An owner of a dock, that is to say, to be within the protection of this section, need not be in any sense a proprietor nor need he have any proprietary interest in the dock. He is entitled to the benefit of the section if he can say of himself that he controls and manages it. A "dock" again, as has already been stated, includes many things besides dry docks. For facility of reference I again transcribe the miscellaneous list. The term includes

> "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks,

graving docks, gridirons, slips, quays, wharves, piers, stages, landing places, and jetties'': sub-s. (3). A

This definition is I think, significant in at least three relevant directions. When taken in connection with the definition of owner it shows how small is the place—even in the category of ''owners of docks''—which is held by those of the respondents' sub-class. Again, while it is a catalogue of places with reference to each of which B the owners in their ''control and management'' will frequently be responsible for damage to ships, very few of them are places in which even the possibility of their owners conducting upon them any separate business is other than remote, or is, indeed, existent at all. More particularly still the definition in its remarkable comprehensiveness seems to dispose once and for all of the suggestion—never a very hardy one—that the extension of the benefit of the section to the respondents as C repairers of ships under the name of the owners of a dry dock may well be justified by the view that the legislature had an intention to encourage such repairers to construct their own dry docks wherein ship repairs could be carried out. The principle of noscitur a sociis is fatal to such a suggestion. The definitions of a harbour authority and a conservancy authority are also specially suggestive in the present connection. Harbour authority includes D

''all persons or bodies of persons, corporate or unincorporate, being proprietors of, or entrusted with, the duty or invested with the power of constructing, improving, managing, regulating, maintaining, or lighting a harbour'': see Merchant Shipping Act 1894, s. 742.

''Conservancy authority'' includes E

''all persons or bodies of persons, corporate or incorporate, entrusted with the duty or invested with the power of conserving, maintaining, or improving the navigation of a tidal water'': ibid.

This being a section by which an identical benefit is, in identical terms, conferred F upon these various classes of persons or bodies, it is manifestly important to discover, if one can, whether there is now disclosed any characteristic position or responsibility common to them all and of a nature not inappropriate to instruct the benefit which by the section is indifferently extended to each. First, it cannot be suggested that all the individuals or bodies concerned are looked upon as the potential owners of separate businesses from any of the responsibilities of which they G should have their liability limited. This is not so of any one of them, even in their sub-divisions ; it is almost unthinkable in relation to a conservancy. Ownership or the possession of a proprietary interest again is not the essential thing. Even in the case of a canal or dock, it is not, as has been seen, essential to protection ; in the case of a conservancy authority, the possibility of ownership is not so much as mentioned in the definition, and in the case of such an authority such possibility H ex necessitate rei is indeed remote. But the examination discloses that there is attached to every one of the four a responsibility which, while in no way inconsistent with ownership, is capable of a separate existence. That responsibility is in relation to canals and docks described as the power of ''control and management'' ; it is in relation to harbour authorities and conservancy authorities, the discharge of the duties and powers with which they are respectively entrusted and invested. I There being nothing in the section necessarily leading to any other conclusion, I should myself have thought, on a consideration of these things alone, that the liability and the only liability which under it a defendant is in any circumstances entitled to limit is a liability which, in the case of ''the owner of a canal or dock'' arose from his responsibility for the control and management of the canal or dock, and in the case of a harbour authority or conservancy authority arose from its discharge or failure to discharge some duty or power with which the authority in question was entrusted or invested.

The correctness of this view by no means depends on that consideration alone. Later, in describing the area with reference to which the limit of liability is to be ascertained, s. 2 (1) of the Act of 1900 refers to it as the area

> "over which such dock or canal owner, harbour authority or conservancy authority performs any duty or exercises any power"

—the same terms being employed, it will be noticed, both with reference to the "owners" and the "authorities," and the terms chosen being taken from the definitions of the harbour and conservancy authorities as applicable to all to which reference has been made. That comprehensive reference, couched in terms so significant when they are traced to their origin, supplies to my mind the strongest confirmation of the view that the liability with which the section is dealing is a liability arising as above stated and none other. But the argument does not even stop there. Sub-section (6) of s. 2 has not yet been alluded to. To my mind it clinches the whole matter. The sub-section is as follows:

> "Nothing in this section shall impose any liability in respect of any such loss or damage on any such owners or authority in any case where no such liability would have existed if this Act had not passed."

The necessity, or, at the least, the propriety of such a reservation is apparent if the liability referred to is intended to be confined to a liability arising from the performance of a duty or the exercise of a power in relation to a canal, dock, harbour, or conservancy area. But how entirely otiose and unnecessary it becomes if the liability to be limited is one that may arise on the part of the "owner" or "authority" on any account whatever.

Accordingly, by reference to the terms of the section, unaltered and unexpanded, but, be it noted, to all its terms, I reach the conclusion that the liability of the respondents to the appellants, already established in this House, is entirely outside its protection. That liability was in no way referable to the duties or powers of the respondents as owners of their dock. The negligence which led to the fire on the steamship *Ruapehu* in the dry dock of the respondents was negligence of their servants in the course of their duties as ship repairers—it was negligence which would have caused the fire wherever the vessel had been, whether in the dock of the respondents or of another, whether in a dock at all or afloat. I would further observe that the relevance to the present discussion of s. 2 (6) is very pointedly illustrated by *London and South-Western Rail. Co.* v. *James* (1), to which reference has been made by three of your Lordships. I think myself that the distinction between that case and the present has been clearly shown by my noble and learned friend, Lord Wrenbury. I refer to it again only because the whole basis of Lord Selborne, L.C.'s judgment is confirmatory of that view of his present section which I have ventured to present to your Lordships. The gist of Lord Selborne, L.C.'s judgment is to be found in the following words (8 Ch. App. at p. 249):

> "We think it manifest that the ordinary case, or at least one of the most ordinary cases, in all contracts of affreightment is that of the shipowner carrying on his own ship. The corresponding term 'carriage' occurring in the 505th section of [the Merchant Shipping Act, 1894], with what is there said about freight, appears to me to show that the ordinary case was not excluded and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner, nor is this reference rebutted by the subsequent repeal of this section."

I claim support from these words: "Whether the owner was carrier or not." Lord Selborne, L.C., there recognises a separation of function exactly comparable to the separation of function in the case of the owner of a dry dock who also repairs vessels within his dock. But more apposite still, these words foreshadow the

principle which in terms is to be found embodied in s. 2 (6). The liability of the respondents as ship repairers will be limited by the section only to the extent to which, as owners of a dock, they are under the same liability. But they must, as dock owners, be under some liability if there is to be any limitation at all. When the dock owner is also ship repairer, he will be entitled under the section to limit the amount of such damage as would, in a question between the ship and the dock owner, have been recoverable against the latter had he been someone other than the ship repairer. And to a limitation of that damage he will be entitled, whether or not in respect of it he was also liable as ship repairer or in any other character. But liability as dock owner for that damage there must be.

The strength of the appellants' case is not, however, dependent only on the cogency of the considerations by which it can be affirmatively supported. It gains almost as much from the destructive criticism to which the respondents' alternative limitation is exposed. It is, I think, true of that limitation to say, first of all, that it is purely arbitrary. It will enable those in the position of the respondents to limit their liability where its origin was, in connection with their dock, as remote or accidental as was the liability in *The City of Edinburgh* (2). I agree with LORD WRENBURY in thinking that there is, in principle, no distinction between the facts of that case and the present. But, secondly, I think this limitation is calculated to create absurdities hardly less serious than those which it would remove. Under it the liability for any damage done by the respondents, even as ship repairers, would be limited if the vessel in question were within the dock of the respondents; their liability for damage done by them without their actual fault or privity, even as dockowners, would be unlimited if the vessel were in another dock or even just outside their own. The limitation, too, would produce the striking result shown by one of the illustrations of HILL, J. He supposes the case of a railway company owning a pier—which is a "dock" within the meaning of the section—and also steamships. The railway company for reward permits another ship to be at the pier. One of the railway company's steamships, by the negligence of the master or crew, collides with and sinks that ship. The negligence arises and the liability is incurred in the capacity, not of pier owner, but of steamship owner. Yet the respondents' proposed limitation would presumably entitle the railway company, if it suited them, to limit their liability by the standard provided by the Act of 1900, and not by that provided by the Merchant Shipping Act, 1894. More serious still, the limitation proposed by the respondents would exclude from benefit cases—it may be many cases—which I suggest are clearly within the benefit of the section. Take, by way of example, one case of a harbour authority. Among the defined duties of such an authority as has been seen, is that of lighting its harbour. Suppose that without the actual fault or privity of the authority the entrance to its harbour is on some stormy night left unlighted, and in consequence a vessel making for that entrance loses her bearings and is wrecked on rocks outside the harbour. That would, I suppose, be the case of cases clearly within the protection of the section so far as a harbour authority is concerned. Yet, if your Lordships are induced to sanction, as the proper and necessary limitation, this limitation by area, the authority would, in such a case, be left liable without limit of amount for the total loss of that ship. The only purpose of introducing the limitation by area in preference to a limitation by function, is to include within the section liabilities incurred on what I may call general account. I have given my reasons for the view that such liabilities are quite outside the scope of the enactment. It is, however, permissible to suggest in the present connection that a court of construction should hesitate before, by actually reading words into the section which are not there, it is led at such a price as that just indicated to produce a result at once so dubious and so equivocal. Limitation by area can, admittedly, only be made effective by reading words into the section. Unlike, as I think, limitation by function, it cannot be extracted from the section as it stands. I find myself in this case and for these reasons in agreement with LORD WRENBURY. In my judgment

it would be proper for your Lordships to discharge the order appealed from and restore that of Hill, J.

*Appeal dismissed.*

Solicitors: *William A. Crump & Son; Pritchard & Sons.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

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## GLASKIE *v.* WATKINS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), February 22, 23, 1927]

[Reported [1927] 2 K.B. 181; 96 L.J.K.B. 469; 137 L.T. 132; 43 T.L.R. 314; 71 Sol. Jo. 192]

*Moneylender—Action to recover money lent—Power to direct inclusion in Short Cause List—Claim for balance due on promissory note—Claim by borrower for relief on ground that interest excessive—R.S.C., Ord. 14, r. 8—Moneylenders Act*, 1900 (63 & 64 *Vict., c.* 51), *s.* 1 (1).

The court has jurisdiction to order a claim by a moneylender against a borrower in respect of failure to repay a loan to be put in the Short Cause List for trial provided that the writ has been specially endorsed under R.S.C., Ord. 3, r. 6, and an application for judgment, supported by a proper and sufficient affidavit, has been made by the moneylender under Ord. 14, r. 1, even though the claim includes a sum for interest disputed on the grounds, under the Moneylenders Act, 1900, s. 1 (1), that the interest is excessive and the transaction is harsh and unconscionable, but this jurisdiction ought to be exercised very sparingly and only in plain and simple cases where it is reasonably plain that the dispute is a short one, and (per Atkin, L.J.) there should be borne in mind the power of the court, under Ord. 14, r. 9 (b), to dismiss an application for judgment under the Order where, in the opinion of the court, the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend.

*Bennett* v. *Stubbs* (1), [1926] 1 K.B. 272, not followed.

**Notes.** As to actions by moneylenders to recover money lent and the relief of borrowers see 23 Halsbury's Laws (2nd Edn.) 201 et seq., and for cases see 35 Digest 212 et seq. For Moneylenders Act, 1900, see 16 Halsbury's Statutes (2nd Edn.) 370.

Cases referred to:

(1) *Bennett* v. *Stubbs*, [1926] 1 K.B. 272; 95 L.J.K.B. 334; 134 L.T. 307, C.A.; 35 Digest 218, *448*.

(2) *Wells* v. *Allott*, [1904] 2 K.B. 842; 73 L.J.K.B. 1023; 91 L.T. 749; 53 W.R. 195; 20 T.L.R. 799, C.A.; 35 Digest 217, *445*.

(3) *Dott* v. *Bonnard* (1904), 21 T.L.R. 166, C.A.; 35 Digest 218, *446*.

(4) *Tumin* v. *Levi* (1911), 28 T.L.R. 125, C.A.; 35 Digest 217, *434*.

(5) *Lazarus* v. *Smith*, [1908] 2 K.B. 266; 77 L.J.K.B. 791; 99 L.T. 77; 24 T.L.R. 592; 52 Sol. Jo. 481, C.A.; 35 Digest 218, *447*.

(6) *City and County Private Finance Co.* v. *Dolphin* (Feb. 12, 1920), unreported, C.A.

(7) *Rothfield* v. *Leighton* (Dec. 5, 1918), unreported, C.A.

(8) *Symon & Co.* v. *Palmer's Stores (1903), Ltd.*, [1912] 1 K.B. 259; 81 L.J.K.B. 439; 106 L.T. 176, C.A.

**Appeal** from an order of SWIFT, J., at chambers. A

The plaintiff, who was a moneylender, issued a writ, specially endorsed, under Ord. 3, r. 6, claiming to recover from the defendant the sum of £325, the balance due on a promissory note for £750, dated July 28, 1926, signed by the defendant, and made payable to the plaintiff in equal consecutive monthly instalments of £125 each. The defendant filed an affidavit, in which he said that he had repaid to the plaintiff the sum of £425, which left a balance of £75 due in respect of principal, B and that the transaction was harsh and unconscionable. He asked for relief under the Moneylenders Act, 1900, and applied for leave to defend the action on its merits, to have the transaction re-opened and to be relieved from the payment of any sum in excess of the amount fairly due to the plaintiff. A summons was issued under Ord. 14, and on the hearing, MASTER BALL gave judgment for £75 in favour of the plaintiff and gave the defendant leave to defend with regard to the C balance of the claim. The plaintiff applied to MASTER BALL to send the case to the Short Cause List, but MASTER BALL, considering himself bound by the decision of the Court of Appeal in *Bennett* v. *Stubbs* (1), refused the application, and his decision was affirmed by SWIFT, J., in chambers, who was also of opinion that *Bennett* v. *Stubbs* (1) precluded him from sending a disputed claim for interest in a moneylender's action to the Short Cause List for trial. The plaintiff appealed. D

*J. B. Matthews, K.C.*, and *R. F. Levy* for the plaintiff.

*A. E. Woodgate* for the defendant.

**BANKES, L.J.**—This is an appeal from an order of SWIFT, J., in chambers, affirming an order of a master. The appeal raises an important point of practice. E The question is whether there is any decision of the Court of Appeal which renders it impossible for a master or a judge in chambers to order a moneylender's action where the claim for interest is disputed on the ground that it is excessive to be tried in the Short Cause List. It is important to bear in mind what the contention put forward on behalf of this defendant involves, because, if that contention is to prevail, it will deprive the plaintiff of a statutory right, and the judge in F chambers and the master of a statutory jurisdiction which is conferred on them by the Rules of the Supreme Court.

To make that point plain I will refer quite shortly to a few of the rules. First of all there is Ord. 3, r. 6, which provides that if a case comes within those provisions a plaintiff may specially endorse his writ, and if a writ is specially endorsed, and the plaintiff has followed the directions of the rules by making a sufficient affidavit, G two consequences follow, as it seems to me. One is that the plaintiff has the statutory right under the rules to take proceedings for summary judgment under Ord. 14. That arises from the fact that he has issued a specially endorsed writ, and he has made a sufficient affidavit. The next consequence is that the plaintiff, having that right and having exercised it, the rules confer a statutory jurisdiction upon the master or judge, as the case may be, to deal with the application which H comes before him in certain specified ways. He may, in an appropriate case, give judgment for a part of the amount and give leave to defend as to another part of the amount. Rule 4 of Ord. 14 directs:

> "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does I not apply to or as is admitted, subject to such terms . . . as the judge may think fit."

Therefore, the giving of a judgment is not discretionary in such a case subject to the terms that the judge may enforce, but the rule directs that, if there is no defence to a part of the claim, the plaintiff shall have judgment for that part. The judge also has jurisdiction, where a matter comes before him on a summary application, under r. 8, to give directions as to how the case shall be tried and

where it shall be tried, and, in a proper case, to order it into the Short Cause List to be tried. Then, by r. 9 (b):

> "If the plaintiff makes an application under this Order when the case is not within the Order, or where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff."

It seems to me that those rules give the judge or master a certain statutory jurisdiction in cases brought before him where the writ is a specially endorsed writ and the plaintiff has made a proper and sufficient affidavit. The contention, therefore, that the master or judge has no jurisdiction to order the contested part of a moneylender's claim, the part in reference to interest, to be tried in the Short Cause List is in substance saying that something has happened which has deprived the judge and the master of that jurisdiction.

Where does one find anything that can have so deprived him? The only possible contention—I do not in the least agree with it—as it seems to me, is the one advanced by counsel in *Wells* v. *Allott* (2) that the effect of the Moneylenders Act, 1900, to put it in his language, was to oust Ord. 14. The only way in which it could oust Ord. 14 would be by construing the Moneylenders Act, 1900, as transferring a claim of a moneylender upon a bill from a claim for a liquidated amount into a claim for an unliquidated amount. That, in substance, was the contention of counsel in *Wells* v. *Allott* (2). It was not accepted, and, in my opinion, as a contention going to the jurisdiction it is an impossible contention. So far, therefore, as concerns the contention that there is anything in the Moneylenders Act, 1900, which deprives the judge or the master of the jurisdiction which the rules confer upon him, in my opinion, there is nothing in that Act which can possibly support such a contention. That being so, the question we have to consider is: Is there any decision of this court which binds us to say—whether we agree with it or whether we do not agree with it—that the judge or master has been deprived of that portion of his jurisdiction which would have enabled him to make an order that the case should be dealt with in the Short Cause List? That drives one to consider not only what is the real effect of the decision in *Bennett* v. *Stubbs* (1) but whether *Bennett* v. *Stubbs* (1) is itself in conflict with other decisions of this court, and, if so, which of the two sets of decisions we, sitting here to-day, think that we ought to accept as being the law.

In *Bennett* v. *Stubbs* (1) the judgment of SIR ERNEST POLLOCK, M.R., is founded upon his view of the language of LORD COLLINS, M.R., in his judgment in *Wells* v. *Allott* (2). Speaking with all respect, it seems to me that the language of LORD COLLINS in that case has been considered without reference to the facts of the case about which the learned Master of the Rolls was expressing his view. In *Wells* v. *Allott* (2) the case was one where there was a specially endorsed writ, and when the defendant put in his affidavit under Ord. 14, he admitted that a portion of the principal was still due, and contested the claim for the interest on the ground that the transaction was harsh and unconscionable. Counsel for the plaintiff has sought to draw a distinction between *Bennett* v. *Stubbs* and the other cases on the ground that there is a difference where a defendant in his affidavit admits that some of the principal is due. With submission, I do not think that that is a real distinction, since, if the judge has jurisdiction to deal with the case because the writ is a specially endorsed writ, it seems to me to be immaterial whether, when the defendant comes to split up the claim into principal and interest, he is not in a position to dispute that some of the principal still remains unpaid. However, those were the facts in *Wells* v. *Allott* (2) and the master had given leave to sign judgment for the admitted amount of the principal and a certain amount of interest. He gave the defendant leave to defend as to the general claim for the interest. When that case came on on appeal from

that order the moneylender swore an affidavit which set out his grounds for contending that there was no foundation for suggesting that the bargain was harsh and unconscionable, and thereupon PHILLIMORE, J., discharged the order of the master and gave the plaintiff leave to sign final judgment for the full amount claimed. The question before the court was whether that was a right order, and what the Master of the Rolls and other members of the court had to deal with was whether in a case where the defendant admitted part of the claim, but swore an affidavit which disclosed a primâ facie defence as to the rest of the claim, an order ought to be made under Ord. 14, either for judgment, or in any other form, except giving the defendant unconditional leave to defend. It was in reference to that view, and that state of facts, that LORD COLLINS, M.R., used the language which he did. He says ([1904] 2 K.B. at p. 846): "It is clear in the present case that there is primâ facie a debt due from the defendant to the plaintiff," and that was the reason given why he allowed that part of the master's order which had given judgment to stand; but how could that be if the contention is right that there is something in the Moneylenders Act, 1900, which would deprive the master or the judge of his jurisdiction to deal with the claim at all under Ord. 14 proceedings? Then LORD COLLINS goes on and uses the expression to which SIR ERNEST POLLOCK, M.R., in *Bennett* v. *Stubbs* (1) referred, and which is really the foundation of his (SIR ERNEST POLLOCK'S) judgment. He says this ([1904] 2 K.B. at p. 846):

> "The procedure under Order 14 is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to the court by the Moneylenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a primâ facie debt, it seems to me to be clear that that class of case is taken out of Order 14."

He is there obviously only referring to the claim in that particular case for the interest. One seldom criticises the language of so accurate a judge as LORD COLLINS, but when he speaks of a case being taken out of Ord. 14, it does require some explanation as to what exactly he means. SIR ERNEST POLLOCK, M.R., I think, in *Bennett* v. *Stubbs* (1) has interpreted that as meaning that the judge or the master has no longer any jurisdiction to deal with it. It cannot be that LORD COLLINS used the expression in that sense, because in that very case he re-affirmed or restored the order of the master which had given the plaintiff judgment for part of his claim, the admitted part, and when this language of LORD COLLINS is read in reference to the facts of the case it seems to me not possible to place the interpretation upon his language which counsel for the defendant asks us to place upon it, or which SIR ERNEST POLLOCK, M.R., in *Bennett* v. *Stubbs* (1) did place upon it. So much for *Wells* v. *Allott* (2).

I need not really refer to *Dott* v. *Bonnard* (3) or *Tumin* v. *Levi* (4) because in neither of those cases is there anything of real assistance upon the point we have to decide. In one case the question was whether any order should be made under Ord. 14, the defendant having alleged in his affidavit that he had paid or more than paid the whole claim of the plaintiff moneylender for principal and interest. Of course, it is perfectly obvious that in face of that affidavit no order under Ord. 14 in the sense of an order giving judgment could be made. In the other case there was the battle of the two Divisions. The borrower there brought an action in Chancery to set aside the whole bargain upon the ground that it was harsh and unconscionable. After that proceeding had commenced the plaintiff took out a specially endorsed writ and took proceedings under Ord. 14, and the question really turned there upon what was the right procedure to follow in those circumstances. It is quite true that there was some difference of opinion between the Chancery members of the Court and KENNEDY, L.J. They were very strongly

inclined to the view that such a case as that particular one could not possibly be dealt with satisfactorily in the Short Cause List, and KENNEDY, L.J., was not at all convinced upon that point, but there was nothing said, as it seems to me, in that case which bears directly upon the question that we have to consider, or is of any real assistance.

There are, however, three other cases, all of them decisions of this court, which are very material. I think the problem which is presented to us is whether we should accept the decisions in those cases in preference to the decision in *Bennett* v. *Stubbs* (1), if it goes to the length that counsel for the defendant contends. The first of those cases was *Lazarus* v. *Smith* (5). There it is material to observe that COZENS-HARDY, L.J., was a party to the decision, and that he had also been a party to the decision of *Wells* v. *Allott* (2). The facts were that there was a claim by a moneylender and a specially endorsed writ. The defendant by his affidavit set up the defence under the Moneylenders Act, 1900. The master gave leave to the plaintiff to sign judgment for the sum of £40, being the amount admittedly due from the defendant in respect of the sum actually advanced, gave leave to the defendant to defend for the residue of the claim, and ordered the action to be placed in the Short Cause List for trial, and this order was confirmed by RIDLEY, J., in chambers. Mr. Chaytor was for the defendant in the appeal, and his contention was: "In a moneylender's action, where the borrower sets up a defence under the Moneylenders Act, 1900, Ord. 14 has no application: *Wells* v. *Allott* (2)." That means to say that it has no application for any purpose either for giving judgment for a portion of the principal, or for giving directions, or for ordering the case into the Short Cause List, or for any other purpose. That was his main contention. Then he went on: "It is true that the only question there was as to the claim for interest, but the principle of that decision extends to the whole claim." Upon that the Master of the Rolls, LORD COZENS-HARDY, says ([1908] 2 K.B. at p. 268):

> "I have no desire or intention to depart from one word that I uttered in *Wells* v. *Allott* (2), and in what I then said I was merely following and adopting the language of the then Master of the Rolls. I desire to make it quite clear that my view is that in any case in which an issue has to be decided under the Moneylenders Act that is a matter which ought to be dealt with at the trial of the action, and not by summary judgment under Order 14."

Is he there saying anything more than this: You ought not to give a summary judgment under Ord. 14 and a summary judgment is an order for judgment where the defendant raises an issue under the Moneylenders Act 1900? In other words, he is saying that the defendant took it upon himself to swear that the interest charged was excessive and exorbitant. That must be accepted as establishing a primâ facie case which entitles him to defend, and entitles him, therefore, to have his case tried, but it says nothing as to the tribunal which shall try it or the direction as to the mode of trial, or anything which suggests that a short cause is not a proper way of trying a very simple case. KENNEDY, L.J., uses language to that effect. He says ([1908] 2 K.B. at p. 269):

> "It seems to me that, while it is our duty to maintain in all proceedings in which the Moneylenders Act comes into operation everything necessary to make the Act effective, it would be going beyond anything which that Act either demands or authorises to say that Order 14 does not apply to an admitted debt—a debt which is admitted quite irrespective of any matter with which that Act has to deal. Here the defendant is in a position in which he must admit that, even if this loan had been given without any terms as to interest, it has not been repaid to the extent of £40. It cannot be right, if Order 14 is to be used at all, to hold that, where there is an admitted debt as to part of the claim, r. 4 is not to apply, whether it is a moneylender's claim or the claim of any other creditor. The Moneylenders Act only relates to transactions which

can be re-opened and modified under its provisions, and what would be re-opened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal."

The result of that decision of the Court of Appeal was that the order of the master and the judge ordering the claim for interest to be placed into the Short Cause List was affirmed. It is impossible, in my opinion, having regard to the argument, and having regard to the language used, to say that it was not present to the minds of the lords justices whether or not the Short Cause List was within their discretion a proper tribunal in which to try the dispute when they held they had jurisdiction to affirm the order which had been made in chambers by the judge and master. That case, which seems to be a clear authority by the Court of Appeal, that the contention put forward in the present case is not well founded, is supported by the two unreported decisions which counsel for the plaintiff has cited—one, *City and County Private Finance Co.* v. *Dolphin* (6), in this court, in which, I think, SCRUTTON, L.J., and myself were members of the court. I forget whether we affirmed an order directing a trial in the Short Cause List or whether we made the order in the first instance, but, at any rate, it was quite present to our minds that we had the jurisdiction to do it, and we in fact did it, because we thought that that was a proper case. A similar order was made in the other case to which attention was called, of *Rothfield* v. *Leighton* (7) where, I think, SCRUTTON, L.J., and EVE, J., sitting together as a Court of Appeal to deal with interlocutory matters, made a similar order.

If one assumes that *Bennett* v. *Stubbs* (1) does decide the question of jurisdiction and that the master and the judge had no jurisdiction to make an order directing the trial of a moneylender's claim for disputed interest in the Short Cause List, with all respect to those who gave the decision it seems to me in conflict with the three other decisions of this court to which I have referred, and which I prefer, because I cannot see anything anywhere which deprives the judge of the jurisdiction which the rules give him in a case which is properly brought before him, because the writ is specially endorsed and the affidavit is in proper form. If that is the correct view it follows that the headnote in *Bennett* v. *Stubbs* (1) does not correctly state the law on this matter, and, for myself, I say that, where a moneylender properly endorses a writ for a liquidated amount, and the liquidated amount is represented by a promissory note or a bill of exchange, and where the defendant in his affidavit raises a case under the Moneylenders Act, 1900, in my opinion, the judge or the master retains the full jurisdiction given him under Ord. 14 to order any disputed part of that claim to be placed in the Short Cause List. I desire to say also, and to say it very emphatically, that I think that jurisdiction ought to be exercised very sparingly, and it ought to be exercised in cases which are simple and clear cases. It is impossible to lay down any rule which shall define what constitutes a simple and a plain case, but I think I can go to this extent and say that in a case where a defendant is seeking to rip up, not only the particular transaction in respect of which the claim is made, but previous transactions with a moneylender, that would certainly not be a proper case in which to send such a dispute to the Short Cause List. Indeed, I think that probably it is true to say that in the majority of cases, in the exercise of a wise discretion, it would be better not to send disputes under the Moneylenders Act, 1900, into the Short Cause List, but in every case the master or the judge has a discretion, and it is for him to exercise it. Speaking for myself, with all respect I should say that they would be wise to exercise that discretion with considerable caution and only to make orders sending this class of case into the Short Cause List where it is reasonably plain that the dispute is a short one. In these circumstances I think that this appeal should be allowed with costs in any event, and, there being nothing tangible to suggest that this is not a proper case, we ought to make an order to

A remit it to the Short Cause List, treating it as an exceptional case rather than as an application of a general rule.

**SCRUTTON, L.J.**—This case raises a question of some practical importance in regard to what undoubtedly forms a considerable branch of the business of the King's Bench, what are known as moneylenders' cases, and as the decisions of
B the Court of Appeal are not at present consistent I express my reasons for allowing the appeal in my own language.

In this particular case a moneylender sues on a promissory note, giving credit for certain instalments paid. The defendant says: "Yes, that promissory note is for money you lent me. As to the principal that you lent me I have paid all but £75. As to the interest it is at least 100 per cent., and I desire to raise the
C point that the interest is excessive and the transaction harsh and unconscionable." The master made an order in effect giving judgment for the £75, the balance of principal unpaid, and gave leave to defend as to the interest, and he was then asked to put the case in the Short Cause List. The master took the view that the decision of two members of the Court of Appeal in *Bennett* v. *Stubbs* (1) prevented him from putting the case into the Short Cause List because it related
D to the adequacy and amount of interest. On appeal the judge took the same view, that he was precluded by *Bennett* v. *Stubbs* (1) from putting the case into the Short Cause List. We have asked the learned judge whether he exercised any discretion in the matter, and he tells us that he did not; he thought he was bound by *Bennett* v. *Stubbs* (1).

E In *Bennett* v. *Stubbs* (1) the point that there was no jurisdiction to put the case into the Short Cause List was not raised before the master or the judge, but appeared for the first time in the Court of Appeal, with the consequence that all the authorities in the Court of Appeal bearing upon the point were not cited to the two learned judges who decided the case. In particular, *Lazarus* v. *Smith* (5) was not cited to the court, and it is not referred to by the court in its judgment. It is extremely
F difficult to reconcile the judgment in *Lazarus* v. *Smith* (5) with the judgment in *Bennett* v. *Stubbs* (1). Two unreported cases were also cited to us, unreported decisions of the Court of Appeal, which also were wrongly decided if *Bennett* v. *Stubbs* (1) is right. The result is that this court, a court of three, has before it a series of judgments of the Court of Appeal which do not appear to be consistent with each other. It is not that the later judgment has considered the earlier ones
G and decided that they mean so-and-so; it is that the later judgment was given when the judges were not aware of three of the previous decisions. In those circumstances, in my view, as a matter of judicial comity, it is open to this court to consider all the decisions of the Court of Appeal, and to form its own views as to which are the more accurate and which it shall follow in this case. It is quite true that it is possible to make a distinction between *Bennett* v. *Stubbs* (1) and
H the present case, and the distinction is that in *Bennett* v. *Stubbs* (1) it appeared from the defendant's evidence that all the principal had been repaid, and in this case it appeared from the defendant's evidence that there was still a balance of principal left unpaid, but when one considers the matter from the point of view of principle I cannot see that that fact makes any legal difference.

Approaching the matter from the point of principle, if one can use such a word
I about the White Book, before one comes to any authorities, the rules of court which have the authority of a statute give power to the masters and judges in certain specified cases mentioned in Ord. 3, r. 6, to give summary judgment without the cases going through the form of trial in court. You require, to get that jurisdiction, that the claim on the writ of the plaintiff shall comply with certain specified rules mentioned in Ord. 3, r. 6. It is undoubted that if on the writ you find something that comes within Ord. 3, r. 6, and something which does not, the writ does not comply with the statutory requirements, and the plaintiff cannot go on and get summary judgment unless he has struck off the writ that which does not come

within the matters described in Ord. 3, r. 6; but in moneylenders' cases there is almost always this to start with, that the moneylender sues on a promissory note or bill of exchange which exactly complies with the requirements of Ord. 3, r. 6, and unless the defendant raises some defence which entitles him to object to summary judgment, Ord. 14 will be complied with. Judgment can be given if the defendant does not appear. Usually in moneylenders' cases the defendant does appear, and he says: "True it is that I have signed this bill, but it is for money lent. The principal lent was" so much. Sometimes he says that and sometimes he says he does not know what the principal was. "The interest is at such a rate, and I say, as I am entitled to say under the Moneylenders Act, that that interest is excessive and the transaction is harsh and unconscionable." He then raises a primâ facie defence to a writ which comes within Ord. 14, and, in my view, the powers given to a judge who gives leave to defend as to a part of the claim remain unaltered because there is a writ properly endorsed under Ord. 3, r. 6, which gives the judge power to exercise the jurisdiction contained in Ord. 14. I do not know that it is necessary to decide it, but it seems to me that the judge, reading the defendant's affidavit under Ord. 14, may say: "There is no evidence on which anyone can say that this interest is excessive or harsh and unconscionable," but not to say: "I decide on the evidence before me on each side that it is or is not harsh and unconscionable." That was what PHILLIMORE, J., did in *Wells* v. *Allott* (2), and he was held to have done that wrongly. To take a possible case, supposing that all the defendant says is: "You lent me £100 at one per cent. interest, and I was in the retreat from Mons," I should have thought that in a case like that it was open to a judge to say: "Nobody can reasonably say that you have raised a contention of excessive interest or of a harsh and unconscionable transaction; nobody can say that one per cent. is an excessive rate of interest." But the moment that the affidavit gets to a point where it is a doubtful question what the decision will be, it is quite clear in principle, it seems to me, that a master or a judge cannot deal with the matter under the summary procedure of Ord. 14 by giving judgment. The master or a judge can deal with so much of the principal as is unpaid, because there the defendant admits a principal lent, and he admits that he has not repaid all of it, and the judgment may be given for part of the principal which the defendant has not repaid. It seems to me on principle and on the rules that the master is in this position. There is a properly endorsed writ under Ord. 3, r. 6. The defendant shows no defence to part of the claim when that claim is analysed. He shows a possible defence to part of the claim. Then there is leave to sign judgment for the part for which he shows no defence, the balance of principal, and as to the part for which he shows a possible defence you deal with it under Ord. 14, r. 4, and under Ord. 14, r. 8 (a), by giving directions as to the further conduct of the action, and, further, if you think it right and under Ord. 14, r. 8 (b), it is a proper case, by putting it into the Short Cause List. That is how, it seems to me, the case would stand on principle if there had been no decisions of the court at all.

When we come to decisions of the court there is no doubt that the practice of masters and judges has changed from time to time. For instance, in the first case to which we were referred, *Wells* v. *Allott* (2), the court allowed summary judgment to stand for five per cent. interest on the principal, and there is no doubt that in *Lazarus* v. *Smith* (5), the later decision of the court, the Court of Appeal, said that that was wrong and that it should not be done. In *Wells* v. *Allott* (2) part of the principal was still unpaid when the order came for summary judgment. The master having given judgment for part of the principal, with interest at five per cent., and leave to defend as to the rest of the interest, PHILLIMORE, J., took the view that he could decide on the affidavits whether the transaction was or was not harsh and unconscionable. He decided that it was not harsh and unconscionable, and gave judgment for the whole amount claimed. That was the

substantial point raised in *Wells* v. *Allott* (2), and that was the point that the court decided when they set aside PHILLIMORE, J.'s, judgment and restored the judgment of the master. There were two members sitting in the court, LORD COLLINS, M.R., and COZENS-HARDY, L.J. I think the source of misunderstanding as to *Wells* v. *Allott* (2) has been this. There is a passage in LORD COLLINS's judgment ([1904] 2 K.B. at p. 846):

> "It is impossible now to say that the procedure of Order 14 can be made applicable to an action by a moneylender to recover interest on money lent, where the loan appears primâ facie to carry an excessive rate of interest."

That has been read, and I think it was read in *Bennett* v. *Stubbs* (1) as if he meant the whole procedure of Ord. 14, whereas I am fairly clear on reading the judgment that all that he meant was the procedure of summary judgment so far as interest was concerned, which was the particular matter which they were deciding because they were considering whether PHILLIMORE, J., could give summary judgment for principal and interest, that being the conflict on the affidavit. That appears to me to be the point decided in *Wells* v. *Allott* (2), where the judgment was given for the balance of principal due, and also for some interest on that principal. One is confirmed in that view when one sees that COZENS-HARDY, L.J., was later a party to *Lazarus* v. *Smith* (5), in which he gave judgment for principal and said that the judgment should not be given for interest on the principal, not even five per cent., and ordered the case to be placed in the Short Cause List for trial.

*Dott* v. *Bonnard* (3) does not seem to me to have very much relevance. There, a claim being made on a bill of exchange and a promissory note, the defendant's answer was: "I have paid the whole principal and interest, not in money, but I have given you shares which are worth far more than the amount of principal and interest that you claimed"; and the court said there what I should have thought was fairly obvious, "This is not Ord. 14 at all. You cannot possibly get Ord. 14 when this is the answer made on the affidavit."

Next in date comes the case to which I have referred of *Lazarus* v. *Smith* (5), where the point that was argued was that which had also been argued unsuccessfully in *Wells* v. *Allott* (2), that if the defendant shows that there is excessive interest judgment cannot be given against him for any principal that he owed, and the court said certainly it can. Where you have a properly endorsed writ and the defendant shows a defence as to part but no defence as to the other part, you can give judgment for the part for which he shows no defence; you must give leave to defend as to the part for which a possible defence is shown, and can put the case into the Short Cause List. In that case it was left in the Short Cause List where it had been put by the court below.

*Tumin* v. *Levi* (4), it seems to me, would be better described as *Chancery* v. *King's Bench*. *Tumin* v. *Levi* (4) was decided at a stage when the procedure was constantly being adopted, of which we have not heard so much lately, that the borrower rushed to the Chancery Division with a writ to re-open all the transactions, and the moneylender rushed to the King's Bench Division with an application under Ord. 14. At that time it took very much longer for a case to come on in Chancery than it did in the King's Bench, and also the Chancery idea of a short cause was one which took only ten minutes, and the King's Bench idea of a short cause was one which was said to take an hour and which frequently took a day. In those circumstances one can conceive that there was likely to be a difference of opinion in the Court of Appeal which had in it a Chancery lord justice and a King's Bench lord justice. In *Tumin* v. *Levi* (4) you had—and it was really the point of the case—two actions. The first action was by the borrower in the Chancery Division to re-open all the transaction, and the second action by the moneylender in the King's Bench Division was to take advantage of the procedure under Ord. 14. The majority of the court—and with great respect to my Lord, I do not think he was quite right in saying that they were both Chancery men; VAUGHAN WILLIAMS,

L.J., was one of the majority—acted on the rule which I think has been acted on largely with regard to those cases since—that the person who issues his writ first will be the person who will be allowed to proceed, and they allowed the Chancery action to proceed where the writ was issued first, KENNEDY, L.J., dissenting. Undoubtedly, however, in that case BUCKLEY, L.J., did say, and he repeated it five days afterwards in a case where the question did not arise but where he used it as an illustration of principle, that he did not think that questions of interest were ever intended to come into the Short Cause List.

Two unreported cases, of one of which counsel for the plaintiff has furnished us with a contemporary note, and of the other of which he has furnished us with the papers, also came before, in each case, two judges of the Court of Appeal. I happened to be a member of both courts. My Lord was a member of one court with me, and EVE, J., was a member of the other court. In each of those cases we put the trial of the question of interest in the Short Cause List. In the second case the only question argued was whether it should or should not go into the Short Cause List, although, as far as I remember, the question was argued as one of discretion and not one of jurisdiction. It was not argued to us, as far as I remember, that there was no jurisdiction to put the case into the Short Cause List.

In that state of the authorities *Bennett* v. *Stubbs* (1) came before two other judges of the Court of Appeal in 1925, and, as I have said, the junior counsel for the plaintiff tells us that the point not having been taken before the master and the judge he had not that command of all the authorities that he would have had if he had known what point was coming. *Lazarus* v. *Smith* (5) was not cited to the court in *Bennett* v. *Stubbs* (1), and the two unreported cases were not cited to the court, so that the two lord justices who sat in *Bennett* v. *Stubbs* (1) were not aware that in three cases, in one of which short cause was the only point argued, their brothers, in each case two other members of the court, had done what they were saying in *Bennett* v. *Stubbs* (1) there was no power to do. In my view, *Bennett* v. *Stubbs* (1) proceeded upon a misreading of the decision of *Wells* v. *Allott* (2) in thinking that the phrase that Ord. 14 did not apply to all the procedure instead of, as I think, to the power to give summary judgment on the question.

Having considered all the authorities in the Court of Appeal, I come to the conclusion that the view taken in *Lazarus* v. *Smith* (5), and the two unreported cases, is right. I understand it to be this, that if you have a writ properly endorsed under Ord. 3, r. 6, but the defendant is able to raise a defence to part of it, namely, as to the interest by making a primâ facie case of excessive interest, the powers given to the master or a judge when he gives leave to defend as to part of giving directions for the action under r. 8 (a) and putting it into the Short Cause List, under r. 8 (b), apply, although summary judgment cannot be given for the amount of interest.

Next comes the question in the present case, there being jurisdiction in the court, but the master and the judge having declined to exercise jurisdiction because they thought they were bound by the decision of *Bennett* v. *Stubbs* (1), which this court has held that they were not in view of the other decisions in the Court of Appeal, what should this court do as to the Short Cause List? I quite agree with what my Lord has said, that this power of putting moneylenders' cases into the Short Cause List should be exercised with considerable caution. It is certainly not to be taken as a rule that whenever the only dispute is as to the adequacy of interest in a moneylender's case, the case should go into the Short Cause List. Moneylenders' cases are very complicated, particularly cases where the defendant desires to re-open a previous transaction, and I think the master would be safe, although I do not lay down any final rule, in never putting any cases into the Short Cause List where there is a claim to re-open previous transactions as well as a dispute as to the particular transaction put on the writ. Where only one transaction appears to be concerned the masters must use their judgment whether it is

likely to be a short cause, and I think they may require the defendant to show some reason why it is likely not to be a short cause. The questions what the financial position of the borrower was at the time of the loan, and how much the moneylender knew about him, are sometimes quite simple. Sometimes the borrower knows exactly what he has had, and there are undoubtedly some cases which are properly dealt with in the Short Cause List, but I think the masters would be wise to approach the question rather with a prejudice against the Short Cause List in moneylenders' cases. They are not always short, and I do not know of any reason of public policy which requires that moneylenders, whose claims are being investigated because a primâ facie case of extortionate interest is shown, should have any special precedence over other litigants who are not in the position of having a primâ facie case of extortion made against them, but I do not think it is possible to say more to help the masters on the question whether or not cases should be put in the Short Cause List. A case should not be put in the Short Cause List unless the master has strong reason to believe that it will be short; perhaps that is as simple a rule as one can give him.

**ATKIN, L.J.**—If it were not for the decision in *Bennett* v. *Stubbs* (1) I should have found this case a reasonably simple one, and I should not have given a judgment of my own except to concur in the judgments that have been delivered, but the decision in *Bennett* v. *Stubbs* (1) stands and presents a difficulty. It is because of that case that I feel bound to express my own reason for concurring in this appeal being allowed. If *Bennett* v. *Stubbs* (1) had stood alone, it appears to me that it would govern this case. I think that it is an expression of opinion by the Court of Appeal that in a case where a moneylender has sued upon a bill of exchange and a defence under the Moneylenders Act, 1900, is raised to which the court ought to give effect and treat as raising a defence to be tried, the court has got no jurisdiction under the provisions of Ord. 14 to allow the case to be put in the Short Cause List. It is true that in the case in question the only matter that was in dispute was the question how much interest should be paid in addition to the principal which had already been paid, but I can see nothing in principle which would make any difference to any degree, although there was still some undoubted balance of the principal sum due. I could not say that, taking that view of the case if it stood alone, it would make any difference, and I should feel, and indeed I am quite sure that we should all feel, bound by it. It is obvious that a Court of Appeal consisting of three judges is not entitled to overrule a decision of a Court of Appeal expressed by two judges, but the case does not stand alone, because now it is quite apparent that there were at least three previous decisions of the Court of Appeal which have been mentioned, and to which I need not refer, which are inconsistent with the decision in *Bennett* v. *Stubbs* (1) and in each of which the Court of Appeal, to my mind quite obviously, considered and gave effect to their opinion that it was within the jurisdiction of the court to order a trial as a short cause in a moneylender's case where the defendant had raised a primâ facie defence under the Moneylenders Act, 1900, and it also is the case that none of those three cases was in fact cited to the court in *Bennett* v. *Stubbs* (1). It is not a case, therefore, where there is an authoritative decision of the Court of Appeal distinguishing the two previous cases.

This being the state of the authorities, it appears to me obvious on authority and on principle that this court is not now bound by the decision in *Bennett* v. *Stubbs* (1), but has to express its own view of what the law is. I do not decide as a question whether or not the court is bound by the previous decision in those cases, but I think it is open to us to deal with the matter on principle, which is the way in which I propose to deal with it. Dealing with the matter on principle, it appears to me that the provisions of Ord. 14 depend in the first place upon observing whether or not a writ has been specially endorsed under Ord. 3, r. 6. If the plaintiff has in fact endorsed his writ with a specially endorsed claim under

Ord. 3, r. 6, and has made a sufficient affidavit following the rules in Ord. 14, it appears to me that the case is then within Ord. 14, and he is entitled to make an application for summary judgment. It also appears to me quite plain that in a case where a moneylender sues, at any rate upon a bill of exchange, including in that term a promissory note or cheque, and claims an amount for interest which is either due as being part of a fixed sum mentioned in the bill or is a rate of interest expressed to be in the bill of exchange at a fixed rate, then the amount of the claim is a liquidated claim as far as the interest is concerned, by reason of the provisions of the Bills of Exchange Act, 1882. It is quite true that by reason of the Moneylenders Act, 1900, the party liable on such a bill may, in a moneylender's transaction, raise a defence under the Moneylenders Act, 1900, namely, that the interest was excessive, and that the transaction was harsh and unconscionable. If he makes a primâ facie case to that effect, he is precisely, in my opinion, in the same position as any other defendant against whom a summons is taken out under Ord. 14—that is to say, he has raised a case of a primâ facie defence which has to be tried. It is in no way different from the case of a man sued on a liquidated claim for goods sold and delivered who raises a primâ facie defence, either that he has not had the goods, or that they have not been delivered, or that the goods are not of the contract quality, and so on, or that they did not comply with some other condition. It appears to me that the judge is equipped with all the powers which are expressly provided in Ord. 14 in such a case where he desires to give leave to defend. He may give leave to defend conditionally or unconditionally. He may give directions as to the mode of trial, and among the directions that he may give it appears to me that he may think the case is a simple one and order the case to be tried in the Short Cause List. I see no reason at all for supposing that there is some magic in the defence under the Moneylenders Act, 1900, which makes it other than a defence which has to be tried. It has to be remembered that the mere fact that the defendant raises a case that the interest is excessive and that the transaction is harsh and unconscionable is one which on authority, and by the plain words of the rule, cannot be determined by the master or the judge. It is a question for trial, and it still remains an issue. It may be that the moneylender will prove either that the interest was not excessive or that the transaction was not harsh and unconscionable, and in that case his bill of exchange remains as he sued upon it, and he is entitled to judgment for a liquidated sum. It is obvious, to my mind, that it is quite illogical for the court, before the matter is determined whether the transaction was a transaction in which the interest was excessive and was harsh and unconscionable, to presume the fact against the plaintiff, and on that assumption decide that the claim is not a liquidated claim.

That is how the matter seems to me to stand, apart from authority, and I think that the decision to the contrary, apart from the fact that the three previous cases were not brought to the attention of the court, rests upon what I venture to think is not an uncommon misuse or misunderstanding of language used of a case not being within Ord. 14. I have known the expression commonly used at the Bar, and I have often heard it used on the Bench in this particular connection, as a compendious way of stating that it is not a case where the court ought to give summary judgment on an application made on the summons taken out under the provisions of Ord. 14. Merely used in that way all that it means is that the court will not give summary judgment. One has often known the case where a plaintiff claims on a specially endorsed writ. The defendant makes an affidavit which seems to suggest a trial defence, and at once everybody thinks: "This is not a case for Ord. 14," and so I suppose the expression might be used: "This is a case which is outside Ord. 14." But in all those cases all that is meant is that it is not a case in which the ordinary right of a defendant to have the case determined by trial should be taken away from him and summary judgment should be given.

Without referring to the whole of the language used by Lord Collins, M.R., in the case upon which *Bennett* v. *Stubbs* (1) was mainly founded, namely, *Wells* v.

*Allott* (2), I think that is made quite plain in two passages of LORD COLLINS's judgment. He begins by saying ([1904] 2 K.B., at p. 846):

> "The question we have to determine is whether the plaintiff is entitled to judgment for the whole amount claimed under Ord. 14. It seems to me that, whatever may have been the law before the passing of the Moneylenders Act, 1900, it is impossible now to say that the procedure of Ord. 14 can be made applicable to an action by a moneylender to recover interest on money lent, where the loan appears primâ facie to carry an excessive rate of interest."

I think that what the learned judge is saying there is that it is impossible to say that a moneylender is entitled to judgment under Ord. 14 in an action where the loan appears primâ facie to carry an excessive rate of interest. He goes on to say:

> "In such a case the moneylender has not an absolute right to recover what the borrower has agreed to pay, but only a right sub modo involving an investigation by the proper tribunal for the purpose of seeing if the plaintiff's primâ facie right of action is one to which in the particular circumstances effect ought to be given."

Then he goes on to say:

> "The procedure under Ord. 14 is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence."

That means to give a right to judgment, and it is obvious, therefore, that when the Master of the Rolls is saying that the procedure of Ord. 14 cannot be made applicable, he means the procedure as defined by him later on, namely, the procedure of a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence, or, in other words, to give judgment to that effect. I think, therefore, there is no authority other than *Bennett* v. *Stubbs* (1) which lays down that where a defendant, sued by a moneylender on a moneylending transaction, makes a primâ facie defence under the Act there is no power to give the necessary directions under the provisions of the Order, including the power to order the case to be put into the Short Cause List.

The only other question which arises is whether or not the discretion ought to be exercised in the present case. In reference to that I should like to express my adherence to the views which have been expressed by my Lord and by SCRUTTON, L.J., as to the propriety of putting such cases into the Short Cause List. It is quite clear to my mind that there ought to be no general rule, which it is rather suggested to us at the Bar existed before *Bennett* v. *Stubbs* (1), to put all cases of this kind in the Short Cause List. It appears to me that primâ facie the kind of investigation that has to be embarked upon in order to do justice to the parties is a discussion which is very unlikely to be properly conducted within the limits of time which a short cause ought to take. I think that it is a matter in which the fullest investigation ought to be made, and in which the master ought to have it quite clearly in his mind that time should be allowed to both parties for the purpose of dealing with the matter. As I say, although I am far from saying that there may not be cases in which the case is so short and so simple that it would come within the formula which was given some time ago by a judge as a case likely not to take more than an hour, yet in the majority of cases I should have thought myself that it would be extremely difficult to say that such a defence could be adequately and justly tried within the limits of a short cause.

There is one other point to which I wish to refer. Nothing that we have said as to the power to order a case to be tried in the Short Cause List applies to cases where the claim endorsed on the writ is obviously one that does not fall within the provisions of Ord. 3, r. 6. Under Ord. 14, r. 9, when a plaintiff makes an application under Ord. 14 in such circumstances that he must have known that he had no right

to summary judgment and leave to defend is given, the court may dismiss the application with costs. There is a dictum of BUCKLEY, L.J., in *Symon & Co.* v. *Palmer's Stores (1903), Ltd.* (8)—a dictum with which I am bound to say that I agree—to the effect that it would be an illegitimate use of the provisions of Ord. 14 to make an application in a case where it should have been quite plain to the plaintiff that he was not entitled to summary judgment merely for the purpose of getting an order for trial in the Short Cause List. Therefore, I think that the master and the judge in exercising their discretion whether or not they should put a case in the Short Cause List are entitled to have regard to the question whether or not the moneylender was or was not justified in his claim for summary judgment. That, of course, depends on whether or not he had reason to suppose that a defence could be raised, and that if raised it would be likely to be successful, but no general rule can be laid down upon it. If these were found to be the facts, then I think the court, in exercising its discretion, might very well refuse to order the case to be tried in the Short Cause List, treating the application as being an illegitimate use of Ord. 14.

In the present case it appears to me from the facts that it is an exceptionally simple case, and there is no reason disclosed why it should not be heard in the Short Cause List. The learned judge obviously did not exercise any discretion, and we are told by counsel that he rather suggested that, if he had had a discretion, he would have exercised it in the way in which we propose to exercise it. I, therefore, agree that this appeal should be allowed and an order made that this case should be heard in the Short Cause List.

*Appeal allowed.*

Solicitors : *Lazarus & Son; F. W. Perkins.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

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## THE GOULANDRIS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), January 31, February 2, 3, 4, 1927]

[Reported [1927] P. 182; 96 L.J.P. 85; 137 L.T. 90; 43 T.L.R. 308; 17 Asp. M.L.C. 209]

*Shipping—Salvage—"No cure no pay" agreement—Maritime lien—Subsequent sale of ship—Arbitration—Claim for amount of award in proceedings abroad in bankruptcy of original shipowner—Competency of action in England against purchasers of ship.*

The plaintiffs claimed salvage remuneration for services rendered under the terms of a Lloyd's salvage agreement providing for "no cure, no pay" and an undertaking by the owner of the ship before the defendants bought her to provide security, in default of which the plaintiffs were to be at liberty to enforce their maritime lien. By arrangement the vessel, which had been arrested at Constantinople, was permitted to proceed to Alexandria, where she was seized under a saisie conservatoire, which conferred no maritime lien. At Alexandria the vessel was seized by the syndic (trustee) in bankruptcy of her then owner, by whom she was sold to the defendants. The plaintiffs proceeded with arbitration in London under the salvage agreement, and an award was made, in the

absence of the owners, awarding to the plaintiffs £1,250. Nothing was paid under the award, and the plaintiffs lodged a claim for the amount of the award with the syndic in the bankruptcy in Egypt, who recommended that the claim should be rejected.

**Held:** (i) the services rendered by the plaintiffs under the "no cure no pay" agreement gave rise to a maritime lien in their favour which was not extinguished by the sale of the ship at Alexandria since that was not a sale by the court in an action in rem, but was a sale cum onere ; (ii) the rights of the plaintiffs, including their maritime lien, were not merged in the award which, therefore, did not afford a defence to the defendants in a salvage action in rem brought against them by the plaintiffs; (iii) the remedy open to the plaintiffs in this country being entirely different from the relief obtainable in the bankruptcy proceedings in Egypt, the fact that the plaintiffs had claimed for the amount of the award in those proceedings did not render it inequitable or vexatious that the plaintiffs should be allowed to pursue their action in England.

**Notes.** As to maritime liens see 30 Halsbury's Laws (2nd Edn.) 947 et seq., and as to salvage see ibid., p. 880 et seq. For cases see 41 Digest 823 et seq., 927 et seq.

Cases referred to :

(1) *The Solway Prince*, [1896] P. 120; 65 L.J.P. 45; 74 L.T. 32; 12 T.L.R. 184; 8 Asp. M.L.C. 128; 41 Digest 932, *8227*.

(2) *The Sylph* (1867), L.R. 2 A. & E. 24; 37 L.J. Adm. 14; 17 L.T. 519; 3 Mar. L.C. 37; 1 Digest 143, *510*.

(3) *The Charles Amelia* (1868), L.R. 2 A. & E. 330; 38 L.J. Adm. 17; 19 L.T. 429; 17 W.R. 624; 3 Mar. L.C. 203; 41 Digest 954, *8485*.

(4) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 19 W.R. 1; 3 Mar. L.C. 454, H.L.; 11 Digest (Repl.) 525, *1375*.

(5) *The Christiansborg* (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 1 T.L.R. 634; 5 Asp. M.L.C. 491, C.A.; 41 Digest 955, *8498*.

(6) *A.-G.* v. *Norstedt* (1816), 3 Price, 97; 146 E.R. 203; 41 Digest 946, *8388*.

(7) *The Brig Nestor* (1831), 1 Sumner, 73.

(8) *Harmer* v. *Bell, The Bold Buccleugh* (1852), 7 Moo. P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, *8168*.

(9) *The Saracen* (1846), 2 Wm. Rob. 451; 4 Notes of Cases, 498; 7 L.T.O.S. 469; 10 Jur. 396; 166 E.R. 826; on appeal sub nom. *Bernard* v. *Hyne, The Saracen* (1847), 6 Moo. P.C.C. 56, P.C.; 41 Digest 954, *8483*.

(10) *The Wild Ranger* (1862), Lush. 553; 1 New Rep. 132; 32 L.J.P.M. & A. 49; 7 L.T. 725; 9 Jur. N.S. 134; 11 W.R. 255; 1 Mar. L.C. 275; 167 E.R. 249; 41 Digest 161, *17*.

(11) *The Mannheim*, [1897] P. 13; 66 L.J.P. 16; 75 L.T. 424; 13 T.L.R. 56; 8 Asp. M.L.C. 210; 11 Digest (Repl.) 552, *1590*.

(12) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; 24 T.L.R. 411; 52 Sol. Jo. 335; 11 Asp. M.L.C. 66, C.A.; Digest Supp.

(13) *The Golaa*, [1926] P. 103; 95 L.J.P. 60; 135 L.T. 208; 42 T.L.R. 414; 70 Sol. Jo. 776; 17 Asp. M.L.C. 35; 11 Digest (Repl.) 551, *1586*.

(14) *The John and Mary* (1859), Sw. 471; 3 L.T. 123; 5 Jur. N.S. 1085; 166 E.R. 1221; 21 Digest 206, *477*.

(15) *The Bengal* (1859), Sw. 468; 5 Jur. N.S. 1085; 166 E.R. 1220; 21 Digest 203, *460*.

(16) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp. M.L.C. 304; 41 Digest 938, *8298*,

(17) *The Tervaete*, [1922] P. 259; 91 L.J.P. 213; 128 L.T.; 176; 38 T.L.R. 825; 67 Sol. Jo. 98; 16 Asp. M.L.C. 48, C.A.; 41 Digest 815, *6763*.

**Motion** to set aside a writ in rem and subsequent proceedings.

The plaintiffs, the Ocean Towage and Salvage Co., Ltd., claimed salvage remuneration in respect of services rendered to the defendants' steamship

*Goulandris*, formerly *Carston*, in the Bosphorus in November, 1925. The following statement of the facts is taken from the judgment of BATESON, J.

The facts of the case seem to be that on Nov. 26, 1925, a vessel, then called the *Carston* and now called the *Goulandris*, left Galatz on a voyage with cargo. On Nov. 29 she grounded at a place called Sil Burnu, when services of a salvage character were rendered to her by a vessel belonging to the plaintiffs, the *Cleopatra III*, a well-known salvage vessel in those waters. The services were rendered on the well-known Lloyd's form. That form is a "No cure no pay" agreement, that is to say, it is a salvage contract, and provides for security being given by the owners of the ship and cargo. Clause 5 says :—

> ". . . In the event of security not being provided as aforesaid (that is, as arranged in the contract) or in the event of any attempt being made to remove the property salved contrary to this agreement the contractor may take steps to enforce his aforesaid lien."

That is, the maritime lien which he has on performing the salvage services. That contract was signed by the master of the *Carston* on behalf of the owner of the ship and of the cargo, and by the master of the *Cleopatra III* on behalf of the plaintiffs ; and under it salvage services were rendered which gave the plaintiffs who rendered them a maritime lien on the ship. On Nov. 30 the vessel was re-floated and taken to Constantinople. Negotiations then took place with regard to security, but that could not be satisfactorily arranged, and on Dec. 7 the vessel was arrested in the Turkish courts. Further negotiations followed. The owners of the cargo were very anxious to get the cargo to Alexandria, and the owner of the ship, no doubt, was very anxious to get her away from Constantinople, because he was on the verge of bankruptcy. The solicitors for the plaintiffs, the well-known firm of Catzeflis and Lattey, arranged for the arrest at Constantinople to be taken off, and for the ship to proceed with her cargo to Alexandria. The owners of the cargo were going to give security, and the owner of the ship was going to allow the vessel to be seized in Alexandria on what is known as saisie conservatoire. The terms are set out in this form :—

> "After a number of long discussions with the shipowners and cargo owners and their underwriters, we succeeded in finding the solution to the problem which we telegraphed to you forthwith in our cablegram of the 12th inst., i.e., to obtain an order for the seizure of the vessel here upon her arrival with the consent of the shipowner and at the same time to consent to the release of the vessel at Constantinople."

That is amplified in a letter from Mr. Paschalis, who was then the owner of the *Carston*. He there says :—

> "With the object solely of permitting the immediate departure of the *Carston* from Constantinople and its arrival at Alexandria, as well as the immediate lifting of the embargo placed at present on the said vessel at Constantinople and under formal reservation of all my rights and notably of contesting later both the existence, the nature, the necessity and the extent of the services alleged to have been rendered by the Ocean Salvage Co., and the amount of the remuneration claimed by it, I agree to allow that the arrest of the steamship *Carston* at Constantinople may be renewed on the arrival of the *Carston* at Alexandria in the form of a new conservative seizure in guarantee of my contributive share of the average in question in the event of its being eventually recognised as founded by the Mixed Tribunal and that up to the maximum sum of £2,500. In consequence I authorise formally and irrevocably by these presents the Ocean Salvage Co. to proceed immediately to obtain order authorising it to seize conservatively the steamship *Carston* on its arrival at the port of Alexandria, whither I undertake to bring it immediately and directly from Constantinople, and I debar myself either from taking my ship from the said port

of Alexandria before I have furnished an equivalent guarantee, or from demanding the lifting of the above-mentioned conservative seizure under any pretext and notably under the pretext that I may myself be domiciled at Alexandria, the home port of the *Carston* and this until the full settlement of the dispute before the Mixed Tribunal of Alexandria."

So the owner was saying that he gave the plaintiffs an equivalent to the arrest in Constantinople by this conservative seizure in Alexandria. That was assented to ; and on Dec. 24 the order so attaching the vessel was obtained from the court, although the vessel had not then arrived. On Jan. 12 the Ocean Salvage and Towage Co., Ltd., wrote to Lloyd's saying :—

"We beg to inform you that in respect of the salvage services rendered by us to the steamship *Carston* we have now accepted the following arrangement with regard to the guarantee : 1. Messrs. P. Wigham Richardson & Co., Ltd., open guarantee. 2. Shippers at Alexandria on behalf of the Hamburg interests, £3,000. 3. Mr. C. D. Paschalis, attachment of ship at Alexandria. We have, therefore, wired to Constantinople to-day as follows : '*Carston* satisfactory arrangements guarantee settled give captain our written consent to proceed to Alexandria subject to immediate arrest of ship at that port.' "

I take it it is pretty clear from those documents that the arrangement was that the arrest in Constantinople should be lifted on the terms that a similar arrest should be provided at Alexandria and give the same results at Alexandria, so as to protect the plaintiffs for the amount of their maritime lien. So the vessel escaped from Constantinople and got to Alexandria. She was released on Jan. 14 or 15, as appears by the judgment of the Constantinople court. But subsequent to that she was arrested by other creditors and did not in fact get away until February. In the meantime, on Jan. 27, the plaintiffs' solicitors in Alexandria wired to the plaintiffs :

"*Carston:* shipowner declared bankrupt and order to seize vessel here ineffective as she passes into receiver's hands. If possible detain vessel Constantinople as question of privilege not certain here."

I think I am justified in assuming that that is an accurate statement of the facts, that at that date Mr. Paschalis, the owner, was declared bankrupt, and his offer, which had been accepted, to give similar security by arrest of the ship at Alexandria, became quite ineffective. The result was that the arrangement which the plaintiffs had made to release the ship in Constantinople in exchange for a similar arrest in Alexandria came to nothing. The ship in fact did not leave Constantinople until about Feb. 16. It appears that she left before it was possible to re-arrest her. On Feb. 18 the solicitors for the plaintiffs in England, Messrs. Middleton, Lewis, and Clarke, wrote a letter to Messrs. Catzeflis and Lattey in Alexandria :—

"Our clients were not able to re-arrest the ship before she left Constantinople. There is no doubt our clients have a maritime lien on the ship for salvage services and they propose to exercise that lien irrespective of whosesoever hands the steamer may get into, unless in the meantime we are able to get security for the ship's proportion of the salvage and it may be desirable to warn any buyer that that is the position, and you might also let the receiver know."

So that, as early as February, 1926, the position which the plaintiffs took up was made plain to the gentleman in charge of the bankruptcy. If those orders were carried out—and I have not the least doubt that they would be—the position which the plaintiffs were going to take up had been definitely decided.

On Feb. 21 the steamer arrived in Alexandria. It is quite true that in the affidavit of Mr. Mathias, who was the "syndic," or, as we should call him, the trustee in bankruptcy, he says that Mr. Paschalis was only declared bankrupt on

Mar. 22. There it says: "Declared bankrupt by definite judgment." Whether that was some formula that was finally concluded on Mar. 22, though in fact he had gone bankrupt early in January, I do not know, but I do not think that there is the least doubt that the bankruptcy began in January. On April 8, Mr. Mathias made an application to the juge commissaire (what exactly his position is, I am not sure ; in some of the documents he is called "registrar") asking for an order authorising him to object to the dispute as to the salvage under the agreement that had been made by the master of the ship when he was in trouble in November, 1925, being settled by arbitration. The attitude of the trustee in bankruptcy representing the bankrupt from that time forward has always been that any arbitration under that "No cure no pay" agreement was null and void. On May 5 he wrote to Messrs. Phillippides & Co., Alexandria, who were the representatives of the owners of the cargo, sending them certain documents in connection with the negotiations which were going on with regard to the arbitration, and he says :

> "Please note that the above-mentioned information is furnished to you for your own defence, for, as I have already intimated to you, I have advised the Ocean Salvage Association that I consider that the arbitration now pending is null and void as far as I am concerned."

He repeats that in substance in another document, so it is quite clear that the attitude which the syndic was taking up with regard to settling the dispute by any arbitration was null and void so far as he was concerned.

An arbitration was in fact held on Aug. 26 before Mr. Dumas, a well-known practitioner of great experience, and he made his award on that date. The award does not recite who was represented, whether the owners of the ship as well as the owners of the cargo were represented, but I was told by counsel—and I do not think there is any doubt about it, because his client, I understand, has informed him, and he was present at the arbitration—that nobody appeared on behalf of the ship in that arbitration ; only the owners of the cargo and the plaintiffs were present and discussed the case there. The award is made by Mr. Dumas in these terms :

> "I find that salvage services were rendered by the contractors to the steamship *Carston* and her cargo, and I assess the amount payable to the contractors by the owners of the *Carston* at the sum of £1,250 (one thousand two hundred and fifty pounds) and the amount payable to the contractors by the owners of the cargo of the *Carston* at the sum of £500 (five hundred pounds) and I further award and direct that the owners of the cargo of the *Carston* do pay their own and the contractors' costs of the hearing before me. . . ."

The costs of the arbitration were confined to the only persons before the arbitrator, which bears out the statement that there was nobody there on behalf of the ship. But the amount payable to the contractors was stated to be £1,250 as far as the ship was concerned.

On Aug. 31 there was a creditors' meeting at which was discussed the sale of this vessel, the syndic, having, on Aug. 24, asked the court for permission to sell the ship. It does not appear anywhere in the proceedings whether the plaintiffs were there. The creditors present agreed to a sale in accordance with the deed and formalities put before them. That sale was completed by documents on Sept. 3, and finally allowed by the court on Sept. 13, when the confirmation of the sale by the court took place. The sale was by the syndic and was no doubt approved by the court, but it was certainly not a sale after a judgment in rem. The trustee in bankruptcy had applied to the court for permission to sell, and he got permission to sell, and that was in accordance with the practice of the court and was approved by the court, but it was not a sale by the court in the sense that it was a sale on a judgment in rem, which would be a sale of the thing as it stood and not merely a sale of such interests as the parties it belonged to had in it. I cannot think that there is any doubt about that. It was a sale such as any other trustee

in bankruptcy would make, namely, a sale of the interest of the debtor such as it was. In other words, it was a sale cum onere. When one looks at the terms of the contract I think that it is made clear that it is a sale by the trustee in bankruptcy guaranteeing that the buyers will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, and if he fails to make that good no doubt he will be liable to the buyers for breach of his guarantee. I ought perhaps to draw attention to the letter of Sept. 3 attached to Mr. Hadoulis's affidavit, in which it is made quite clear that the negotiation of the sale was an ordinary negotiation of the sale of a ship, brokers acting on one side and on the other—Messrs. Embiricos, acting for the present defendants and Messrs. Griffiths and Tate & Co. acting apparently for the syndic. Mr. Hadoulis states in terms in his affidavit:

> "The sale was made with the approval of the liquidator in the Egyptian bankruptcy proceedings ; and I was given to understand that the sale gave to my clients a title to the vessel free of all charges and incumbrances."

If one looks at the document itself one sees at once that the terms are that the syndic guarantees freedom of claims by creditors. Mr. Mathias in his affidavit with regard to this says:

> "The steamship *Carston* was properly sold to Messrs. L. Dambassis and A. Diapoulis, according to a notarial act executed before the Greffier Notaire of the Mixed Tribunal of Alexandria, the 13th Sept., 1926, for the sum of £10,250. The said sale was homologated by judgment of the 15th Sept., 1926. The proceedings of sale after deduction of certain expenses were deposited with the cash department of the Mixed Tribunal for subsequent distribution among creditors."

On Oct. 18, the plaintiffs being unable to enforce their rights except by action in the courts of Alexandria or to get any security at all—they could put forward their claim, no doubt, in the bankruptcy and be met by the syndic saying that the arbitration contract was null and void—caught the ship in Hull and issued their writ, and claimed, as I think they were entitled to claim, a maritime lien on the property. They caught the res and issued their writ, and it is that which the defendants are trying to set aside on the ground that they have bought the ship free of all incumbrances. On Oct. 19 it is said by Mr. Mathias that the plaintiffs had put in a claim in the bankruptcy for the salvage, and that had been referred to the court. On Oct. 26 Messrs. Catzeflis and Lattey wired to the plaintiffs, saying:

> "*Carston:* Receiver disposed settle five hundred pounds. If you succeed seizing, vessel and purchasers disposed furnish you bank's guarantee we recommend you insist payment subject decision English court as arbitration submission attackable Egyptian courts."

If that is right, it seems that not only can the syndic say the arbitration is null and void but he can say that the whole agreement to arbitrate may be set aside ; and there was some suggestion before me that a point would be taken in the Egyptian court that the master of the ship had no authority to bind the owner, and that the whole foundation of the "No cure, no pay" agreement had gone. What the position may be in the Alexandrian courts I do not know, but at any rate it seems quite clear that the plaintiffs have no security of any sort or kind in Alexandria. They have only the claim, which may or may not turn out to be good, against the proceeds of the bankrupt's estate in the hands of Mr. Mathias.

There is only one telegram that I think I need refer to, and that is one of Jan. 13, 1927. The warning which the plaintiffs had given to their solicitors in Alexandria to tell anybody that they were going to insist upon their maritime lien on this vessel was conveyed to them to the defendants in Alexandria in connection with the sale. The telegram is this:

> "*Carston/Goulandris* on Sept. 13 Dambassis and Diapoulis personally consulted us upon draft purchase contract and after informing them of possible

seizures by creditors including Ocean Salvage they instructed attempt insert clause for indemnification by vendors in event of seizure stop we drafted necessary clause but same refused by vendors and purchasers accepted vendors' terms and contract duly executed and registered same day stop can send affidavit giving full facts if necessary."

So that it appears when the present defendants bought the ship they had full warning of the possible claim by the Ocean Salvage Co. for their salvage services. They did not get the clauses which their advisers had drawn up for them inserted in the contract, but it looks as if they had something towards that in the terms in the guarantee which I read out some time ago. That—so far as I think it is necessary to go into it—is the order of events in this case.

*Balloch*, for the defendants, submitted that the writ should be set aside and referred to *The Solway Prince* (1), *The Sylph* (2), *The Charles Amelia* (3), *Castrique* v. *Imrie* (4) *The Christiansborg* (5).

*Dunlop*, *K.C.*, and *Stranger*, for the plaintiffs, referred to DICEY, CONFLICT OF LAWS (4th Edn.) pp. 799, 873, *A.-G.* v. *Norstedt* (6); ABBOTT (14th Edn.) p. 1011; PARSON'S LAW OF SHIPPING, Bk. II, chap. X, p. 338; *The Brig Nestor* (7), *The Bold Buccleugh* (8), DANIEL'S CHANCERY PRACTICE (8th Edn.) vol. I, p. 872; *The Saracen* (9), *The Wild Ranger* (10), *The Mannheim* (11), *The Hagen* (12), *The Golaa* (12), *The Christiansborg* (5), *The John and Mary* (14), *The Bengal* (15), *The Sylph* (2), *The Solway Prince* (1), *The Charles Amelia* (3).

**BATESON, J.,** stated the facts as set out above, and continued: Counsel for the defendants takes, as I understand, four, or possibly five points, which he says entitle him to have his writ set aside. The first he takes is this. The Lloyd's salvage contract "No cure no pay" prevents the plaintiffs' bringing an action for salvage. He says that it is just the same as in *The Solway Prince* (1) where the contract by the salving vessel to salve a ship made with the insurers of the vessel excluded them from any right to sue the ship herself when the insurers became bankrupt and failed to pay. I think the two cases are totally different. In *The Solway Prince* (1) there was a contract between the salvors and insurers to do a particular work at a particular price. It meant, therefore, that the salvors were not volunteers. It was not a "no cure no pay" contract, and inasmuch as they were not volunteers there could not be any salvage. In the present case the contract was a contract to salve "no cure no pay" with all the attending consequences if salvage services are performed of there being a maritime lien on the property in favour of the salvors; and that maritime lien on the property has never been put an end to by any action of a competent court or by any bargain which has been fulfilled between the parties.

Then counsel for the defendants says that it is a contract by the owner of the ship and no one else for remuneration in a mode specified. It is perfectly true that the bargain of "no cure no pay" Lloyd's form is a bargain to go to arbitration and have the thing settled by an arbitrator out of court, but it seems to me that the contract itself, by cl. 1 and cl. 5 together, is based on the owner of the salved property providing security in terms of the contract, and if he does not provide security then the contractor may take steps to enforce his lien, which would be by the court. There is no other way of enforcing his lien. He cannot enforce his lien except through the court. In the very terms of the contract it is provided that, if no security is furnished by the owner of the salved property, the plaintiffs may resort to the court to enforce their maritime lien. The truth is that the salvors have a right against the ship which can only be defeated if the whole of the salvage agreement "no cure no pay" is carried out. I think that the real answer to counsel's point here is that the owners of the salved property as far as the ship is concerned never put up any security at all in accordance with the terms of the contract. They did not implement the bargain.

It is also said that the plaintiffs did get the security they bargained for, because

A they only bargained for a saisie conservatoire. They got an order for a saisie conservatoire, though they never got seizure. Certainly, in my view, what they bargained for was not a mere paper saisie conservatoire, but an effective arrest of the property equal to the value of the arrest in Constantinople, which would ensure their obtaining payment from any award that was made. I think the terms of their letter show that they only released her in Constantinople on terms of arrest
B in Alexandria. I think "arrest" there means arrest as we understand it—an effective arrest which would produce security. Counsel says that the security which they got was good security, because by means of the sale by the syndic the proceeds of the ship were put into court and made available for any claim they might have. I do not think that that was the meaning of what was done or a carrying out of the intention of the parties. No doubt, the property of the bankrupt went into a
C common fund and the plaintiffs would have some rights against it as distinct from their maritime lien. That language itself seems to me to be only giving them a partial remedy instead of a complete one.

It was further argued that the award by Mr. Dumas was a binding award against the owners, or which could be made binding on them, by being made a rule of
D court, and that in effect the rights of the salvors were merged in what is equivalent to a judgment. He cited for that *The Sylph* (2) and *The Charles Amelia* (3). I thought *The Sylph* (2) and *The Charles Amelia* (3) were dead against him. It is true that counsel sought to distinguish them, on, as I thought, slight grounds. He tried to distinguish them on the ground that there was some reservation in each case. But I think that really they were on all fours with this case and conclude the
E matter. In *The Charles Amelia* (3) the defendants had given a bill of exchange, and had been allowed to go away with the ship. The ship came to England, and although the bill of exchange had been given it had not been paid, and it was held that the plaintiffs had not lost their lien for damages either by "laches" or by the subsequent sale of the vessel. *The Sylph* (2) was an action for personal injuries. The plaintiff went to arbitration and was awarded compensation. He, however,
F was never paid, he sued in Admiralty and it was held that he was entitled to do so. The reservations in both cases I think do not amount to any more than would be implied in law if on a bargain one side failed to carry out or make good their part of the bargain. I think that in this case the owner of the ship distinctly failed to make good his part of the bargain to give security for the plaintiff's claim. Counsel further contended that the award in itself was a good defence ; but I think
G that if the award is not performed, and so far from being performed is contested in every possible way as far as one can see, it is no defence at all to an action in rem.

His next contention was that the sale by the syndic under the authority of the court in Egypt was as good as a sale in an action in rem. My first observation with regard to that is this. It was not a sale in an action in rem because the action
H of the syndic had nothing whatever to do with an action in rem. Secondly, the sale does not purport to be by the court ; it is a sale by the syndic with the approval of the court. Nor does it purport to be any decision as to the property in the ship. It transfers such property as the debtor may have had ; but it does not purport to decide the rights in the property. Then counsel said that according to *Castrique* v. *Imrie* (4), a sale by the court in France is just the same as a sale in rem. I
I do not think that that is the proper result in *Castrique* v. *Imrie* (4). I think *Castrique* v. *Imrie* (4) was a decision that what had happened in that case was the same as a sale in an action in rem. I think here that the facts are quite different, and I do not think that the sale in this case has any resemblance to a sale in an action in rem. Counsel for the plaintiffs cited on the other side ABBOTT (14th Edn.) pp. 1012 and 1013 and quoted this passage :

> "In the case of a judgment in personam [and at most that is what this is, if it is anything at all, because according to the evidence there is no proceeding in

rem in the Egyptian court] the court does nothing more than issue process against the property of the defendant, and if the officer of the court should sell a particular chattel as being the defendant's property, there is nothing to prevent a third person impeaching such sale setting up a claim to the chattel. All the court does in such circumstances is to sell the defendant's interest, if any, in the particular chattel. In the case of a judgment in rem the court directs that the res, and not the defendant's interest in the res, be sold. In other words, it determines on the disposition of the res. To this extent a judgment in rem binds third parties."

And so far as I know it is only a judgment in rem that does bind third parties. Counsel followed that up by quoting PARSONS ON THE LAW OF SHIPPING, vol. II, c. 10, p. 340; *The Brig Nestor* (7), *The Bold Buccleugh* (8), and DANIELL'S CHANCERY PRACTICE (8th Edn.) p. 939—all much to the same effect.

He further said he relied on the origin of a maritime lien as shown in *The Bold Buccleugh* (8), *The Ripon City* (16) and in *The Tervaete* (17), showing that a maritime lien is something more than a mere right in rem. It is described in *The Bold Buccleugh* (8) as a kind of property ; it is described in *The Ripon City* (16) as a jus in re aliena ; and it is described in *The Tervaete* (17) as a subtraction from the interests of the owner. But whatever form of words is used, there is no question that it is something more than a mere right in rem, and I think counsel was right in saying that in order to get rid of it you must get a decision in an action in rem or something equivalent to it. The only other way in which you can get rid of it is by saying that you are impleading the sovereign state of the sovereign of this country or by laches. He says that those are the only ways that you can get rid of a maritime lien ; and as far as I know he is right. *Castrique* v. *Imrie* (4) itself draws this distinction between a sale in rem, and a judgment in personam. In this connection the law of Egypt was referred to, and I had before me M. Duhamel, who gave me a great deal of assistance with regard to the law of France, and helped in the discussion of the Egyptian code. I think that if a ship is sold by the Egyptian court it must be sold in accordance with the Code de Commerce Maritime. There are only certain privileged claims, salvage not being among them, which are dealt with in the sales by court, and certain formalities must be carried out before they extinguish the privileged claims. Article 5 sets out what are privileged claims. Article 7 says how the privileges of creditors are extinguished by a sale, but as that only refers to those privileged claims in art. 5 it has no relation to the extinction of a claim which does not come under art. 5. And salvage certainly does not come under art. 5. As he says it is only privileged creditors of the clauses set out in art. 5, which are extinguished. Salvage is not one of those, and, therefore, a salvage claim is not extinguished by such a sale. Therefore, under art. 4 he has the right to follow the property notwithstanding there has been a sale. Furthermore, if one has to find some right of salvage in the Egyptian code, it must be under s. 729 of the Code Mixte ; but that is only a common law right for work and labour done. It is quite a different right from salvage as we understand it. There is nowhere to be found in these codes any right in rem, or any maritime lien for salvage at all. Therefore, the plaintiffs' points are that this is not a sale by the court at all, and that if it is a sale, it does not extinguish the salvor's lien.

Lastly, the defendants contend that in the circumstances of this case, where the plaintiffs have the power of putting forward a claim against the proceeds of this bankrupt's estate in Alexandria, and where they have done what they have in regard to releasing the vessel in Constantinople and arranging for her re-arrest, so to speak, in Alexandria, it would be inequitable after the sale to his clients that the plaintiffs should be allowed to follow the ship again here. I do not agree. As the plaintiffs have a maritime lien on the ship, and find her here when they have been kept out—I will not use any other expression—of their security, and when they have not any means of getting their claims secured elsewhere, and find the ship in the hands

of somebody else who must have known the danger and risk he ran in purchasing such a vessel, I do not think that there is much want of equity in saying that he should take the consequences. That really is not a plea to jurisdiction. That is a plea to the exercise of it. The remedy here, it seems to me, would be quite different from the remedy available in Egypt, if any, and, therefore, it does not come within cases like *The Christiansborg* (5) of lis alibi pendens or double vexation of the defendant. It cannot be double vexation in a case of this sort, because it is a different defendant.

There is one other matter I ought perhaps to refer to, and that is this. The award of Mr. Dumas is unsatisfied. It is just like a judgment that is unsatisfied. That is at the highest. It could not be put higher than to say that it is just like a judgment that is unsatisfied. If a judgment at common law in personam were unsatisfied with regard to the claim for salvage, there would be no question but that the plaintiffs could issue a writ and sue in this court to enforce their maritime lien. I think that is clear from *The John and Mary* (14) *The Bengal* (15) and also *The Sylph* (2). In my judgment the motion fails, and should be dismissed with costs.

Solicitors: *William A. Crump & Son; Middleton, Lewis & Clark*, for *Middleton & Co.*, Sunderland.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

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## HALIFAX CORPORATION *v.* FAIRBANKS' ESTATE

[PRIVY COUNCIL (Viscount Cave, L.C., Viscount Haldane, Lord Wrenbury, Lord Darling and Lord Warrington), July 7, 8, October 18, 1927.]

[Reported [1928] A.C. 117; 97 L.J.P.C. 11; 138 L.T. 162; 44 T.L.R. 5; 71 Sol. Jo. 946]

*Canada—Nova Scotia—Taxation—Direct taxation—Business tax on owner of real property—Covenant by lessee to pay tax—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *head* 2.

The Halifax city charter imposed a "business tax" which was to be "payable by every occupier of any real property for the purposes of any trade, profession, or other calling carried on for purposes of gain." The respondent estate owned certain premises in the city of Halifax which they leased to the Crown for use as a ticket office of the Canadian National Railways, the lessee to pay the business taxes, if any. The respondent estate was assessed and rated to business tax in respect of these premises under s. 394 of the charter of the city, which provided that property let to the Crown or to any person exempt from taxation should be deemed to be in the occupation of the owner thereof for business purposes, and that he should be assessed and rated for business tax.

**Held:** an occupation by the Crown could be for purposes of gain, and a business was carried on upon the premises in question on behalf of the Crown, and so the premises were occupied "for the purposes of trade" within the charter ; in determining whether taxation was direct or indirect the nature and general tendency of the tax must be considered and not its incidence in particular or special cases ; the present tax might be passed on by the landlord in whole or in part to a tenant, but it was none the less a tax on property and

within the category of direct taxes ; and, therefore, the respondent estate was rightly assessed.

**Notes.** Considered: *A.-G. for British Columbia* v. *Kingcome Navigation Co.*, [1934] A.C. 45; *A.-G. for Saskatchewan* v. *Canadian Pacific Rail Co.*, [1953] 2 All E.R. 970. Referred to: *Forbes* v. *A.-G. for Manitoba*, [1937] 1 All E.R. 249; *Atlantic Smoke Shops, Ltd.* v. *Conlon*, [1943] 2 All E.R. 393; *A.-G. for British Columbia* v. *Esquimalt and Nanaimo Rail. Co.*, [1950] A.C. 87.

Cases referred to:

(1) *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C.; 8 Digest (Repl.) 725, *214*.

(2) *Cotton* v. *R.*, [1914] A.C. 176; 83 L.J.P.C. 105; 110 L.T. 276; sub nom. *Cotton* v. *R.*, *R.* v. *Cotton*, 30 T.L.R. 71, P.C.; 8 Digest (Repl.) 726, *220*.

(3) *Montreal City* v. *A.-G. for Canada*, [1923] A.C. 136; 92 L.J.P.C. 10; 128 L.T. 295; 39 T.L.R. 17 P.C.; 8 Digest (Repl.) 727, *225*.

**Appeal** by special leave from an order of the Supreme Court of Canada, which allowed by a majority (Duff, J., dissenting) the appeal of the respondent estate from the judgment of the Supreme Court of Nova Scotia in banco, that court being equally divided, affirming the judgment of Rogers, J., on a Case Stated.

The substantial question raised on the appeal was whether a tax imposed by the city of Halifax upon the estate of James P. Fairbanks as the owner of certain premises in the city leased by the estate to the Crown represented by the Minister of Railways, for use as a ticket office in connection with the Canadian National Railways was valid, or whether it was void as not being "direct taxation" within the meaning of s. 92, head 2 of the British North America Act, 1867. The city of Halifax levied under its charter a tax called "business tax" which was to be "payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain." The tax was to be on 50 per cent. of the value of the premises so occupied. By s. 394 of the charter:

> "If any property is let to the Crown or to any person, corporation, or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business . . . purposes . . . and he shall be assessed and rated for . . . business tax . . . "

Under the terms of the lease His Majesty as lessee was to pay the business taxes, if any. The assessor for the city of Halifax assessed the respondent's estate in respect of the premises for a business tax for the year beginning May 1, 1924, and ending April 30, 1925. The Supreme Court of Canada (Anglin, C.J., Mignault, Rinfret, and Newcombe; Duff, J., dissenting) held that the tax was indirect, and, therefore, not within the powers of taxation committed to a provincial legislature by s. 92, head 2, of the British North America Act, 1867. The city of Halifax appealed.

*F. H. Bell, K.C.*, and *W. Gordon Brown* for the appellants.
*J. C. Rand, K.C.*, and *D. N. Pritt, K.C.*, for the respondents.

Oct. 18. **VISCOUNT CAVE, L.C.**—The substantial question raised in this appeal is whether a tax imposed by the city of Halifax on the estate of John P. Fairbanks as the owner of certain premises in the city is valid, or whether (as the Supreme Court of Canada has held) it is void as not being "direct taxation" within the meaning of s. 92, head 2, of the British North America Act.

The city of Halifax levies under its charter three taxes called respectively a business tax, a household tax and a real property tax. The business tax is payable by every person occupying real property for the purposes of any trade, profession or calling carried on for purposes of gain, and is assessed on 50 per cent. of the capital value of such property. The household tax is payable by every occupier of any real property for residential purposes, and is assessed on 10 per cent. of the

A capital value of such property. The real property tax is a tax on the owners of all real property and is assessed on its capital value. By s. 391 of the charter real property which is the property of His Majesty used for Imperial Dominion or Provincial purposes, or which is used for certain charitable and other public purposes there described, is exempt from real property tax. By s. 392 no household tax or business tax is to be paid by the occupiers of any of the properties declared exempt B from real property tax if such occupiers are the owners or lessees thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption. By s. 394 it is enacted that property let to the Crown or to any person, corporation or association exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business C tax according to the purpose for which it is occupied. The respondent estate is the owner of certain ground floor premises in the city and has let them to His Majesty the King, represented by the Minister of Railways and Canals of Canada, for a term of years, the lease providing that the demised premises shall only be used as a ticket office of the Canadian National Railways and that the lessee shall pay the business taxes, if any. The property is, in fact, used as a ticket office. The D respondent estate, having been assessed and rated to business tax in respect of these premises, appealed to the Court of Tax Appeals for the city of Halifax, which confirmed the assessment, and the decision was affirmed by the Supreme Court of Nova Scotia, but on a further appeal to the Supreme Court of Canada that court (by a majority) set aside the decision of the courts in Nova Scotia, and held the tax to be ultra vires and void. Hence the present appeal.

E In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for the purposes of gain, and, accordingly, that the premises in question were not assessable to the business tax, but in their Lordships' view there is no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and F they are, therefore, within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under s. 125 of the British North America Act ; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada. The real and substantial question to be decided is whether the tax is a direct tax falling within the authority of s. 92, head 2, of the G British North America Act, or whether it is an indirect tax and so beyond the powers of the province under that section ; and it was because the Supreme Court held the tax to be indirect that they declared the respondent not legally liable for payment.

The reasons for the decision of the majority of the Supreme Court of Canada were stated by NEWCOMBE, J., in a lucid judgment, in the course of which he relied H upon the often quoted statement of JOHN STUART MILL (POLITICAL ECONOMY (Edn. 1886) vol. 2, p. 415), that

> "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it [while] indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

I The learned judge held that such an expectation or intention might be inferred from the form in which the tax is imposed, or from the results which in the ordinary course of business transactions must be held to have been contemplated ; and he expressed the opinion that in the present case, where the owner is made liable for a tax which is imposed in respect of the purposes for which the tenant occupies the premises, it was only to be expected that the landlord would exact indemnity from the tenant. He held, therefore, that the tax was an indirect tax upon the tenant and beyond the powers of the provincial legislature. On the other hand, DUFF, J.,

who dissented from the judgment of the court, called attention to the great difficulty of determining the actual incidence of local rates on occupiers, building owners and land owners ; and he quoted the opinion of PROFESSOR SELIGMAN (INCOME TAX, 1914), that the incidence of such rates in an urban district is determined by a great variety of factors depending on the demand for houses or business premises and the general state of trade. He declined, therefore, to act upon any general theory as to such incidence, and held the tax to be direct.

In considering the question so raised it is, their Lordships think, important to bear in mind that the problem to be solved is one of law, the answer to which depends upon a true understanding of the meaning of the expression "direct taxation within the province" as used in the British North America Act. In this connection some observations made by LORD HOBHOUSE in delivering the judgment of this Board in *Bank of Toronto* v. *Lambe* (1) (12 App. Cas. at p. 581) are of value. The tax there in question was a tax imposed upon banks and insurance companies carrying on business within the Province of Quebec, and LORD HOBHOUSE dealt with the point as follows :

> "First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one—viz., what the words mean, as used in this statute ; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct' and 'indirect' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the tax-payers or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it ; and of every direct tax that it affects persons other than the first payers ; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

The result of these observations, which are closely applicable to the present case, is that their Lordships have primarily to consider, not whether in the view of an economist the business tax imposed on an owner under s. 394 of the Halifax City Charter would ultimately be borne by the owner or by someone else, but whether it is in its nature a direct tax within the meaning of s. 92, head 2, of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories, namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act ; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognised as falling within one or other category. Thus, taxes on property or income were everywhere treated as direct taxes : and JOHN STUART MILL himself, following ADAM SMITH, RICARDO, and JAMES MILL, said

A that a tax on rents falls wholly on the landlord and cannot be transferred to anyone else. "It merely takes so much from the landlord and transfers it to the State" (POLITICAL ECONOMY, vol. 2, p. 416). On the other hand, duties of customs and excise were regarded by everyone as typical instances of indirect taxation. When, therefore, the Act of Union allocated the power of direct taxation to the Province, it must surely have intended that the taxation of property and income should belong
B exclusively to the provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

C What, then, is the effect to be given to MILL's formula above quoted? No doubt, it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed ; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary
D to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation ; and although new forms
E of taxation may from time to time be added to one category or the other in accordance with MILL's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognised as belonging to one class to a different class of taxation.

If this be the true view, then the reasoning of the majority of the Supreme Court of Canada requires reconsideration. It may be true to say of a particular tax
F on property, such as that imposed on owners by s. 394 of the Halifax Charter, that the taxpayer would very probably seek to pass it on to others ; but it may none the less be a tax on property and remain within the category of direct taxes. Probably no one would say that the income tax levied in this country under Sched. A of the Income Tax Act, although levied upon the occupier of property who is authorised to recover it from the owner, is not a direct tax. So, although a customs
G duty paid by a person importing commodities for his own use is not passed on to anyone else, it would hardly be contended that such a duty is a direct tax within the meaning of the British North America Act. It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity ; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax. The authorities cited by NEWCOMBE, J.,
H show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or indirect ; but, with the possible exception of *Cotton* v. *R.* (2), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognised as direct has been held to be indirect for the purposes of the British North America Act by reason of any theory as to its ultimate
I incidence. On the other hand, *Montreal City* v. *A.-G. for Canada* (3), where land in Montreal belonging to the Crown in right of the Dominion and let to a tenant was held to have been validly assessed under a section of the city charter which enacted that persons occupying for commercial purposes land belonging to the Federal Government should be taxed as if they were the owners, appears to be directly in point and to support the contention of the appellant in this case. Upon the whole their Lordships have come to the conclusion that the tax here in dispute is direct taxation within the meaning of the statute, and, accordingly, that this appeal should be allowed and the decision of the Supreme Court of Nova Scotia restored,

and that the respondent estate should be ordered to pay the costs of the appellant here and below ; and they will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors : *Linklaters & Paines; Freshfields, Leese & Munns.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

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## Re FEGAN. FEGAN *v.* FEGAN

[Chancery Division (Tomlin, J.), October 14, 18, 1927]

[Reported [1928] 1 Ch. 45; 97 L.J.Ch. 36; 138 L.T. 265; 71 Sol. Jo. 866]

*Administration of Estates—Payment of debts—Mortgage debt—Liability of interest charged—Contrary intention signified by testator—Constitution of fund for payment of debts—Proceeds of sale of real and personal property—Administration of Estates Act*, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 35 (1) (2).

By cl. 2 of his will the testator devised and bequeathed freehold and leasehold property and chattels on trust for sale and conversion and payment of his funeral and testamentary expenses and debts out of the money so produced. By cl. 8 and a codicil to the will he bequeathed to each of his four daughters the sum of £1,000 out of the proceeds of life policies of the value at his death of some £5,600, which, however, he had mortgaged to secure sums amounting to £2,000.

**Held:** (i) by cl. 2 the testator did not give a direction for the payment of his debts "out of his personal estate, or his residuary real and personal estate, or his residuary real estate" within s. 35 (2) of the Administration of Estates Act, 1925, and by constituting the fund specified in that clause he had signified a "contrary intention" within s. 35 (1) to the policies being primarily liable for the payment of the charge on them ; and, therefore, the debts in respect of the mortgages of the policies must primarily be borne by the fund created by cl. 2.

(ii) the indication by the testator that that fund should be used for paying debts amounted to a direction that the mortgage debts were to be paid out of the fund so far as it was available ; to the extent that it was insufficient to satisfy the mortgage debts in full the balance must be paid out of the policy moneys and not out of the residue.

*Re Birch* (1), [1909] 1 Ch. 787, applied.

**Notes.** As to the order of the payment of liabilities in an administration see 16 Halsbury's Laws (3rd Edn.) 346 et seq., and for cases see 23 Digest (Repl.) 542, 543. For Administration of Estates Act, 1925, see 9 Halsbury's Statutes (2nd Edn.) 718.

Case referred to :

(1) *Re Birch*, *Hunt* v. *Thorn*, [1909] 1 Ch. 787; 78 L.J.Ch. 385; 101 L.T. 101; 23 Digest (Repl.) 500, *5655*.

**Originating Summons** taken out by one of two executors, asking (inter alia) whether, on the true construction of the testator's will and codicil, each of his four daughters was entitled to a full legacy of £1,000 or only to such less sum as might arise from certain policies of insurance, and, in the latter case, whether under s. 35 of the Administration of Estates Act, 1925, the mortgages on these policies must be first paid out of the proceeds thereof.

By cl. 2 of his will, dated Jan. 24, 1924, Richard Fegan devised and bequeathed his freehold property known as 111, Mayow Road, Sydenham, his freehold land situated at Coombe Hill, East Grinstead, his leasehold property known as 24, St. John's Park, Blackheath, and his furniture, plate, plated articles, linen, china, glass, pictures, prints, and other household effects (after his daughters Ethel Sophia Fegan and Adeline Constance Gladys Fegan had selected what they wanted) upon trust that his trustees should sell, call in, and convert the same into money, and out of the money produced thereby and out of his ready money pay his funeral and testamentary expenses and debts. After bequeathing an annuity and making certain specific devises and bequests, the testator bequeathed to his daughters in equal shares the money payable at his death under his three life policies in the Law Life Office, the Phœnix Assurance Co., and the British Equitable Assurance Co. absolutely, and, after making certain further bequests, the testator directed his trustees to invest the residue of his real and personal estate in any security they might be advised and to hold the same upon the trusts therein mentioned. By a codicil to his will, dated Sept. 3, 1924, the testator revoked the above bequests of his policy money to his daughters, and in lieu thereof bequeathed to each of his daughters out of the proceeds of the said life policies the sum of £1,000 absolutely, and gave the balance of the proceeds upon the trusts in favour of his son Clifford Pease Fegan therein mentioned. The testator died on Feb. 9, 1927, leaving three sons and four daughters. The policy in the Law Life Office had been taken over by the Phœnix Assurance Co. on an amalgamation during the testator's lifetime, and at his death he was entitled to a policy in the British Equitable Assurance Co., and three policies in the Phœnix Assurance Co. These policies with bonuses had at the testator's death the total value of £5,599 7s. 5d. The testator had, however, mortgaged the policies to the respective issuing companies to secure sums amounting in the whole to £2,002.

*Bradley Dyne* (*Sir Arthur Underhill* with him) for the summons.
*Eardley-Wilmot* for the testator's four daughters.
*Horace Freeman* for two sons of the testator.
*R. R. Formoy*, for the grandchildren of the testator.

**TOMLIN, J.**—By his will the testator in cl. 3 devised and bequeathed certain freehold and leasehold property and chattels upon trust that the trustees should sell, call in and convert the same and out of the proceeds pay his funeral and testamentary expenses and debts, and he seems thereby to have constituted a primary fund for the payment of debts. By cl. 8 he bequeathed to his daughters his life policies in three companies. Finally, in cl. 10 he deals with his residue, and leaves it upon trusts which it is unnecessary to state. By a codicil to his will he revoked the bequest of the life policies, and in lieu thereof bequeathed £1,000 to each daughter out of the proceeds of the life policies, and directed his trustees to hold the balance of the policy money upon trusts in favour of his son Clifford. The policies in question were worth between five and six thousand pounds at the testator's death, but they were subject to mortgages of substantial amounts which have reduced the policy money considerably below the amount required to pay the four legacies of £1,000 each, and the first question raised by the summons is whether these legacies are specific or demonstrative. [His Lordship decided that on the true construction of the will and codicil they were specific.] The further question then arises whether, having regard to the Administration of Estates Act, 1925, s. 35, the mortgages on the policies must be borne by the proceeds of the policies, or whether, having regard to the provisions of the will, a contrary intention had been expressed sufficient to exclude the operation of the section. Section 35 (1) provides:

"Where a person dies possessed of, or entitled to . . . an interest in property, which at the time of his death is charged with payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid

purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge . . ."

By s. 35 (2):

"Such contrary or other intention shall not be deemed to be signified—(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate ; or (b) by a charge of debts upon such estate ; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge."

Under cl. 2 of the will there is a disposition under which the testator constitutes a specific fund consisting of freehold and leasehold property, chattels, and some ready money as a fund for payment of his debts. He directs his trustee to

"sell call in and convert the same into money and out of the moneys provided by such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts."

That fund is not one of the funds mentioned in s. 35 (2). It is not a direction for payment of debts out of personal estate, or residuary real and personal estate, or residuary real estate. It is a direction for the payment of debts out of a fund to be constituted by the sale of specific property, consisting of freehold or leasehold property and chattels. That being so, the question is whether, apart from sub-s. (2), which does not apply to this case, there is a "contrary or other intention" expressed. It is difficult in the extreme to say that, if the testator has constituted a particular fund for the payment of debts, he did not so intend, but meant the particular debt in question to be paid out of some other property. It seems to me that when once a testator directs payment of debts out of a specific fund, he has signified a contrary or other intention in respect of any debt which would otherwise be payable out of another fund. Therefore, I hold that a contrary intention has been expressed within the meaning of the section, and that the mortgages of the policies must primarily be borne by the fund created by cl. 2.

The special fund is insufficient to satisfy the debts in full, and the question now arises whether the unsatisfied balance of the sum charged on the policy moneys is payable out of residue. On the one hand, it is contended that this is so and that s. 35 does not apply, but, on the other, it is said that the section applies and that the provision of a special fund expressed a contrary or other intention so far only as money was available from the special fund to pay the debts. I have little doubt that, although the language of the section is not precisely the same, its object was to place personal estate on the same footing as that on which real estate stood, having regard to the Real Estate Charges Act, 1854 (Locke King's Act). By s. 1 that Act provided:

"When any person shall . . . die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged. . . ."

A question arose under that Act in *Re Birch* (1), where a testator directed that a mortgage debt secured on Whiteacre was to be paid out of the proceeds of sale of Blackacre, and it was held that the direction exonerated Whiteacre to the

A extent of those proceeds, but did not indicate a general "contrary or other intention" within s. 1 of the Act of 1854, so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency. SWINFEN EADY, J., said:

> "The true construction of that section is that the devisee of land so charged takes the land subject to the payment of the mortgage debt except so far as a contrary or other intention is shown, and it is only so far as a contrary or other
B intention is shown that the land is to be exonerated."

He referred to earlier cases in which there had been some conflict, and said:

> "I am not satisfied that ROMILLY, M.R., meant to express any opinion in favour of the devisee's right to general exoneration in such a case; but I adopt the opinion of SIR R. KINDERSLEY, which appears to me to be the true view, namely,
C to give effect to the contrary intention so far as shown by the will and no further. In the present case the only intention is to exonerate Whiteacre to the extent of the proceeds of Blackacre, and I can find no indication of any intention that Whiteacre is to be exonerated also out of the general personal estate."

Unless there is some difference between the language of s. 1 of Locke-King's
D Act and s. 35 of Administration of Estates Act, 1925, the language of SWINFEN EADY, J., seems to me to apply to the present case. The testator has indicated that a particular fund should be used for paying debts. That seems to me to be a direction that the mortgage debt is to be paid out of that fund so far as it is available, but not a direction that the property charged is to be exonerated beyond that so as to throw the burden of the balance of the sum charged on the general personal
E estate. Counsel for the daughters suggests that there is a distinction in language between the two sections and that, although under s. 35 of the Act of 1925 the mortgaged property is made primarily liable for the mortgage debt in the absence of an expression of a contrary intention, yet if another fund is made primarily liable, that expresses a sufficient contrary intention to free the mortgaged property from the burden of the debt. Although the language of the two sections differs
F somewhat, I think the effect is precisely the same, and that each section provides that the mortgaged property is to be primarily liable unless a contrary intention is expressed, but that if the intention expressed is that some other fund is to be primarily liable, it only expresses a contrary or other intention to the extent that this other fund is to be primarily liable so far as its size permits, and that in other respects no alteration is made in the order in which the debts are to be paid. If the
G special fund is insufficient, there is nothing to throw the balance of the mortgage debt on the general personal estate. Therefore, I will declare that in so far as the special fund is insufficient for payment of debts the money charged will remain payable primarily out of the fund charged.

Solicitor: *W. G. A. Edwards.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

# FULLWOOD *v.* HURLEY

[Court of Appeal (Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.), July 6, 7, 1927]

[Reported [1928] 1 K.B. 498; 96 L.J.K.B. 976; 138 L.T. 49; 43 T.L.R. 745]

B

*Agent—Conflict of interest—Receipt of commission from other party to transaction —No consent by principal—Unenforceable custom.*

A vendor's agent, employed to effect the sale of property, and remunerated by commission on the purchase price, cannot contract with the purchaser for the payment by the latter of a second commission, except upon the basis of actual work done for the purchaser and with the full knowledge and consent of both vendor and purchaser. Strong and cogent evidence is necessary to prove such knowledge and consent. A custom to the effect that an agent shall be entitled to commission from the other party to a transaction without the knowledge of his (the agent's) principal is unreasonable and unenforceable.

C

**Notes.** Referred to: *Harrod's, Ltd.* v. *Lemon*, [1931] All E.R. Rep. 285.

As to the relations between principal and agent see 1 Halsbury's Laws (3rd Edn.) 181 et seq., and for cases see 1 Digest 424 et seq.

D

**Appeal** from an order of the Divisional Court (Bankes, L.J., sitting as an additional judge of the King's Bench Division and Roche, J.), reversing the decision of the judge of the county court at Leighton Buzzard, who gave judgment for the plaintiffs for £66 5s., the amount claimed. The plaintiffs appealed.

E

*G. F. Emery* for the plaintiffs.

*du Parcq., K.C.*, and *C. W. Measor* for the defendant.

**LORD HANWORTH, M.R.**—This appeal fails. The action in the county court was brought by Messrs. Fullwood, who are hotel and public-house brokers, general business transfer agents, and licensed valuers, against the purchaser of a public-house called the Hunt Hotel, Leighton Buzzard, Bedfordshire. It appears that the plaintiffs, on July 6 last year, issued to the defendant orders to view a number of public-houses, among them the Hunt Hotel, Leighton Buzzard. A letter accompanying the orders states: "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage."

F

It is quite plain that the order to view the Hunt Hotel issued because Messrs. Fullwood were the authorised agents of the vendor, and, therefore, entitled, and under a duty to issue an order to view to such proper persons as they thought would be suitable who had asked to have the opportunity of seeing whether the property was such as they wished to buy. The order to view having been issued, the defendant viewed the premises and ultimately entered into a contract with the owner, Mrs. Lloyd, under which he bought the hotel. The plaintiffs have received a commission from the vendor, a sum of £134. They now make a claim in this action against the purchaser for an additional commission of £66 5s., as being due to them upon the terms of this letter—that there was a contract by the defendant, the purchaser, to pay them this second commission on the sale of the Hunt Hotel. The way in which the case is put is this. It is said that it is a practice in the trade for one person to act for both parties. That may be the case on completion, when measurements have to be taken of the goods in the hotel. Mr. Fullwood said in his evidence: "I told the defendant, 'We shall expect brokerage.' The defendant did not argue the matter with me, or repudiate liability in any way." Then he said in cross-examination: "I did not tell the defendant personally that he would have to pay commission, but he must have known it." On the other hand, the evidence is that the defendant saw this order to view, which I think includes the letter, and made no objection. Upon that the learned county court judge says this:

G H I

A "He accepted the order to view [which, as I have said, includes the letter] and made no objection to the terms of that order with regard to commission, and there must be judgment for the plaintiff."

In the opinion that I have formed there was no evidence to justify that finding or to establish that a contract had been made between the plaintiffs and the B defendant to pay this second commission. The plaintiffs' position is made quite clear from the terms of what we have called the order to view, that is to say, that they were at that time the agents for the vendor, acting for their principal, and intending to receive, and being entitled to receive under the conditions, a commission from the vendor. That being their position, they were in accordance with their duty disentitled to engage in a second agency with the purchaser which would C conflict with their duty towards the vendor, a position which, unless it was assented to with the full knowledge by their original principal, could not be maintained by them as an agent at all. All that the evidence shows is that the defendant made no objection, that he was conscious of the terms of this letter, which said that, if business were done, "we shall act for you at the usual brokerage." In my judgment, those terms are not sufficient to enable the plaintiffs to say that a contract D was made between them and the purchaser under which the purchaser agreed to pay them a second commission, especially as it was plain to both parties that at that time the plaintiffs were the agents for the vendor and not entitled to enter into such a contract with the defendant, unless there had been a full knowledge and assent on the part of the vendor to this subsequent dealing between the defendant and her established agents. The evidence seems to me to fall far short E of what would be necessary to establish the right of the plaintiffs to recover, if it could be established. It appears to me that it would be necessary to have some evidence, strong and cogent, to show that the vendor placed her agents in the position of being at liberty to engage in a fresh contract with the purchaser, before they could enter into any such contract as is contained in those words in the letter. "Not objected to by the defendant," falls far short of what is necessary. F It cannot be stated too plainly that an agent must not accept commissions from both sides, that if two commissions are to be received it must be on the basis of the actual work being done for both parties with the assent of both parties after full knowledge. If such knowledge is afforded and it is made plain what position the agent occupies, it is possible for the agent to act between the parties, but if and so long as the agent is the agent of one principal he cannot engage to become G the agent of another principal without the leave of the first principal, with whom he has originally established his agency. In the present case I have come to the conclusion that there was no contract established, such as to justify the plaintiffs' claim. Therefore, the appeal must be dismissed, and I have come to the same conclusion as was reached by the Divisional Court, that the plaintiffs' claim fails. The appeal will be dismissed with costs.

H **SCRUTTON, L.J.**—I have come to the same conclusion, though I feel that if I did know all the facts it is quite possible that the defendant, who was said to be a very experienced gentleman, might not have my sympathy. Also I am not quite sure that I agree with all the remarks which the Divisional Court are said to have uttered in the very short report which we have got. As my Lord has done, I wish I to emphasise the view that the law takes of these double commissions. No agent who has accepted an engagement from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment. That Messrs. Fullwood's manager quite misunderstood his rights is obvious from the statement he admits he made: "I did say that I could have got the property for £500 less than the purchaser would give." If as agent for the vendor he is negotiating price, and knows that his principal will pay a named figure, by no possibility could he use

that knowledge to get the property for the purchaser at £500 less than the purchaser was inclined to pay. That answer given by him shows that he completely misunderstands the legal relation which results from a man attempting to get commission from each side.

The main ground, however, upon which I decide this case is that I do not think the plaintiffs show any real contract to pay this commission. In view of the nature of the contract that they desired to establish, that is to say, a contract that an agent employed by one principal shall be paid commission by another, it is essential, in my view, to make that contract perfectly clear to the party against whom he is claiming. The order to view contains nothing which puts on the purchaser a liability to pay purchaser's commission to the agent. It does give the purchaser notice that there is some agreement or other between the vendor and the agent for commission, but that is not enough. It is not enough merely to give notice that there is a commission, leaving the purchaser to inquire what it is and how much. It is the agent's duty to make the fullest disclosure on his second contract of all the benefit he is getting out of it, and I think that counsel for the plaintiffs agrees that there is nothing in the order to view by itself which imposed this liability on the purchaser. Again, Messrs. Fullwood seem quite to misunderstand the position, because they have suggested that they were entitled, in giving the order to view, to make terms, giving the order to view as consideration for the payment of commission to them. That again would be quite inconsistent with their duty to the vendor, which is to give an order to view to every probable purchaser, and not to refuse an order to view because they cannot get any agreement to pay them commission. Again, Messrs. Fullwood seem quite to misunderstand their position as agents in trying to get a double commission. With regard to the phrase used in the letter: "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage," in my view, that is quite ambiguous. It may be an offer: "If you want us to act for you we shall be prepared to, if you pay the usual brokerage," but there is nothing to make it a proposal for a contract which is necessarily accepted by using the order to view—an order which it is the agent's duty to his vendor to give without any conditions at all. If Messrs. Fullwood or any public-house broker wants to get two commissions, they must fulfil the two conditions of the law by making a full disclosure to each party of the exact nature of their interest before they make the alleged agreement, and, if they get a second commission, of obtaining the consent of each party. It is not enough to say that it is the usual or customary brokerage, because the law has held that a custom to the effect that an agent shall have double brokerage without informing his principal is unreasonable, and shall not be enforced; and anybody who does want to get double commission where he has two different interests in himself which may clash must fulfil to the strictest extent the requirements of the law. This I understand to be the substance of the Divisional Court's judgment, and, while not disagreeing with it, there are one or two phrases in it that I do disagree with. I rest my judgment on the ground that an agent who wants to make two contracts for double commission must do so in the clearest possible terms and with the clearest possible information to each of his principals what he is doing, otherwise he cannot sue under an alleged agreement. On those grounds I think the appeal must be dismissed, and I have stated them because my views are not quite the same as those of the divisional court.

**SARGANT, L.J.**—I am of the same opinion. Counsel for the plaintiffs has from time to time in the course of the argument referred to an alleged custom in the trade. It has been said that the matter could not be based on custom, that there was not any such evidence of custom as would be sufficient to establish that. The learned county court judge himself has not relied in any way on custom. Therefore, I think custom may be put entirely out of the question.

That being so, the claim of the plaintiffs seems to me to depend simply and

solely on that final paragraph in the letter which accompanied the large number of orders to view which they gave to the defendant. That sentence: "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage," seems to me to be an ambiguous sentence. It may be the expression of an offer to act for the purchaser at the usual brokerage, or a statement that they will so act, or it may be that it would be necessary, in order for the plaintiffs to establish their claim, to show that it was a statement that this order to view was merely given to the purchaser on the condition that he agreed to pay them a second commission. With regard to that interpretation, I do not think the plaintiffs can insist upon that, because, if so, they are seeking to impose an onerous condition on the purchaser which might very well prevent him from ever taking advantage of the order to view, and to impose such a condition would be in flagrant violation of the plaintiffs' duty to the vendor, which is to bring along any purchaser who can be found on the terms of the vendor paying the plaintiffs the agreed commission. It would be entirely wrong and improper for the plaintiffs, without the fullest prior sanction on the part of the vendor, to seek to impose upon the purchaser a condition which might have the effect of stalling him off and preventing the plaintiffs securing for the vendor such a purchaser as would be acceptable to the vendor. In my judgment, therefore, the plaintiffs have failed to prove that there was any contract between them and the defendant entitling them to claim this second commission from the defendant, in addition to the commission they have already been paid by the vendor.

Solicitors: *W. H. Lane; Mockridge & Co.*, Ealing and London.

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

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## DE VRIES *v.* SMALLBRIDGE

[COURT OF APPEAL (Scrutton and Atkin, L.JJ., and Eve, J.), December 9, 1927]

[Reported [1928] 1 K.B. 482; 97 L.J.K.B. 244; 138 L.T. 497]

*County Court—Jurisdiction—Ancillary relief—Declaration—Injunction—Need for money claim in same proceedings—Cancellation of agreement for sale of property—Purchase price exceeding £500—Claim by vendor for declaration of right to £100 deposit—County Court Act*, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 52 (1) (*d*).

A county court has no power to entertain a claim for an injunction or a declaration unless there is in the same plaint a money claim within the jurisdiction of the court.

*Stiles* v. *Ecclestone* (1), [1903] 1 K.B. 544, overruled.

A claim for a declaration that the plaintiff was entitled to a deposit of £100 paid by the defendant to stakeholders under an agreement by the defendant to purchase real property for £750 **held** not to be within the jurisdiction of the county court since its determination would involve consideration of the question whether the agreement should be cancelled and the purchase money provided by the agreement exceeded the sum of £500 which, under s. 52 (1) (d) of the County Courts Act, 1934, was the limit of the jurisdiction in proceedings for the cancellation of an agreement for the sale of property.

**Notes.** The County Courts Acts, 1934 and 1955 have been consolidated and replaced by the County Courts Act, 1959, s. 52 of which corresponds to s. 52 of the 1934 Act.

Considered: *Upton* v. *Farmer* (1930), 142 L.T. 526.

As to the jurisdiction of the county court to grant ancillary relief see 9 HALSBURY'S LAWS (3rd Edn.) 142 et seq., and as to the equitable jurisdiction see ibid. 156 et seq. For cases see 13 DIGEST (Repl.) 381, 395. For County Courts Act, 1934, see 5 HALSBURY'S STATUTES (2nd Edn.), and for County Courts Act, 1955, see ibid., vol. 35, p. 24.

Cases referred to:

(1) *Stiles* v. *Ecclestone*, [1903] 1 K.B. 544; 72 L.J.K.B. 256; 88 L.T. 294; 51 W.R. 411; 47 Sol. Jo. 257; 67 J.P. Jo. 76, D.C.; 13 Digest (Repl.) 381, *103*.

(2) *R.* v. *Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone*, [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 65 Sol. Jo. 552; sub nom. *R.* v. *Parsons, Ex parte Malone*, 37 T.L.R. 546, C.A.; 13 Digest (Repl.) 381, *104*.

(3) *Simpson* v. *Crowle*, [1921] 3 K.B. 243; 90 L.J.K.B. 878; 125 L.T. 607; 37 T.L.R. 658, D.C.; 13 Digest (Repl.) 382, *105*.

**Appeal** from an order of the Divisional Court.

The plaintiff claimed against the defendant, a declaration that under a contract dated Oct. 2, 1926, and made between the plaintiff and the defendant, for the sale and purchase of freehold premises known as No. 3, Upper Addison Gardens, Kensington, London, which agreement incorporated the Statutory Conditions of Sale, 1925, the defendant had forfeited the deposit of £100 paid to Messrs. Griffinhoofe and Brewster, as stakeholders, and that he (the plaintiff) was entitled to receive payment of the deposit from the stakeholders. The action was commenced in the Bloomsbury County Court of Middlesex by a plaint lodged on Mar. 18, 1927, whereby the defendant was summoned to appeal at the county court to answer the plaintiff to a claim, the particulars of which were annexed. The summons contained no statement of any debt or any money claim, except "costs of plaint, £2, and solicitor's costs, £1 11s. 9d." The defendant alleged that she entered into the contract on the express statements of the plaintiff that the property was freehold and free from restrictions, whereas in fact it was, to the knowledge of the plaintiff, subject to onerous restrictions which prevented the defendant from using the property for the purpose for which, to the knowledge of the plaintiff, she required it, namely, for use as a boarding-house or for letting in apartments and not as a private house. The defendant said that she was also informed that the restrictions were inoperative, but this information was incorrect to the knowledge of the plaintiff. The purchase price under the agreement was £750, and a deposit of £100 was paid by the defendant to the stakeholders. The county court judge dismissed the action, holding that he had no jurisdiction to entertain it. The Divisional Court (BANKES and LAWRENCE, L.JJ.), on the authority of *Stiles* v. *Ecclestone* (1), ordered a new trial, but gave leave to appeal to the Court of Appeal. The defendant appealed. By County Courts Act, 1888, s. 56:

> All personal actions, where the debt, demand, or damage claimed is not more than £50 [now £400: see County Courts Act, 1955, s. 1 (1)], whether on balance of account or otherwise, may be commenced in the [county] court, and all such actions shall be heard and determined in a summary way according to the provisions of the Act. . . .

*S. P. Kerr* for the defendant.

*A. H. M. Wedderburn* for the plaintiff.

The following authorities were referred to during the arguments:—County Courts Act, 1888, ss. 56, 67, and 73; County Court Rules 1923, Order V., rr. 1 and 2; Supreme Court of Judicature Act, 1873, s. 89; Supreme Court of Judicature (Consolidation) Act, 1925, s. 202; *R.* v. *Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone* (2); *Stiles* v. *Ecclestone* (1) and *Simpson* v. *Crowle* (3).

**SCRUTTON, L.J.**—I am of opinion that the plaint in this action was a bad plaint and the summons a bad summons because neither the plaint nor the summons contains a statement of any debt or any money claim. The particulars of claim state that "the plaintiff's claim against the defendant is for a declaration that . . . the defendant has forfeited the deposit of £100 paid to Messrs. Griffinhoofe and Brewster . . . as stakeholders, and the plaintiff further claims a declaration that the plaintiff is entitled to receive payment of the said deposit from the said stakeholders," who were not in fact parties to the action. The county court judge, acting on the authority of *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2), declined to hear the case, being of the opinion that, there being no money claim, the county court judge had no jurisdiction to grant a declaration. The plaintiff appealed to the Divisional Court, and the appeal was heard by two members of the Court of Appeal sitting as a Divisional Court of the King's Bench Division. They were referred to *Stiles* v. *Ecclestone* (1), where a Divisional Court of three judges had held that an action in which the only relief claimed was an injunction was within the jurisdiction of the county court provided that there was a claim for damages which, if put in suit, would have been within the jurisdiction of the county court. In *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2), the plaintiff had no legal claim for damages. In this state of the authorities, the Divisional Court thought that they ought to observe the rule of that court, which is to respect the decision of a court of three judges, and so they reversed the judgment of the county court judge and gave the defendant leave to appeal to this court.

I am of opinion that the Court of Appeal in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2) did decide the point in dispute in this case, and held that in order to bring a personal action like the present within the jurisdiction of the county court a money claim must be the subject of the plaint and particulars, and that the jurisdiction of the court by way of injunction or declaration, being only an ancillary jurisdiction, is not available unless the claim or demand is one which can be the subject of a plaint within the jurisdiction of the court. That is the result of the judgments in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2). It follows that *Stiles* v. *Ecclestone* (1) was wrongly decided. The same view was taken by the Divisional Court in *Simpson* v. *Crowle* (3), who held that the county court has no jurisdiction to grant an injunction where there is no money claim. In the result the appeal must be allowed.

In my view there is another fatal objection to the plaint in this case. It relates to a deposit paid on a contract of sale of freehold premises for £750. In order to make a declaration of the right to the deposit it would be necessary to decide whether there was a valid contract of sale of the property. The defendant says that she entered into the contract on the express statement of the plaintiff that the property was freehold and free from restricions, whereas in fact it was to the knowledge of the plaintiff subject to restrictions which prevented her from putting it to the use for which she required it. Thus the county court judge would have to decide the rights of the plaintiff under a contract for the sale of property where the purchase money is £750, while the equitable jurisdiction of the county court is limited to cases where the purchase money does not exceed £500. But I need not decide this point, because *R.* v. *Cheshire County Court Judge and United Society of Boilermarkers* (2) binds us to hold that where a plaint in the county court contains no money claim, but only asks for a declaration, it is not within the jurisdiction of the court.

**ATKIN, L.J.**—I am of the same opinion. This action was brought for a declaration that the plaintiff was entitled to a sum of money paid as a deposit into the hands of stakeholders who were not parties to the action. That form of action is not within the jurisdiction of the county court, which is entirely a statutory jurisdiction. The only section relied on by the plaintiff as enabling him to bring

the action is s. 56 of the County Courts Act, 1888, but in my opinion, the point raised by the plaintiff has already been decided against him in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2).

In that case the plaintiff had brought an action in the county court against a trade union claiming a declaration that a resolution of the union purporting to expel him was ultra vires and void, and for an injunction to restrain the union from acting upon it. The particulars of claim contained no claim for damages. In the circumstances of that case there could be no claim for damages, because a member of a union cannot recover damages against the union for being expelled, even though the expulsion was illegal. The Court of Appeal, upholding the decision of the county court judge, held that s. 56 of the County Courts Act, 1888, conferred on the county court no jurisdiction to entertain an action in that form, because the words "personal actions" in that section mean actions to enforce money claims not exceeding the amount over which the court has jurisdiction. If there is a money claim within the jurisdiction of the court, then no doubt the court can give ancillary relief by way of declaration or injunction, but if there is no money claim within the jurisdiction of the court, or if there is no money claim at all, then the court has no jurisdiction to give that relief. In the course of his judgment in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2), LORD STERNDALE, M.R., said ([1921] 2 K.B. at p. 700):

> "I think it follows, if I am right in what I have said, that the declaration or the injunction can only be granted where there is an action such as is described in s. 56 of the County Courts Act, 1888, and where the plaintiff has established a right to relief in that action. If the declaration or the injunction is merely ancillary to the other relief, as I think it is, then you must have established the right to the other relief in the action."

To explain what the other relief is, there are the plain statements of the other lords justices. SCRUTTON, L.J., said (ibid. at p. 706):

> "The other view is that it is essential to the jurisdiction of the court that there should be a money claim not exceeding £100. That, I think, is the true view of the section, and in that view it is essential that the plaint should show that the money claim made does not exceed £100."

Then he points out that in that case there was intentionally no claim for money, and after referring to the definition of personal actions given in vol. III of BLACKSTONE'S COMMENTARIES, p. 117, as actions whereby a man claims a debt, or personal duty, or damages in lieu thereof, SCRUTTON, L.J., continues thus (ibid. at p. 709):

> "The idea of something which was not a claim for money founded on contract, or a claim for money founded on tort, but was a demand for a declaration, I think, never occurred to SIR WILLIAM BLACKSTONE, and I do not think, when the legislature used the phrase 'personal action,' it was thinking of any such matter as declarations, which were practically unknown in the county court."

YOUNGER, L.J., in the same case, said (ibid. at p. 712):

> "The first question one asks oneself is, What are the personal actions which under [s. 56 of the County Courts Act, 1888] may be brought in the county court? and as a matter of construction I myself have no doubt that the words which follow the words 'personal actions'—namely, 'When the debt demand or damage claimed is not more than £100 whether on balance of account or otherwise'—are all of them words of qualification of the words 'personal actions,' and that no personal action with regard to which you are unable to say that it is one where the debt demand or damage claimed is not more than £100, whether on balance of account or otherwise, is a personal action within the jurisdiction of the County Courts Act under this section at all. If I had any doubt upon the question whether the action could be construed as extending,

as has been suggested, to actions for declarations or other incidental relief or for any form of order that may be made in any personal action not in itself involving the payment by the defendant of a sum of money, it would, I think, be resolved by the last words of the sentence which I have read that 'all such actions—that is to say, the personal actions which are previously referred to—'shall be heard and determined in a summary way.' It appears to me that those words undoubtedly confirm the view that one would, apart from them, take of the section that what is referred to are actions of the description stated resulting in a money claim and a money payment, either in the form of debt or damages, and that it is not intended to refer to or comprise vague things like declarations which, not resulting in payment directly by the defendant to the plaintiff, may nevertheless affect their relations in respect of property which in point of value is beyond any limit of value in any section of the County Courts Act."

That statement is perfectly plain. The fact that the declaration sought in the present action relates to a sum which is not in amount beyond the jurisdiction of the county court does not in any way qualify the decisions of YOUNGER, L.J., that the claim in question in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2) was not a money claim, and, therefore, that the action was not a personal action within s. 56 of the County Courts Act, 1888. That decision binds us. In my opinion, it overrules *Stiles* v. *Ecclestone* (1), and this was also the view taken by BRAY, J., and LUSH, J., in *Simpson* v. *Crowle* (3). The result is that the appeal must be allowed and the judgment of the county court judge must be restored.

**EVE, J.**—I agree. The first question whether there can be a claim in the county court for a declaration simply, and without a money claim, is concluded by *R.* v. *Cheshire County Court Judge and United Society of Boilermakers* (2). With regard to the second point—namely, the jurisdiction of the court under s. 67 of the County Courts Act, 1888—the court has all the powers and authority of the High Court, by sub-s. (4):

"For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase, the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of £500."

Counsel for the plaintiff presented this claim to retain the deposit as if it were a claim for damages for breach of an agreement which had been repudiated by the defendant. That is not in truth the relief sought. The claim is really for partial specific performance based on the non-performance of an agreement by the defendant, whose default is said to entitle the plaintiff to claim from certain stakeholders payment of a sum deposited with them. Whether that claim is a valid one depends upon the terms of a contract of sale, and a declaration that the plaintiff is entitled to retain the deposit is pro tanto a decree for specific performance, for it is only by the terms of the contract that the plaintiff's right to retain the deposit can arise. This is not a case of a purchaser claiming rescission of a contract, where the court may come to the conclusion that he is entitled to the return of the deposit. The claim in the present case is that on the true construction of the contract and in the events which have happened the plaintiff, the vendor, is entitled to retain the deposit. That claim raises questions not only of the construction, but also of the right to performance, of a contract for the sale of property where the purchase money exceeds £500. The claim is therefore outside the jurisdiction of the county court, as limited by s. 67. The appeal must, therefore, be allowed on this ground also.

*Appeal allowed.*

Solicitors: *Griffinhoofe & Brewster; N. Ramsay Murray.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

# FORSTER *v.* NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN AND CLERKS

[CHANCERY DIVISION (Eve, J.), January 19, 20, 21, 1927]

[Reported [1927] 1 Ch. 539; 96 L.J.Ch. 141; 137 L.T. 86; 43 T.L.R. 199; 71 Sol. Jo. 105] B

*Trade Union—Political purposes—Application of funds—Conditions precedent fulfilled—Complaint by member to Registrar—Right to resort to courts—Trade Union Act*, 1913 (2 & 3 *Geo.* 5, *c.* 30), *s.* 3.

Where the conditions precedent relating to the application of the funds of a trade union for political purposes, which are contained in s. 3 (1) of the Trade Union Act, 1913, have been complied with, the statutory restrictions contained in that sub-section cease to operate, and an action founded upon a breach of those restrictions must fail. C

Where a member of a trade union has complained to the Registrar of Friendly Societies under s. 3 (2) of the Trade Union Act, 1913, alleging a breach of the rules of the union and the Registrar of Friendly Societies has decided that there has been no breach of the rules, the member cannot then resort to the courts. D

**Notes.** Considered: *Birch* v. *National Union of Railwaymen*, [1950] 2 All E.R. 253.

As to the application of trade union funds to political objects see 32 HALSBURY'S LAWS (2nd Edn.) 469 et seq. For Trade Union Act, 1913, see 25 HALSBURY'S LAWS (2nd Edn.) 1270. E

**Action** for injunction.

The plaintiff claimed from the defendant trade union, of which he was a member, an injunction to restrain them from applying directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, any of the general funds of the union in the furtherance of the political objects to which s. 3 of the Trade Union Act, 1913, applied, and, in particular, from paying any contributions or sums to the Trade Union Congress so long as that body expended its funds or part thereof in the furtherance of such political objects, or intended to do so. The plaintiff had been a member of the defendant union since 1903. The general funds were, he said, indirectly applied for the purposes mentioned by affiliation fees paid to the Congress, which came into existence about 1872 as a non-political body, but had recently altered its procedure so as to become a political body. The main question on the pleadings was whether the defendants were entitled to pay such affiliation fees. F G

By s. 3 (1) of the Trade Union Act, 1913:

"The funds of a union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of political objects to which this section applies . . . unless the furtherance of those objects has been approved as an object of the union by a resolution . . . passed on a ballot of the members of the union . . . by a majority of the members voting; and where such a resolution is in force, unless rules, to be approved . . . by the Registrar of Friendly Societies, are in force . . ." H I

The rules in question are to provide (a) for payments for political purposes to be made out of a separate ("the political") fund to which (b) members should not be obliged to contribute. The political objects to which the section applies are (inter alia) the expenditure of money

"(b) on the holding of any meeting or the distribution of any literature or documents in support of any [parliamentary] candidate or prospective candidate; or (e) on the holding of political meetings of any kind, or on the

A distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act."

By s. 1 (2) of the Act the "statutory objects" means

B ". . . the objects mentioned in s. 16 of the Trade Union Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."

C The Congress represented about 200 unions with a membership of some four millions. They met annually and the affiliated unions sent delegates from whom the council of the Congress was elected, which transacted all the business until the next meeting. In 1924 the Congress, with the Labour Party, appointed a body called the National Joint Council, and their expenses were defrayed by the two electing bodies. The plaintiff alleged that these expenses were largely supplied by the affiliation fees, and that many of the documents produced by them D were of a political character. The plaintiff complained to the Congress in 1924 about certain payments which had been made and was referred to his own union. He then complained to them, but receiving no satisfactory reply he wrote the Registrar of Friendly Societies complaining of a breach of the rules as to the application of the funds, and particularly of r. 45 (2), which provided that "any payments in the furtherance of such political objects shall be made out of a separate fund (here- E after called the political fund of the union)" and asking for his decision on the point. That decision was against him. These proceedings were then commenced in which the plaintiff based his claim on the Act itself.

*Montgomery, K.C., Manning, K.C., Swords*, and *W. H. Williams*, for the plaintiff.
*Greene, K.C., Sir H. Slesser, K.C., Stamp*, and *A. Henderson*, for the defendants.

F **EVE, J.**—The plaintiff's claim to relief in this action is based on the alleged breach by the defendant union of s. 3 of the Trade Union Act, 1913. The first question I have to decide is whether he has established any such breach. By sub-s. (1) of the section in question restrictions are imposed on the application of the funds of a trade union for the political objects specified in sub-s. (3) unless the G furtherance of those objects has been approved as an object of the union by a resolution of the nature therein mentioned, and rules approved by the Registrar of Friendly Societies are in force providing that any payments in furtherance of those objects are to be made out of a particular fund, referred to in the Act as the political fund of the union. It is also provided that any member may by appropriate notice claim and obtain exemption from any obligation to contribute to the political H fund, and, putting it shortly, that no prejudice, disability, or disadvantage is to attach to the non-contributing member of any person intending to become a member by reason of his claiming that exemption.

It is admitted that a valid resolution has been passed, and that rules approved by the Registrar of Friendly Societies providing for all and each of the matters referred to in paras. (a) and (b) of s. 3 (1) were in force at the date of the writ and I still are. In these circumstances all the conditions precedent have been complied with, and, in my opinion, the statutory restrictions have ceased to operate. I cannot accept the view that by the wording of this section any implication is raised that after fulfilling all the conditions mentioned in the section the restrictions still survive as statutory restrictions. On the contrary, from that time forward, any alleged breach was a question to be determined by the rules and not by the statute. The procedure adopted by the union has been in accord with and not in breach of the Act, and no such cause of action as the plaintiff has advanced was subsisting when the writ was issued.

If the facts on which the plaintiff relies constitute a misapplication of the general funds of the union his cause of action is a breach of the rules, in particular of r. 45 (2), and this appears to have been his own opinion when he first desired to raise the question and availed himself of his statutory right under s. 3 (2) of the Act by laying a complaint before the registrar. In considering these matters one must not omit to notice what was the effect of that procedure on the plaintiff's part. Had the complaint resulted in the making of an order for remedying the breach the union would have had no alternative but to give effect to that order. It is clear that there could have been no appeal, and that by no procedure in this court could the union have evaded the statutory duty imposed upon it of obeying the order. The question which is not raised as the record stands in this action, except in so far as the plea of res judicata has been put forward in the defence, is whether the plaintiff in these circumstances, even assuming that he had brought his action on the footing of a breach of the rules and not merely of the Act, could have maintained the action. The legislature has provided a remedy of which an aggrieved member may avail himself, and which, if he does avail himself of it, puts the union at the risk of being compelled to remedy the matters complained of. Did the legislature contemplate that the aggrieved member, who has carried in his complaint and failed to satisfy the registrar that there was any proper foundation for it, should be allowed to commence an action and seek relief in connection with the same matters, thereby exposing the union to further litigation? I very much doubt whether that is the position of the aggrieved member. According to the construction which I put on s. 3 (2), the legislature contemplated that the matter of the application of the funds should be dealt with as it has now been dealt with and should be determined by the tribunal indicated in that sub-section, and did not contemplate that it should be open to the member, after he had submitted the matter to the registrar and had failed to get relief, to resort to the courts. The question whether the sub-section leaves it open to him to elect whether he will go to the registrar or to the court has not been argued, but, assuming that there is such an election, the plaintiff adopted an attitude which disclosed his election and it is not open to him now, having failed before the registrar, to proceed by action in this court. But this does not really arise on the pleadings here, and it is enough to say that the relief sought in this action is not founded on any breach by the union of the rules, but on an alleged breach of the statute, and no such breach having been established, I have no alternative but to dismiss this action, and to dismiss it with costs.

*Judgment for defendants.*

Solicitors: *Rhys Roberts & Co.*, for *Horace A. Davies*, Cardiff; *Shaen, Roscoe, Massey & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

# GOOLE AND HULL STEAM TOWING CO., LTD. *v.* OCEAN MARINE INSURANCE CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), December 5, 1927]

[Reported [1928] 1 K.B. 589; 97 L.J.K.B. 175; 138 L.T. 548; 44 T.L.R. 133; 72 Sol. Jo. 17; 17 Asp. M.L.C. 409; 33 Com. Cas. 110]

*Insurance—Marine insurance—Subrogation—Partial loss.*

During the currency of a policy of insurance, by which the plaintiffs' tug was insured for £4,000 by insurers against marine risks, the tug was damaged by being in collision with a steamship, the repairs costing £5,000. A collision action brought by the plaintiffs against the owners of the steamship was settled on the basis that both vessels were to blame, the £5,000 was accepted as a reasonable expenditure, and, accordingly, that sum was divided equally between the parties to that action. On a claim by the plaintiffs against the insurers for £2,500, the balance of the cost of the repairs,

**Held:** as insurers in a case of total loss were subrogated to the rights of the insured, so, also, in a case of partial loss they were subrogated to the rights of the insured, and, therefore, the insurers in the present case were entitled to the benefit of the whole of the amount received by the plaintiffs in respect of the damage suffered; under the policy the insurers were primarily liable in respect of damage to the tug in the sum of £4,000 only, the plaintiffs had received £2,500 towards the cost of the repairs, and the insurers were liable for the difference of £1,500 and no more.

**Notes.** As to subrogation in marine insurance see 22 HALSBURY'S LAWS (3rd Edn.) 160 et seq., and for cases see 29 DIGEST 52–54. For Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

(1) *Balmoral Steamship Co.* v. *Marten*, [1902] A.C. 511; 71 L.J.K.B. 819; 87 L.T. 247; 18 T.L.R. 802; 9 Asp. M.L.C. 321; 6 Com. Cas. 298, H.L.; 29 Digest 232, *1876*.

(2) *North of England Iron Steamship Insurance Association* v. *Armstrong* (1870), L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822; 18 W.R. 520; 3 Mar. L.C. 330; 29 Digest 122, *748*.

(3) *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.*, [1916] 1 K.B. 30; 85 L.J.K.B. 384; 114 L.T. 34; 32 T.L.R. 89; 13 Asp. M.L.C. 221; 21 Com. Cas. 150, C.A.; 29 Digest 292, *2379*.

**Action** tried by MACKINNON, J., without a jury.

The plaintiffs were the owners of the steamship *Goole* which was insured with the defendants and other insurers for £4,000 against the usual marine risks, subject to the Institute Time Clauses annexed to the policy, for a period of twelve months from May 31, 1924, to May 31, 1925. In January, 1925, the *Goole*, while proceeding up the river Thames, collided with the steamship *Delphinus*. The *Goole* received considerable damage and was beached on the mud near Woolwich Arsenal. She was repaired at a cost of £5,000, the sum agreed upon for the purposes of this case. An action was brought by the owners of the *Goole* against the owners of the *Delphinus* in the Admiralty Court and was settled on the basis that both ships were to blame, the figure of £5,000 being divided equally between them. The £2,500 due from the *Delphinus* was paid to the owners of the *Goole*, who then put the matter in the hands of a firm of average adjusters to ascertain the owners' loss as against the various underwriters concerned. Subsequently, the owners of the *Goole* claimed from the underwriters their loss after deducting the amount recovered from the *Delphinus*, and since that sum was less than the £4,000 value of the *Goole* as stated in the policy, they contended that they were entitled to indemnity for the

full amount of their loss. The defendants, on the other hand, contended that, as the limit of their liability was £4,000, the adjusters should take the gross figures without deduction of the amount recovered from the *Delphinus* and then state the claim against the underwriters, limiting it to £4,000 and charging the balance to the owners. They contended that when this had been done the underwriters should be credited with the amount recovered up to £4,000. The court was asked to determine which was the correct way of adjusting the claim. For the plaintiffs it was argued that taking their loss at £5,000, and the recovery at £2,500 the balance of £2,500 being less than the £4,000 insured, they were entitled to be indemnified in full. Another view was that the amount recovered from the *Delphinus* should be shared on an apportionment basis, namely as £4,000 was to £5,000, that is one-fifth to the owners and four-fifths to the underwriters. The defendants argued that as the value of the vessel had been agreed, and if they paid that value, they were entitled to be subrogated to all of the insured's interest to the extent of the indemnity given.

*Raeburn, K.C.*, and *Sir Robert Aske* for the plaintiffs, the assured.
*Miller, K.C.*, and *Mitchison* for the defendant insurance company.

**MACKINNON, J.**—This case, while it involves some elementary principles of marine insurance, raises an interesting point of average adjustment. The question ought logically to be: What have the parties agreed by the policy which is their bargain? But the time has long gone past when one can construe a policy otherwise than in the light of the innumerable cases which are now crystallised in the Marine Insurance Act, 1906, as laying down the rules of construction for policies in the ordinary terms.

The plaintiffs owned a tug, which was insured by the defendants for £535 upon a valuation of £4,000, the total insurable amount. There were other underwriters for the balance of the £4,000 not covered by the defendants, but if that balance had not been wholly underwritten by others, the plaintiffs under the Marine Insurance Act, 1906, s. 81, would be deemed to be their own insurers in respect of the uninsured balance, and their share of any insured liability, or their share of any credit which decreased any insurable liability, would be exactly the same as any of the underwriters. The insured vessel suffered a partial loss by way of particular average damage, and in respect of that partial loss the underwriters in proportion to their subscriptions under s. 69 were liable for the reasonable cost of repairing the damage, less the customary deductions which in this case are excluded, because there are clauses saying that there shall be no deduction of thirds, but not exceeding the sum in respect of any one casualty. If the insured in fact spends as a reasonable cost of repairs more than the insured amount of £4,000, then that excess he has to bear himself, not as a sum in respect of which he is his own insurer under s. 81, but as an expenditure by him outside any insurance calculation at all. In this case the insured did spend more than £4,000. The case has been discussed upon hypothetical figures which raise the point of principle, and I propose to deal with it in the light of those figures. If we take the expenditure on repairs as £5,000, the assured have a claim primâ facie upon the underwriters for £4,000 and no more. The extra £1,000 is a sum outside any insurable calculation. As it happened, the particular average damage was caused by collision with another ship, and accordingly the assured brought an action against the owners of the other ship to recover damages. That action was settled on the basis of "both to blame." In the reference before the registrar, the amount expended upon repairs was proved as £5,000. That was accepted as a reasonable expenditure, and accordingly the assured was allowed in his decree 50 per cent. on the "both to blame" basis, namely, £2,500.

The question is: How does it affect the claim which the assured would otherwise have on the underwriters for £4,000 in that he has already received £2,500 from the owners of the other ship. If the underwriters had already paid the £4,000, the question would arise in the guise of an inquiry as to how much the underwriters

A were entitled to by subrogation. If the underwriters have not paid the £4,000, then the question arises in a slightly different form as to the amount for which the assured must give credit against has claim as already indemnified aliunde ; but the principle involved in other aspects of the case must be exactly the same. The assured say that the true principle on which this calculation is to be dealt with, is this. We have spent £5,000 on repairs ; we have received £2,500 from the B owners of the other ship ; we are, therefore, £2,500 out of pocket ; that £2,500, being less than £4,000, we can claim in full from the underwriters. On the other hand, the underwriters say: "For this particular average damage to your ship we are primarily liable for £4,000, and no more ; you have in respect of that particular average damage to your ship had paid to you by the owners of the other ship, £2,500 ; therefore we, the underwriters, are only liable for the difference, C namely, £1,500 ; the extra £1,000 that you have spent on repairs is outside any insurance calculation altogether." Those are the main contentions. There is a third intermediate basis which has been suggested. I thought at one stage that it did not find much favour, but counsel for the plaintiffs assures me in his reply that he does rely upon it if he is not right in his main contention, and desires to press the question. On that basis the £2,500, it is suggested, should be apportioned D so as to give the underwriters £2,000 in respect of their £4,000, and the assured £500 in respect of their £1,000, so that the net recovery from the underwriters would be £2,000. I will not discuss it at any length for I can see no legal basis for this third method. The real question in this case is: Which of the two main contentions that I have first described is the correct one?

E I think the contention of the underwriters is correct. A marine insurance policy is often said to be a contract of indemnity, but I think it must always be remembered that it is not an ideal contract of indemnity, but is a contract of indemnity according to the conventional terms of the bargain. When a loss has happened, the question is hardly ever: How much is the assured out of pocket? That might be the proper question if the object of the indemnity was to provide an ideal indemnity. F The real question is: What is the measure of indemnity that by the convention of the bargain has been promised to the assured? That may in some cases be less than ideal pecuniary indemnity, in some cases it may be more. If the assured has undervalued his ship in the valuation he has agreed upon he may find that he has suffered pecuniary loss outside any insurable indemnity. That happened very strikingly in the *Balmoral Steamship Co.* v. *Marten* (1), and theoretically the same G result might arise upon an unvalued policy, because by the convention of the policy the insurable value of the vessel under s. 16 is the value at the commencement of the risk, and theoretically you might have some loss happening at the end of a long voyage when the market value of a ship, owing to the change of conditions, had considerably increased. Then by the terms of the bargain, as interpreted in the cases and the Act, the insurable interest in freight allows the gross freight to H be insured. That again is laid down in s. 16, and obviously if freight is lost at an early stage of a long voyage, the assured recovers a great deal more than he ought upon any ideal pecuniary estimation of his loss. Similarly, in some other cases of total loss. When a partial loss occurs, there are various conventional bases for ascertaining the measure of indemnity that is promised. In the case of goods, you have to find the proportion of the damaged value to the sound value I of the goods and apply that to the insured value, or the insurable value. That again may well result in an artificial indemnity, differing from the real pecuniary loss to the assured. For instance, it may well be, the valuation includes freight payable at the destination, and the particular average loss of goods in question is a total loss of part of the insured goods in the course of the voyage. On them no freight would have to be paid, and to that extent in recovering the insured value of those goods the assured would be making an actual profit—that is to say, there is an artificial measure of indemnity which differs from the real.

As regards partial loss of a ship by particular average loss the convention is that

you are to estimate the depreciation not in the way that depreciation is estimated in the case of goods, because it is impracticable, but in terms of the cost of repairs. The assured need not actually do the repairs ; if he does not do them, then you are to estimate the cost, and, accordingly, as is laid down in s. 69, of the Act of 1906, he is entitled in respect of such particular average loss to the reasonable cost of repairs not exceeding the sum insured in respect of any one casualty. When the underwriters, in respect of a particular average loss, have paid the assured the indemnity agreed under this provision—when, in particular, they have paid a sum not exceeding the insured amount (in this case £4,000)—the underwriters are entitled to say: We have paid the agreed indemnity for the whole of the particular average loss you have sustained, and not merely for a part of it. We are, therefore, entitled to take credit for the whole sum which you, the assured, may recover from a third party in respect of that particular average damage. That conclusion seems to me to accord exactly with the provision in s. 79 which deals with the rights of subrogation. By s. 79 (2):

> ". . . where the insurer pays for a partial loss . . . he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the insured has been indemnified according to this Act, by such payment for the loss."

The section does not say indemnified generally so that every penny of pecuniary loss that he has sustained is made good to him, but "indemnified according to this Act." It is quite true in this case that the payment of £4,000 has not fully indemnified the assured for their expenditure of £5,000 on the repairs, but according to the bargain they have made under the policy they have been indemnified "according to this Act" fully for that particular average loss, and the underwriters under s. 79 are entitled to all the rights and remedies of the assured in respect of that loss because they have fully indemnified them for that loss.

It is a strange thing that this question appears never to have arisen precisely in the way in which it does in this case with regard to partial loss, but there are two well-known cases—*North of England Iron Steamship Insurance Association* v. *Armstrong* (2) and *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (3)—in which the underwriters had for total loss paid the agreed valuations, and, therefore, by the indemnity according to the Act and the convention of the bargain, they had fully indemnified the assured for the total loss of his ship. It was held that in consequence the underwriters were entitled to all that the assured recovered from third parties in respect of that total loss, and that the assured was not entitled to go behind the conventional state of things, for the purpose of showing that on the true value of the ship he had not received a true indemnity, but was still out of pocket. The principle of those cases seems to me to be directly applicable in the case of a total loss and of a partial loss. I do not think there is any difference. The rights of the underwriters as regards subrogation seems to me to be quite properly laid down in s. 79 in two sub-sections, one dealing with a total loss, and the other sub-section dealing with a partial loss. The two sub-sections are in identical terms, with one exception, namely, that in the case of a total loss there is, but in the case of a partial loss there is not, cession of the property in the thing insured to the underwriters. Thus s. 79 (2) provides:

> ". . . where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated . . ."

Then the section goes on in the identical words which have been used in respect of the insurer's rights upon a total loss, there being added in a case of total loss the fact that the underwriters become entitled to the property in the thing insured. That difference between the two cases cannot possibly, in my view, make any

A difference as regards the right in this case of the underwriters to the full £2,500 as compared with the right of the underwriters if there had been a total loss and the full sum had been recovered by the assured.

In one of those cases, *North of England Iron Steamship Insurance Association* v. *Armstrong* (2), it has been thought that there was a suggestion by Cockburn, C.J., that, supposing the assured recovered more than the sum that had been paid by the B underwriters, the underwriters would claim the total sum, and so make a profit. Whether Cockburn, C.J., did say that, really depends upon the presence of three words "or worth more" in the report. On the assumption that he did say it, the decision has been to some extent criticised in subsequent cases and in text-books. I do not desire to express any opinion about what would happen whether that is right or wrong with regard to a total loss ; it may be that it is right, but I think it C could only be right if it rests upon the cession of property to the underwriter upon payment for a total loss. In other words, supposing in this case the collision suit had not been settled on the terms of "both to blame," but had either been decided or settled upon the terms that the other ship, the *Delphinus*, was wholly to blame, and suppose the assured had recovered his full £5,000, then I think the underwriters would not be entitled to claim £5,000, but only £4,000 to wipe out their payment.

D There is one other point in the case. It was suggested by counsel for the insurers that the working out of the salvage for the underwriters ought to be done upon the basis of separating the valuations. The actual valuation which I have so far spoken of as £4,000 is in the following terms: "Hull" and material valued at £2,500 ; engines and machinery, £1,500 ; total, £4,000. The suggestion is: E Supposing this £5,000 paid by the owners of the ship, was paid only as regards, say, £200 or £300 in respect of hull and materials, then it may result in the underwriters getting rather more than they would if the £2,500 is treated as paid only in respect of the valuation of £4,000. It all arises on the clause in the policy "Average payable on each valuation separately, or on the whole," and I am quite satisfied that that confers an option on the assured whether he will claim average F on each valuation separately, or on the whole, and the underwriters have no right to use that clause.

*Judgment for defendants.*

Solicitors: *Holman, Fenwick & Willan; Waltons & Co.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

# HUMBER CONSERVANCY BOARD *v.* FEDERATED COAL AND SHIPPING CO., LTD.

[KING'S BENCH DIVISION (Scrutton and Sargant, L.JJ., sitting as additional judges), November 22, 1927]

[Reported [1928] 1 K.B. 492; 97 L.J.K.B. 136; 138 L.T. 334; 17 Asp. M.L.C. 338]

*Port—Inclusion of "place"—Construction ejusdem generis—Locality with characteristics, facilities and advantages of a port—Navigation in pilotage district to make use of port—"Make use"—Receipt from port by vessel at sea of information by signals or wireless—Merchant Shipping Act*, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 742—*Pilotage Act*, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 11 (1), *s.* 62.

By s. 742 of the Merchant Shipping Act, 1894, "port" is defined as including "place," and by s. 62 of the Pilotage Act, 1913, that Act is to be read as one with the Merchant Shipping Act, 1894. By s. 11 (1) of the Pilotage Act, 1913: "Every ship . . . while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district," shall be "(a) under the pilotage of a licensed pilot of the district;" or "(b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship."

"Place" in s. 742 of the Act of 1894 is to be construed ejusdem generis with port as a locality having some or many of the facilities and advantages of a port and as excluding a locality which has none of those characteristics.

**Quære:** whether the receiving of information by signals or wireless from a port amounts to "making use of a port" within s. 11 (1) of the Pilotage Act, 1913.

**Notes.** As to compulsory pilotage see 30 HALSBURY'S LAWS (2nd Edn.) 938 et seq., and for cases see 41 DIGEST 906–912. For Merchant Shipping Act, 1894, and Pilotage Act, 1913, see 23 HALSBURY'S STATUTES (2nd Edn.) 395 and 836 respectively.

Case referred to:

(1) *Cannell and Trinity House Corpn.* v. *Lawther, Latta & Co.*, [1914] 3 K.B. 1135; 83 L.J.K.B. 1832; 112 L.T. 84; 30 T.L.R. 680; 12 Asp. M.L.C. 578; 20 Com. Cas. 29; 41 Digest 909, *8030*.

**Appeal** from Kingston-upon-Hull County Court.

The plaintiff conservancy board claimed from the defendants, who were the owners of a ship named the *Maud Llewellyn*, £3 10s. as pilotage dues and also a declaration that the plaintiffs were in the circumstances entitled to claim those dues. On April 22, 1926, the *Maud Llewellyn*, which was on a voyage from Morocco to the north-east coast of Great Britain, approached Spurn Point, Yorkshire, which was within the plaintiffs' compulsory pilotage district, and signalled to Lloyd's station there for orders to what port she should proceed. The ship, which was then a mile and a half out at sea, proceeded on her voyage without going into the Humber, and without using a pilot, nor did she pay any attention to the plaintiffs' pilot boat. The plaintiffs contended that the vessel was liable for pilotage dues, inasmuch as she had communicated with a station within a compulsory pilotage district. The defendants contended that they did know that the vessel was in a compulsory pilotage district, and that Spurn Point was not a "port." The county court judge held that Spurn Point was a "port" within the meaning of s. 742 of the Merchant Shipping Act, 1894, and that, as the plaintiffs' pilot boat was flying her burgee and thereby offering her services, the defendants, once they came within the compulsory pilotage district, had made use of the port within the meaning of s. 11 (1) of the Pilotage Act, 1913. He gave judgment for the plaintiffs, and the defendants appealed.

*A. T. Miller, K.C.*, and *W. H. Owen* for the defendants.

*R. H. Balloch* for the plaintiffs.

**SCRUTTON, L.J.**—This case raises a short point with reference to a claim for pilotage dues at the mouth of the River Humber. A British steamship, the *Maud Llewellyn*, was chartered to go to some port on the north-east coast, with a provision that she should call at Spurn Point for orders, Spurn Point being a well-known signalling station at the mouth of the river Humber. She directed her course to Spurn Point and arrived within the compulsory pilotage district of the Humber Conservancy Board. It does not appear whether she showed her flags and the signalling station gave her information or whether she asked the signalling station for orders, but in some way the information that she was to proceed to Methil, a port on the Scottish coast, was communicated to her and she proceeded without stopping. Thereupon a claim was made upon her owners by the Humber Conservancy Board for pilotage dues.

Whether they are liable depends upon the meaning to be attached to s. 11 of the Pilotage Act, 1913. [The learned lord justice read the section, and continued:] The first question, therefore, is: Was the *Maud Llewellyn* in doing what she did, "entering, leaving, or making use of any port in the district"? She certainly was not doing anything in relation to any of the recognised ports of Hull, Grimsby, or Immingham in the Humber Conservancy district. What is said is that she was getting information by signal from Spurn Point, and counsel for the plaintiffs very properly, considering his extensive commercial knowledge, has shrunk from saying that Spurn Point is a port. But it is said that the Merchant Shipping Act, 1894, is incorporated with the Pilotage Act, 1913, and that, if we turn to the definition section of the Merchant Shipping Act, s. 742, we find that, unless the context requires otherwise, "port" includes "place." Spurn Point appears to be a very good place for a rest cure; it is at the extreme end of a spit of sand with no road to it, with a trolley line to it, with four inhabitants, a Lloyd's signalling station and a lighthouse, and it appears to have been successfully argued that, whatever else it is, it is a "place," and that, as "port" includes "place" according to the definition, the *Maud Llewellyn* was making use of a "place," which is the same as "port," when she received signals from it. In my view, that is putting much too wide a meaning on the word "place." The word "place" following "port" must, in my opinion, be interpreted as ejusdem generis with "port" as a locality having some or many of the characteristics of a port, though by reason of the absence of charter or for other reasons it would not be spoken of as a port. I am quite clear that Spurn Point is not a port. I am equally clear that it is not ejusdem generis with a port. That being so, the whole foundation of the claim for pilotage dues goes because unless there is first a port, which is to be either entered, left, or made use of, there can be no claim for pilotage dues.

It is, therefore, not necessary to consider, and we have not heard argument on the question, whether to receive information by signals from a signalling station or lighthouse, or to give information by signals or wireless from a signalling station or lighthouse, amounts to making use of a port. There is a decision of BAILHACHE, J., with regard to Dover—*Cannell and Trinity House Corpn.* v. *Lawther, Latta & Co.* (1)—concerning which I only want to say that I should desire liberty to consider it, should that case ever come before me sitting in any court in which I could effectively deal with it. I must not be considered as taking a view, at first sight, that that case is right. But it becomes unnecessary to consider in it view of my finding that Spurn Point is neither a port nor a place akin to a port. This appeal should be allowed, and the usual consequences must follow.

**SARGANT, L.J.**—I agree. I notice that in the learned county court judge's judgment he says:

> "Counsel for the defendants contended that the reason why the definition '"Port" includes "place"' appeared in the Merchant Shipping Act, 1894, was that a 'place' could only be a 'port' strictly by charter—by authority of the Sovereign—and in order to get rid of this technical difficulty the word

'place' was inserted in the definition in the form ' "port" includes "place".' I cannot accept counsel's argument."

It seems to me that that argument was essentially a sound argument and that the Merchant Shipping Act, 1894, in adding to the word "port" the definition that " 'port' includes 'place'," was dealing with some difficulty such as that indicated in counsel's argument, and that "port" was to be deemed to include "place" because there were certain places which had all, or most, of the facilities and advantages of a port which might not be strictly within the definition of the word "port." It seems to me that it is straining the words to an entirely undue extent to say that in the Pilotage Act, because of that extension in the Merchant Shipping Act, which is to be read as one with this Act, a place such as Spurn Point, which has not any of the facilities of a port, can be held to be a port. The only other observation I desire to make is this, that even in the case of *Cannell and Trinity House Corpn.* v. *Lawther, Latta & Co.* (1), there was something considerably more than the sending of a signal by sight. What happened was that a message was taken out to the ship from the port of Dover by a boat, and the facility of being able to communicate by boat was, no doubt, part of the facilities of the port of Dover.

*Appeal allowed.*

Solicitors: *Botterell & Roche*, for *Vaughan & Roche*, Cardiff; *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

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## HOLY LAW SOUTH BROUGHTON BURIAL BOARD *v.* FAILSWORTH URBAN DISTRICT COUNCIL

[King's Bench Division (Lord Hewart, C.J., Avory and Shearman, JJ.), May 4, 1927]

[Reported [1928] 1 K.B. 231; 96 L.J.K.B. 713; 137 L.T. 483; 91 J.P. 104; 43 T.L.R. 519; 25 L.G.R. 324]

*Street—Private street works—Expenses—Exemption—Burial ground "attached" to place of religious worship—Nature of attachment—Need of physical contiguity—Private Street Works Act*, 1892 (55 & 56 *Vict.*, *c.* 57), *s.* 16.

The appellants were a burial board consisting of members of the congregations of two synagogues and appointed to manage a burial ground situate within the area of the respondent urban district council, some five miles from each of the synagogues. The burial ground was rated for the relief of the poor, but the synagogues were exempt from such rates, as being places appropriated to public religious worship. The council, having executed private street works in a street on which the burial ground abutted, apportioned the expenses on the frontagers, including the appellants. The appellants objected to the apportionment on the ground that the burial ground was "attached" to the synagogues and so was exempt from liability to any expenses of private street works under s. 16 of the Private Street Works Act, 1892.

**Held:** that to constitute attachment within the section there must be physical connection and contiguity and not mere attachment in an abstract sense, and, therefore, the appellants' objection was bad.

**Notes.** As to exemption from payment of expenses of private street works see 19 HALSBURY'S LAWS (3rd Edn.) 439, 440, and for cases see 26 DIGEST 542. For Private Street Works Act, 1892, see 11 HALSBURY'S STATUTES (2nd Edn.) 181.

**Case Stated** by Manchester justices.

An application was made to the justices by the respondents, the Failsworth Urban District Council, under the Private Street Works Act, 1892, against the appellants, the Holy Law South Broughton Burial Board, to determine the matter of an objection made by the burial board to a proposal by the council with respect to a charge on the board as owners of premises shown in the provisional apportionment as liable to be charged with £376 5s. 3d., part of the expense of executing private street works on part of a road within the urban district. On Nov. 17, 1926, the justices determined that the objection of the burial board was bad, and overruled it, and the board now appealed.

The council had duly complied with the provisions of the Private Street Works Act, 1892, as to resolutions, specifications, plans, &c., and notices thereof to the burial board who were charged in the provisional apportionment as owners of the Jewish burial ground abutting on the said road. By letter dated May 25, 1926, the burial board gave notice of objection to the proposals of the council, and claimed exemption under s. 16 of the Private Street Works Act, 1892, on the ground that the cemetery or burial ground was attached to the synagogues of the Holy Law Congregation and the South Broughton Congregation, respectively situate at Red Bank, Cheetham, and Bury New Road, Strangeways, Manchester, and being places appropriated to public religious worship and exempt from rates for the relief of the poor within the meaning of that section. The synagogue of the Holy Law Congregation was situate in Red Bank, Cheetham, in the city of Manchester, and the South Broughton Synagogue was situate in Bury New Road, Strangeways, in the city of Manchester. Both synagogues were situate about five miles from the said burial ground, and neither synagogue was within the district of the council. Both synagogues were places appropriated to public religious worship and exempt from rates for the relief of the poor. The burial ground was assessed for poor rate, and poor rate was paid in respect thereof to the said council. By an indenture made on Oct. 25, 1922, between certain persons, of the first part, therein named as vendors, and certain other persons, of the second part and of the third part, therein named as purchasers, it was recited that the parties of the second part were members of the Holy Law Congregation, a religious community of persons of the Jewish persuasion whose place of worship for the time being was known as the Holy Law Synagogue, and that the parties of the third part were members of the congregation of the South Broughton Synagogue, another religious community of persons of the Jewish persuasion whose place of worship for the time being was known as the South Broughton Synagogue, and that the plots of land and hereditaments thereby conveyed were conveyed to the use of the parties of the second and third parts, thereinafter referred to as trustees, upon trust to permit the same or such part or parts thereof as might from time to time be set apart and appropriated for that purpose to be used in perpetuity as a burial ground for the members of the Holy Law Congregation and the members of the South Broughton Synagogue, or, if the trustees should so permit, for the members of other congregations, subject to such payments and conditions as the trustees might from time to time determine. A burial board was formed to carry out the terms of the indenture, and was named the Holy Law South Broughton Burial Board. Rules were made by such board. The land which formed the premises of the board, and in respect of which the council desired to levy the charge, had at all material times been used by the burial board as a burial ground only, and in accordance with the said indenture and rules.

On the hearing of the application it was contended on behalf of the council (i) that the burial ground was not attached to the synagogues or either of them within the meaning of s. 16 of the Private Street Works Act, 1892, in that the

distance between the burial ground and the synagogues was five miles; (ii) that the word "attached" in s. 16 had a physical significance. It was contended on behalf of the burial board (i) that the burial ground was attached to both of the synagogues within the meaning of s. 16 of the Private Street Works Act, 1892; (ii) that the word "attached" in s. 16 had not a physical significance; (iii) that the word "attached" in the said section had a purely functional significance. The justices were of opinion that the burial ground was not attached to the synagogues or either of them within the meaning of s. 16 of the Private Street Works Act, 1892.

*N. J. Laski* for the appellants.

*W. Gorman*, for the respondents, was not called upon to argue.

**LORD HEWART, C.J.**—This is a Case stated by justices for the county of Lancaster sitting at Manchester. The short question arises under the words of s. 16 of the Private Street Works Act, 1892. It is whether, in respect of a burial ground situate some five miles from two synagogues in Manchester, there is exemption from liability under s. 16 by reason of the fact that the burial ground was in some sense connected or associated with each of those two synagogues. It was contended on behalf of the respondents, the urban district council, that the word "attached" which is found in s. 16 had a physical significance. On behalf of the appellants it was contended that the word "attached" had no physical significance at all, and that it related only to the purpose or function of the burial ground in relation to the place of worship. The words of the section are as follows:

> "The incumbent, or minister or trustee of any church, chapel, or place appropriated to public religious worship, which is for the time being by law exempt from rates for the relief of the poor, shall not be liable to any expenses of private street works as the owner of such church, chapel, or place, or of any churchyard or burial ground attached thereto. . . ."

The topic which is being dealt with is the expenses of private street works, and where there is liability for such works the proportionate part of the total expenses which any particular person has to pay depends upon the extent of the frontage of the premises in which that person is interested in relation to the street works which have been or are about to be carried out. What is being dealt with throughout is not something abstract, theoretical or notional, but physical and actual frontage, paving, and streets. The section begins by postulating the existence of a physical place—a building—where there is public religious worship. In order that the section may have any application at all one must first find a church, a chapel, or a place appropriated to public religious worship. That physical structure having been identified, then, if that structure is exempt from rates for the relief of the poor, it follows that it is also exempt from the expenses of private street works, and the exemption is carried beyond the four walls within which the religious worship takes place to that which is connected with it in a physical and also in a functional sense, if the word may be employed, namely, the churchyard or the burial ground. If there is a churchyard or burial ground attached to that church, chapel, or place appropriated to public religious worship, and if that place is exempt from rates for the relief of the poor, then the burial ground also is exempt. The section does not impose liability upon the owner of the church, chapel, or place by reason of the fact that it has a frontage upon the street or streets where the street works are being carried out.

In my opinion, the whole scheme and framework of this section make it plain that what is being considered is physical connection, physical contiguity. It may well be that that is not enough; in addition to the physical connection and contiguity the churchyard or the burial ground must be the churchyard or burial ground of the particular church, chapel, or place appropriated to public religious worship which is exempt from rates. But I cannot imagine within the meaning of this term that a place which is five miles off is attached to the synagogue merely because

it is associated with the synagogue as a place where members of the synagogue and other persons may be buried. It is not necessary to go into the question how close the actual physical contiguity must be, but that there must be physical attachment and association I am satisfied, and on any fair view of the meaning of the word "attached" it could not be held that this burial ground, distant five miles, was "attached" to these synagogues within the meaning of s. 16.

The justices were of opinion that the burial ground was not "attached" to either synagogue within the meaning of this section. The only question for this court is: Whether in coming to that conclusion the justices came to a correct decision in point of law. Counsel for the appellants, if I may say so, has urged with ingenuity everything that can be urged on behalf of the appellants, but I am satisfied that the justices did not misdirect themselves, and that the contention of the respondents was right, namely, that the word "attached" in this section has a physical significance.

In these circumstances I think that this appeal ought to be dismissed.

**AVORY, J.**—I am of the same opinion. The appellants are the Holy Law South Broughton Burial Board, who, in fact, are in occupation of this burial ground, and who pay poor rates in respect thereof. The only question is whether this burial ground can be said, within the meaning of s. 16, to be "attached" to the synagogue of the Holy Law Congregation, or to the synagogue of the South Broughton Congregation, situate at Manchester.

I am of opinion for the same reasons as have been given by my Lord that this burial ground cannot be said to be attached to either of those synagogues, and, therefore, it is not exempt under s. 16.

**SHEARMAN, J.**—I agree.

*Appeal dismissed.*

Solicitors: *O. Collier Littler & Kilbeg*, Manchester; *H. Booth & Son*, Oldham.

[*Reported by* J. Ferguson Walker, Esq., *Barrister-at-Law.*]

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## GOWAR *v.* HALES

[Court of Appeal (Lord Hanworth, M.R., and Scrutton, L.J.), April 11, 1927]

[Reported [1928] 1 K.B. 191; 96 L.J.K.B. 1088; 137 L.T. 580]

*Insurance—Motor insurance—Defendant insured against third-party risks—Addition of insurers as third-parties—Action tried by jury—Arbitration clause in policy.*

In actions for damages for negligence arising out of motoring collisions on the road it is undesirable and inconvenient to allow the jury at the trial to know that the defendant is insured against accidents, and, therefore, if the defendant is insured, the insurance company ought not to be added as a third party. Where the policy provides that any dispute between the company and the assured shall be referred to arbitration, it is an additional reason for not making the insurance company a third party.

**Notes.** The practice rule that an insurance company should not be brought in as a third party does not apply to the trial of an action for personal injuries by a judge alone: see *Harman* v. *Crilly*, [1943] 1 All E.R. 140. In that case it was

questioned whether, in view of the introduction of the compulsory insurance of motor drivers against third-party risks, the rule should be treated as still applicable to trials by jury, but that matter still awaits definite decision.

Applied: *Grinham* v. *Davies*, [1929] 2 K.B. 249. Considered: *Jones* v. *Birch Bros., Ltd.*, [1933] All E.R. Rep. 251. Applied: *Carpenter* v. *Ebblewhite*, [1938] 4 All E.R. 41. Referred to: *Harman* v. *Crilly*, [1943] 1 All E.R. 140.

As to the right and liability of insurers to be made parties to actions against their assured see 22 HALSBURY'S LAWS (3rd Edn.) 337–339, and cases there cited.

Cases referred to:

(1) *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur. N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 16 Digest 115, *149*.

(2) *Lothian* v. *Epworth Press* (1926), [1928] 1 K.B. 199, n.; 96 L.J.K.B. 1092, n; 137 L.T. 582, n., C.A.; 36 Digest (Repl.) 110, *550*.

**Appeal** from an order of SHEARMAN, J., in chambers.

The plaintiff sued the defendant for damages for injury caused to him by the defendant's negligent driving of a motor cycle combination. The defendant was insured against liability for accidents incurred while driving his machine and applied for liberty to issue a third-party notice on the insurance company. On the notice being issued, an affidavit was made by the claims manager of the company stating that the defendant's insurance policy provided that any dispute between the company and the person insured should be referred to arbitration. On the defendant's application for judgment or directions against the insurance company, the master refused to make any order except that the costs should be the third party's in any event. Upon appeal SHEARMAN, J., reversed his decision and ordered the defendant to deliver a statement of claim to the insurance company, who were to be at liberty to appear at the trial and defend, and that the liability of the company to indemnify the defendant should be tried immediately after the trial of the action. The third party appealed.

*J. B. Melville*, *K.C.*, and *R. O. Mobbs* for the third party.
*Cyril Atkinson*, *K.C.*, *Salter Nichols*, and *Single* for the defendant.

**LORD HANWORTH, M.R.**—This appeal must be allowed and the order of the master must be restored. The action is brought by writ dated Jan. 14 in respect of an accident suffered (so the plaintiff alleges) by the negligence of the defendant in driving a motor cycle. It appears that by a policy of insurance dated June 6, 1926, the defendant was insured against accidents which might happen in the course of his riding his motor cycle. The accident took place on Oct. 8, and it is said that condition 2 of the insurance policy, which provides that notice of any accident, loss or damage is to be given immediately after the occurrence, was not complied with, and also that by condition 9, which requires arbitration and not arbitration simply in the *Scott* v. *Avery* (1) form, arbitration is provided for and would be the proper method whereby a claim under the policy could be decided as between the defendant and the insurance company. The action having started, an application was made by the defendant to bring in the insurance company as third parties. The master refused the application, following what I conceive to be the general practice. An appeal was made to SHEARMAN, J., and he—on the ground, as I gather, that the amount was a very small one (the whole matter was comparatively small in amount and of no great importance)—made an order and gave directions under R.S.C., Ord. 16, r. 52, under which the third party was to attend the trial to take such part as should be directed, and that the matter at issue between the defendant and the third party should be decided immediately after the trial had taken place between the plaintiff and the defendant.

As I have said, I think that order was wrong and that the order of the master should be restored. I desire to adhere closely to what I conceive to be the general practice in third-party procedure. It must be remembered that Ord. 16, r. 48,

A [see now R.S.C. Ord. 16A, r. 1] which provides for bringing in third parties, is a very limited rule. It is more limited than it was originally, and it was found in the earlier practice that it was inconvenient to allow a general right-over to be tried by the third-party procedure. The third-party procedure is intended, as the rules stand at present, to be limited in its sphere and scope, and there has grown up a practice recognising the inconvenience of letting the jury know at the trial B that the defendant was insured because it has been thought of importance that the real issue between the parties—the plaintiff and the defendant—should be decided upon the merits of that issue without a supervening and prejudicial circumstance, not really material, being introduced, namely, that the defendant might have recourse under a policy against a large and in many cases a wealthy corporation. I think it is important to recognise that rule and I think the cases have established C that the third-party procedure, which brings the insurance company on whom the defendant is entitled to rely plainly before the court, is unfortunate. There are a number of cases which show that as a rule the order is not made in such cases. More than that, in the present case there are two important questions which arise as between the defendant and the third party. The third party says that there is no liability on his part because two conditions of the policy have not been complied D with, namely, that which I have already referred to as to notice (condition 2), and, secondly, that it is wrong altogether to bring the third party into court, for the provision is definitely made in condition 9 that, if there is a question in dispute between the defendant and the third party, that dispute shall be settled by arbitration and not otherwise. It appears to me for those reasons that the course of making this order in the third-party procedure is not in accordance with the usual practice E and is not appropriate where there are these two questions to be decided before the third party's liability can be established.

*Lothian* v. *Epworth Press* (2) has been called to our attention. It was there uncertain whether the defendant or the third party were liable, and it was held to be convenient, to avoid the possibility of an injustice arising by reason of the one or the other party excusing himself from liability at a time when it was impos- F sible immediately to establish the liability against the other party, that they should both appear. For that reason it does not appear to be a decision which governs the present. I am, therefore, of opinion that the order of Shearman, J., should be reversed and the order of the master restored.

G **SCRUTTON, L.J.**—I am of the same opinion. As the case raises, in my view, general questions of principle, I will express my reasons in my own words.

The owner of a motor vehicle has caused some damage to another party. The owner is insured. The person alleging himself to be damaged is suing the owner of the motor vehicle, who has taken out a third-party procedure against his insurer and has asked for directions that the third party may appear at the trial of the H action and take such part as the judge shall direct, and be bound by the result of the trial. The master, following what I conceive to be the ordinary and general practice, declined to make a third-party order. On appeal to the learned judge in chambers, the learned judge reversed the master, and made a third-party order. In those circumstances, a delicate question arises: Whose discretion is to be interfered with? Is it to be the master's discretion, which ought not to be interfered I with, or the judge's discretion, which ought not to be interfered with? But as, in my view, the case raises two questions of principle, I conceive that I am at liberty to interfere with the judge's order without infringing on the question of discretion.

The first question of principle is whether this third-party claim should be dealt with at the same time as the hearing of the main action. The ways of juries with underwriters have undergone some change in the course of my experience. When first I was called to the Bar it was very difficult for an insurance company to get a verdict in their favour from a jury. Better counsel prevailed, and the time came, with a more extended insurance practice, when one could rely fairly confidently on

a fair hearing from a jury, although there was a slight prejudice against an insurance company which took the premium and did not pay. Then came the introduction of the motor policy with third-party claims—direct claims for amounts claimed by third parties instead of claims for damage to the subject-matter—and, for part of my experience, when there were very few motors, it was almost impossible to get a jury to find in favour of motorists. As time went on, and as probably half the jurors owned cars themselves, the view of juries changed, and they might be relied on to decide fairly between plaintiff and defendant, even although the defendant was a motorist. It was very difficult, and I believe it still is very difficult to get any criminal conviction against a motorist from a jury; but if it was not a question of an action against a motorist, but a question whether an insurance company should pay a person who was damaged by a motor, it was found extremely difficult to get fair hearings from juries, with the result that it has been established as a rule of practice at the Bar which the judges enforce, that in an action against a motorist the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, to discharge the jury when the fact has been told to them, or whether it is to say it is an error of judgment on the part of the counsel who has mentioned it, but that the judge should endeavour to put it right by his summing-up, it is not necessary to decide here; but there was this undoubted rule of practice on which the judges acted, and to have a rule of practice that a jury should not be informed that the defendant is insured, and at the same time for the insurance company to be brought in to take part in the trial of the action as the judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent. It appears to me as a general rule, in the absence of special circumstances, that an order for third-party directions bringing in an insurance company should not be made for the reasons I have stated.

There were special circumstances in *Lothian* v. *Epworth Press* (2). That case was complicated by two things. In the first place, there had been an application to stay on the ground of an arbitration clause in the policy. That application was refused and not appealed against, and the Court of Appeal, therefore, did not take into account the existence of the arbitration clause in the policy; and, in the second place, as all the judges who gave judgment say, there was a very peculiar and unusual feature in the case. It was quite doubtful whose servant the person who drove the motor doing the damage was, whether he was the servant of the Wesleyan Conference, whether he was the servant of an institution called the Epworth Press, which had some connection with the Wesleyan Conference, or whether he was the servant of a man who was book steward of the Epworth Press to the Wesleyan Conference. The sole question arose on the policy because it was not at all clear whom the underwriters had insured and for whose negligence they were liable, and on those grounds the Court of Appeal thought there were special circumstances which justified the making of a third-party order. But I can find no such special circumstances in this case, which appears to me of the ordinary type of action against a motorist who is insured, and, therefore, on the first question of principle, that as a general rule in the absence of special circumstances third party claims upon an open insurance policy should not be brought on at the hearing by third-party procedure before the jury that is hearing the claim against the motorist, I should allow the appeal.

The second question of principle is this. There is an arbitration clause in the policy; it is not the ordinary *Scott* v. *Avery* (1) form because it does not wind up in the way in which the ordinary *Scott* v. *Avery* (1) form does. It does not end with a provision that "the obtaining of an award shall be a condition precedent to the recovery of anything against the insurance company", but counsel for the third party contends that as the policy is subject to conditions and there is a condition that disputes shall be settled by arbitration, it is to the same effect as the *Scott* v. *Avery* (1) clause. I am not deciding that one way or the other, or expressing any opinion about it, but there is an arbitration clause in the policy which means that

the assured has agreed to the term of the policy that disputes between him and the insurance company shall be settled by arbitration. That does not oust the jurisdiction of the courts, but it is a general principle, as expressed in the Arbitration Act, 1889, that people who make contracts should keep them rather than break them, and the owner of a motor car, who, having agreed to settle a dispute by arbitrations, does not do so, but goes to law, is breaking his contract. The general principle, therefore, on which the courts act is that, unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration, because he has made a contract so to do and ought to keep it. I do not see any special circumstances in this case which should cause the Court of Appeal to depart from that general rule, and on those two grounds of principle, therefore, the one that third-party claims by motorists against insurance companies should not, as a general rule, be tried at the same time as the action fixing liability on the motorist, and, secondly, that the person who has entered into a contract containing an arbitration clause as a general rule, should be made to keep his contract, I think the learned judge came to a wrong decision on the question of principle, and that this appeal should be allowed.

Solicitors: *Hewitt & Crane; Corsellis & Burney.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

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## Re FORSEY AND HOLLEBONE'S CONTRACT

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), July 25, 26, 1927]

[Reported [1927] 2 Ch. 379; 91 J.P. 182; 71 Sol. Jo. 823; 25 L.G.R. 442; 97 L.J.Ch. 4; 138 L.T. 26]

*Sale of Land—Incumbrance—Resolution of local authority to prepare town planning scheme—Land Charges Act*, 1925 (15 *Geo.* 5, *c.* 22), *s.* 15 (7), *as substituted by Law of Property (Amendment) Act*, 1926 (16 *& 17 Geo.* 5, *c.* 11), *Sched.*

The passing by a local authority of a resolution to prepare a town-planning scheme, and its registration under the Land Charges Act, 1925, as a local land charge does not create any incumbrance or other defect of title upon any land comprised within the area proposed to be subject to the scheme. The effect of the resolution is merely to create a potential interference with property included in the scheme, which may never come into operation.

**Notes.** For the present law of Town and Country Planning see 32 HALSBURY'S LAWS (2nd Edn.) 213 et seq., as replaced by Cumulative Supplement.

Referred to: *A.-G.* v. *Barnes Borough Council and Ranelagh Club, Ltd.*, [1938] 3 All E.R. 711.

As to local land charges generally see 23 HALSBURY'S LAWS (3rd Edn.) 78 et seq. For cases see 40 DIGEST (Repl.) 91 et seq. For Land Charges Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 1063, and for Law of Property (Amendment) Act, 1926, see ibid., 899.

**Appeal** from an order of EVE, J., made on a vendor and purchaser summons.

By an agreement dated Dec. 10, 1926, the vendor agreed to sell, and the purchaser to purchase in fee simple, free from incumbrances, other than those mentioned in

the schedule, a villa residence in Upperton Road, Eastbourne. On Dec. 30 the purchaser's solicitors applied to search the register of local land charges, and shortly afterwards obtained a certificate from the local authority, that the property was comprised within an area affected by a resolution of the borough council dated Oct. 26, 1925, to prepare a scheme under the Town Planning Act, 1925, which had been registered as a local land charge under the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. At that date the scheme had not been further proceeded with, and neither the vendor nor the purchaser was aware of the resolution. The purchaser contended that the resolution was an incumbrance on the title of which he had had no notice, and, as it was one that the vendor could not get rid of, that she was not bound to complete the purchase. On a summons taken out by the purchaser under s. 49 of the Law of Property Act, 1925, and R.S.C., Ord. 55, r. 14A, asking for a declaration that a good title had not been shown to the property and for repayment of the deposit together with interest and costs on the ground that the resolution created an incumbrance within the contract, free from which the vendor could not sell, and that it rendered the property different from that offered for sale, EVE, J., held that, until the approval of the Minister had been given there was no scheme which could accurately be said in any way to affect the property the subject-matter of the sale. There was a potential interference with its enjoyment, but until that potentiality had ripened into an actual interference the property was not affected in the sense that there was an incumbrance imposed on it by the mere passing of the resolution. The mere passing and registration of such a resolution as that in question did not operate to impose on the land included in the area any subsisting incumbrance. The purchaser appealed.

*Topham, K.C.*, and *Byrne* for the purchaser.
*Farwell, K.C.*, and *Harman* for the vendor.

**LORD HANWORTH, M.R.**—This is an appeal from an order of EVE, J., made on a vendor and purchaser summons, on May 26, 1927. By a contract made on Dec. 10, 1926, the vendor contracted to sell to the purchaser the freehold property described therein, in fee simple, free from incumbrance. The property sold was a villa residence standing in its own grounds abutting on Upperton Road, in the county borough of Eastbourne. On Oct. 26, 1925, a resolution had been adopted by the council of the county borough to prepare a town-planning scheme, under the Town Planning Act, 1925, and the difficulty which has arisen is because that resolution has, by statute, a certain effect. By the Town Planning Act, 1925, it is provided by s. 2 (1):

> "A local authority may by resolution decide—(a) to prepare a town-planning scheme with reference to any land within, or in the neighbourhood of, their area in regard to which a scheme may be made under this Act. . . ."

Upperton Road was within the area of the borough council, and by the resolution the council were acting within their powers under s. 2 of the Act. By s. 2 (2) it is provided:

> "A town-planning scheme prepared or adopted by a local authority shall not have effect unless it is approved by order of the Minister, and the Minister may refuse to approve any scheme except with such modifications and subject to such conditions as he thinks fit to impose."

That Minister is the Minister of Health. By s. 2 (3), when the Minister has approved the town-planning scheme it is to have effect as if it were enacted in the Act, but by s. 2 (4) it may be varied or revoked by a subsequent scheme prepared or adopted in accordance with the Act. By s. 4 power is given to the Minister, by special or general order, to provide that where a resolution to prepare or adopt a scheme has been passed, the development of estates and building operations may

be permitted to proceed, pending the preparation, adoption, and approval of the scheme, subject to such conditions as may be described by the order. By an order made under the Town Planning Act, 1919, and dated Aug. 12, 1922, it was provided that the local authority might permit the building of houses, &c., to be continued under certain conditions. This order was made under the Town Planning Act, 1919, and not under the Act of 1925, but it is provided by s. 21 of the latter Act that nothing in the repeal shall affect any scheme, order or regulation made, or notice, or approval given under the earlier Act. By s. 7 of the Act of 1925 there is power given to the responsible authority to enforce the scheme by removing, pulling down, or altering any building or other work in the area, which would contravene the scheme. By s. 10 (1) compensation is to be paid in respect of property injuriously affected by the scheme, but by s. 10 (2) a person shall not be entitled to obtain compensation under the section, after the date of the resolution of the local authority to prepare or adopt a scheme, unless

> "(b) as respects any building erected, contract made, or other thing done in accordance with a permission granted in pursuance of an order of the Minister allowing the development of estates and building operations to proceed pending the preparation, adoption or making and approval of the scheme. . . ."

There is also an exclusion or limitation of compensation in certain cases under s. 11. Section 12 contains a rather remarkable provision. If a scheme has been adopted and put in force and has injuriously affected any particular property, the responsible authority may, at any time within one month after the date of an award of compensation, give notice to the owner modifying or withdrawing all or any of the provisions of the scheme which gave rise to the claim to compensation. The result is that when the responsible authority find that, if the scheme is carried through, they may have to pay compensation, they may withdraw it in respect of the particular property. It is clear that the date of the resolution for adoption of a scheme is important because, if after that date any building had taken place, no compensation would be payable unless under s. 10 (2) (b) leave had been obtained. From and after October, 1925, therefore, this land in Upperton Road was under the danger that the scheme when prepared and passed might require part of it to be taken in order to carry out the scheme. There would be no right to compensation if the purchaser proceeded to build without the leave of the borough council.

That resolution is a restrictive covenant within the Lands Charges Act, 1925, s. 15 (7) of which provides:

> "For the purposes of this section, any prohibition of or restriction on the user or mode of user of land or buildings enforceable by any local authority by virtue of any statute or any order, scheme or instrument made in pursuance of any statute, and any resolution passed by a local authority to prepare a town-planning scheme, shall be deemed to be a restrictive covenant, and where arising or passed after this Act shall be registered by the proper officer as a local land charge."

If that section had stood the resolution would have been deemed to be a restrictive covenant, and it is for the purposes of compensation that the resolution had to be registered. But sub-s. (7) is no longer in force. By the Schedule to the Law of Property (Amendment) Act, 1926, another sub-section has been substituted, the effect of which is that a town-planning scheme or a resolution to prepare such a scheme passed by a local authority is to be treated as a local land charge and is no longer to be deemed to be a restrictive covenant. If the Lands Charges Act, 1925, had stood without amendment the question might have arisen whether or not the resolution was to be deemed to be a restrictive covenant, but it is not so, it is only a "local land charge." I think that Eve, J., considered the matter from the right point of view, and that was: Is the resolution a restriction which affects the property, so that the property which can now be conveyed is different from the

property contracted to be sold? It appears to me that EVE, J., has come to a right conclusion in his judgment when he said : A

> "There is a potential interference with its enjoyment, but . . . the mere passing and registration of a resolution of this nature does not operate to impose on the land included in the area any subsisting incumbrance."

There was in any case a building line fixed in Upperton Road, and that was a restriction on the user of the front of the property, apart from any town-planning resolution. Has the position of the purchaser been affected in any real sense? A draft statement in relation to the scheme has been prepared. But even then the scheme has to be passed by the Minister. There may be restrictions imposed by the scheme on the purchaser, but I reject the view that the scheme operates as an existing incumbrance on the land. The resolution has only a certain effect as to compensation. I have gone through the various sections of the Town Planning Act, 1925, in order to show that the resolution is passed not so much for purposes of restriction as to prevent unreasonable claims for compensation being made by persons buying up land subject to the proposed scheme. I think that EVE, J., was right in saying that there was nothing like an interference with the property so as to make it different from that which was contracted to be sold. I do not think the purchaser can say that the vendor has failed to make a good title. The appeal must be dismissed with costs. B C D

**SARGANT, L.J.**—I am of the same opinion. This is a villa property with, obviously, a building line on the frontage. The Public Health Act, 1875, applies to Eastbourne, and it is clear, therefore, that the owner of this land could not build anything in front of the house without the special permission of the local authority. It also appears that this property was purchased from the owners of a much larger property, who imposed restrictions upon it, which affect it. The parties who entered into the contract were both ignorant of the existence of the resolution to prepare a town-planning scheme. It is argued that the property is different from that contracted to be sold, that the vendor contracted to sell it free from incumbrances, and that there is a restrictive condition which the vendors ought to, but cannot, clear off the title. But the purchaser did not expect to get a property on which she could build a garage or anything else in front of the building line. The only circumstance which might cause the property to be affected by the resolution to adopt the scheme is that, if the road in front were widened to a width of 50 feet, 10ft. might be taken off the front drive and garden. But even if 20ft. were taken and the scheme went through, that would not, in my opinion, make the property a different property from that contracted to be sold. Quite apart from that, it is by no means certain that the scheme will be fully carried out ; and if it were, compensation would have to be paid for land affected. A more specific objection is that this resolution constitutes an incumbrance on the property. I agree with the view taken by EVE, J., that s. 15 (7) of the Lands Charges Act, 1925, as substituted by the Law of Property Amendment Act, 1926, is less onerous than it was before amendment, but, in my opinion, this resolution has never been a restrictive covenant at all. Section 10 (2) of the Town Planning Act, 1925, imposes no restriction on the property, but if the purchaser were to build a garage or other small building within the 20ft. left for widening the road, he would not then be entitled to receive compensation, if it were taken. That is the sole result of the Town Planning Act, 1925, as regards this property ; it is merely a potential exclusion of the right of compensation for a building which no purchaser can expect ever to get the right to build. It is outside the bounds of any reasonable expectation. The obligation of the vendor on the sale included one to sell free from incumbrances, including restrictive covenants. I agree with the Master of the Rolls that there are numerous steps to be gone through, and at the end only the right to receive compensation is taken away. There is no real reason for refusing the vendor a declaration E F G H I

A that he has made a good title to the property, free from incumbrances. The appeal must be dismissed.

**LAWRENCE, L.J.**—I agree. I think that EVE, J., has reached a right conclusion on the two main grounds in this case. The property is situate in an area which is now to be subject to a town-planning scheme, but no scheme has yet B been settled. I will assume that the scheme will embrace the property, but I agree with the learned judge that the objection of the purchaser on this ground is so shadowy that it cannot prevail. On the second point, I agree that the effect of the Town Planning Act, 1925, and of the order that has been made is not to impose any incumbrance on the land. The possible deprivation of his right to compensation for taking or injuriously affecting his land is not an incumbrance, such as would give C the purchaser the right to rescind the contract.

*Appeal dismissed.*

Solicitors: *Wellington, Taylor & Sons; Burton, Yeates & Hart*, for *Charles & Malcolm*, Worthing.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

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## LAWRENCE *v.* HAYES

[KING'S BENCH DIVISION (Acton and Talbot, JJ.), March 14, 15, 1927]

F [Reported [1927] 2 K.B. 111; 96 L.J.K.B. 658; 137 L.T. 149; 91 J.P. 141; 43 T.L.R. 379]

*Chose in Action—Assignment—Subject to equities—Assignment of debt under contract for sale—Breach of warranty by vendor—Judgment for damages obtained by purchaser—Claim against purchaser by assignee for payments due* G *under contract—Right of purchaser to set-off amount of judgment.*

In February, 1923, one L. sold to the defendant a business for £350 cash and a balance of £400 payable by monthly instalments with interest thereon. On Oct. 3, 1923, L., by a deed of that date, assigned to the plaintiff all his remaining benefit under the agreement for sale. On Feb. 26, 1924, the defendant obtained judgment against L. for £116 damages for breaches of H warranties which were to be implied in that agreement. On Feb. 27 the plaintiff gave the defendant notice of the assignment of Oct. 3, 1923. In May, 1924, the plaintiff began the present action against the defendant to recover instalments and interest which were owing by the defendant to L. under the agreement for sale.

**Held:** the fact that the defendant had, before the notice of assignment, I obtained against L. a judgment crystallising L.'s liability to him in respect of the breaches of warranty did not deprive him of the right in the present action to set-off the amount of that liability against the plaintiff's claim.

**Quære,** how far it was open to the plaintiff to challenge the accuracy of the judgment in point of amount.

**Notes.** Distinguished: *Kitchen's Trustee* v. *Madders*, [1949] 2 All E.R. 1079.

As to assignment of choses in action subject to equities see 4 HALSBURY'S LAWS (3rd Edn.) 507 et seq., and for cases see 8 DIGEST (Repl.) 620 et seq.

Cases referred to: A

(1) *Young* v. *Kitchin* (1878), 3 Ex.D. 127; 47 L.J.Q.B. 579; 26 W.R. 403; 8 Digest (Repl.) 625, *645*.

(2) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. 199; 57 L.J.P.C. 35; 58 L.T. 285; 4 T.L.R. 292, P.C.; 8 Digest (Repl.) 626, *646*.

(3) *Price* v. *Moulton* (1851), 10 C.B. 561; 20 L.J.C.P. 102; 15 Jur. 228; 138 E.R. 222; 12 Digest (Repl.) 581, *4480*. B

(4) *Roxburghe* v. *Cox* (1881), 17 Ch.D. 520; 50 L.J.Ch. 772; 45 L.T. 225; 30 W.R. 74, C.A.; 8 Digest (Repl.) 623, *632*.

**Appeal** from Bishop's Stortford County Court.

The plaintiff sued as assignee of one Launder to recover £78 13s. 8d. from the defendant, that sum representing instalments admittedly due to Launder on the sale of a business by Launder to the defendant on Feb. 15, 1923, together with interest on those instalments. The assignment was by deed dated Oct. 3, 1923. In January, 1924, the defendant commenced an action against Launder for certain breaches of warranty arising out of the contract of sale, alleging, first, that certain chattels had been sold subject to a charge not paid off by Launder, and, secondly, that a cash register assigned to the defendant by the agreement was in fact not paid for and so was not Launder's property. On Feb. 4, 1924, the defendant obtained interlocutory judgment against Launder by default. On Feb. 26, 1924, a master in chambers assessed the damages at £116 odd, and for that amount judgment was entered for the defendant against Launder. On Feb. 27, 1924, notice of the assignment was given to the defendant for the first time by a letter from the plaintiff's agent to the defendant. The defendant claimed that he was entitled to set off against the plaintiff's claim an amount representing the amount of unliquidated damages to which he was entitled for the breaches of warranty. The plaintiff contended that the defendant could no longer rely on any set-off on the ground that there had been a merger of the original liability of Launder in damages in the judgment subsequently obtained against him by the defendant. The county court judge gave judgment in favour of the defendant. The plaintiff (the assignee) appealed.

*J. N. Gray* (*G. B. Hurst*, *K.C.*, with him) for the plaintiff.

*Serjeant Sullivan*, *K.C.*, and *F. S. Laskey* for the defendant.

**ACTON, J.**—This is an appeal from a decision of the judge of the Bishop Stortford County Court, who gave judgment for the defendant, with costs. The plaintiff sued as assignee of one Launder to recover a sum of £78 13s. 8d., being instalments admittedly due to Launder as instalments on the sale of a business by Launder to the defendant in February, 1923, and of that debt the plaintiff Lawrence took an assignment dated Oct. 3, 1923. In the action which was brought by the plaintiff claiming those instalments in arrear the question arose whether the defendant was entitled to set off against or deduct from the amounts which would otherwise be due and owing from him to the plaintiff a sum representing the amount of unliquidated damages to which he was entitled for breaches of warranty contained in the contract out of which there arose his indebtedness to Launder. The business which Launder sold to Hayes was the business of a tobacconist, and was sold for an agreed price of £750—£350 in cash and the balance of £400 to be paid by monthly instalments, with 6 per cent. interest thereupon. It appears that on the same day that this transaction was entered into between the parties the plaintiff, Lawrence, sold to Launder a bungalow for £650 of which £250 was paid by Launder to the plaintiff, and the balance was to be paid at £10 a month. On Oct. 3, 1923, a deed was executed by Launder assigning all his remaining benefit under the agreement of sale with the defendant to the plaintiff, but, although that assignment was executed then, no notice, or at all events no effective notice, was given until two letters were written, the first on Feb. 27, 1924, from the agent of the plaintiff to the defendant, and the second on May 22, 1924, from the plaintiff's solicitors

to the defendant. The defendant's claim to a set-off arose in this way. Soon after the business had been assigned to him the defendant claimed that Launder had not performed his agreement of sale, but was in breach in respect of two matters, namely, first, that certain chattels which had been sold subject to a charge had not been relieved of that charge by Launder, and, secondly, that a cash register assigned to the defendant by the agreement was in fact not paid for and was not Launder's property, but the property of other persons, and in Launder's possession under an agreement pursuant to which he was liable to pay instalments, of which there were a number in arrear. Before, therefore, the property in the cash register could be acquired by the defendant, if it was ever to be acquired by him, he would be under a liability to pay still further instalments. There was a discussion whether the register should be returned to the suppliers and an allowance made upon it, or whether the defendant should acquire the property in it by satisfying the owners and completing payment of the instalments. The plaintiff offered an allowance to the defendant at a valuation, and it appears that the defendant was prepared to accept some such terms, but disputes arose whether the sum was to be fixed by valuation or otherwise, and on Oct. 17, 1923, the proprietors of the register, the Cash Register Co., obtained judgment against Launder for a sum of £45 due for arrears on the register. In January, 1924, the Cash Register Co. issued a plaint against the defendant for the return of the register. This matter, however, was disposed of ultimately by agreement. In January, 1924, an action was launched by the defendant against Launder for unliquidated damages for breach of his implied warranty as vendor in that, in addition to the claims arising in regard to the chattels that had not been freed from the charge, Launder had no title to the cash register. On Feb. 4, 1924, the defendant obtained an interlocutory judgment against Launder by default, and on Feb. 26 a master in chambers assessed the damages at the sum of £116 odd, and for that amount judgment was given against Launder at the suit of the present defendant, with costs. Up to that date, as I have already stated, no effective notice had been given of this assignment, but on the next day, Feb. 27, the first of the notices to which our attention has been drawn was given. That notice, and the subsequent notice in May, having been given to the defendant, the plaintiff launched an action in the High Court for the sum with which we are concerned now, £78 13s. 8d., being seven monthly instalments of £10 due to the plaintiff as assignee under the agreement of Feb. 15, 1923, and interest upon those instalments at 6 per cent. As an answer to that claim, in the first instance, an affidavit was sworn in opposition to judgment, but in the result the matter was remitted to the Bishop's Stortford County Court.

The substantial question which arises is whether in the circumstances which I have detailed the defendant had or had not the right to set off against or deduct from the claim of the plaintiff as assignee in the present action the amount of the liability of Launder to him for damages for breach of warranty contained in the same agreement out of which the indebtedness of the defendant to the plaintiff arose. The argument in this court was that the defendant could not rely upon any such set-off because, the defendant having recovered an interlocutory judgment and subsequently a final judgment against Launder, there was a merger of the original liability of Launder in damages in the judgment which the defendant had obtained against him. It was admitted that, if the defendant had not pursued his remedy against Launder, but had for the first time formulated and insisted upon his claim to unliquidated damages in the present action, he would have been entitled to do so, and subject to his proof of the appropriate facts there could have been no answer in law to the claim which he sought to set up as a set-off against or a deduction from the claim raised by the plaintiff. It is not surprising that that admission should be made, because apart from any cases which have been referred to before us in the course of the argument, *Young* v. *Kitchin* (1) clearly establishes that that is an incontrovertible proposition of law. The headnote to that case is as follows (3 Ex. D. 127):

"The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the plaintiff lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor: *Held*, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor, and that the form of the defence must be amended accordingly."

That case was referred to, and referred to with approval in *Newfoundland Government* v. *Newfoundland Rail. Co.* (2) in the Privy Council. There remains, therefore, upon the argument as addressed to us the sole question, whether that which would indisputably have been the right of the defendant in the present action is barred by the mere fact that before he had any notice of this assignment he had obtained a judgment crystallising the liability of Launder to him in respect of these damages for breach of warranty arising as I have stated. If that were the result, it would appear, at all events, to be a somewhat startling result, but still the argument has to be considered. To my mind, the argument that a merger can operate in these circumstances as against the defendant for the benefit of the plaintiff is based upon an entirely erroneous hypothesis. As was said in the passage to which I have already referred by MAULE, J., in *Price* v. *Moulton* (3) (10 C.B. at p. 574):

"The policy of the law [in merger] is that there shall not be two subsisting remedies, one upon the covenant and another upon the simple contract by the same person against the same person for the same demand."

The words to be emphasised or italicised are the concluding words, but if for the word "covenant" in that sentence the word "judgment" be substituted, and for the words "debt upon a simple contract" be substituted the words "liability in unliquidated damages," the sentence is made to fit the facts in this particular case, and the policy of the law was quite clearly enunciated by MAULE, J.

In the present case it is apparent that, in the first place, the persons concerned are not the same as the persons concerned in the judgment. The plaintiff in this action had nothing whatever to do with the judgment. In the second place, the remedy is not of the same kind. As against Launder one might say that it was a weapon of offence; as against the plaintiff it could only be made, as *Young* v. *Kitchin* (1) shows, a weapon of defence, and the only relevant inquiry into the amount of unliquidated damages in which Launder is liable to the defendant is in regard to the question of the plaintiff's claim, and no further, for if upon investigation it is proved that the amount recovered in damages overtops the amount of the plaintiff's claim, all that surplus is of no matter whatever. It is, perhaps, always likely to make matters clear if one puts questions of this kind as a pleader would put them when pleading. I suppose a pleader would put them in some such way as this. The statement of claim would state that the plaintiff claimed as assignee of one Launder instalments of a debt accrued due and payable by the defendant Launder, which was by Launder assigned by an absolute assignment in writing to the plaintiff, of which assignment notice was duly given by the plaintiff to the defendant. The defence would be that, subject to set-off and counterclaim, the defendant admitted the debt, but he said that he had a claim against Launder for unliquidated damages arising out of the same contract as that under which his indebtedness to Launder arose and claimed the right to set off against or deduct from the amount of the plaintiff's claim a proportion of those damages equivalent in amount to the whole or a part of the amount of the plaintiff's claim. To that counterclaim the pleader acting for the plaintiff has to find a defence, and according to the argument we have heard the defence would be that the defendant had, before

notice of the assignment of the debt due from him to Launder was given, obtained a judgment against Launder for the recovery of unliquidated damages, the whole or a part of which he now sought to set off against or deduct from the amount of the plaintiff's claim, and that the effect of that judgment was that there was a merger of Launder's liability in damages in the judgment debt. On that the question arises, which is the question in this case, whether that would be a demurrable defence to a counterclaim—in other words, whether or not it would be bad in law and one which could not be sustained.

In my opinion, it is not an available defence in the circumstances mentioned. Nobody has ever disputed that there was a merger as between Launder and the defendant or that there was as between them a consequent estoppel which arose from the judgment. Although it is entirely unnecessary to decide that point, it seems to me as counsel for the defendant has contended that it would be open to the plaintiff in these circumstances to say something to this effect: It is all very well for you to say that you have got judgment against Launder, but if you are seeking for a different kind of purpose to exercise a different kind of remedy against a different person, that different person may call upon you to prove the necessary facts to show that in fact you have a claim to unliquidated damages to an amount equivalent to or overtopping my claim against you. If that question had arisen in any form, it would no doubt have been dealt with in the counterclaim, and we might have had to consider it and express some view upon it in this court, but no such course was taken. The case admittedly proceeded from beginning to end upon the basis that the figure of the amount for which the defendant recovered judgment against Launder substantially represents the true figure of the amount of damages which the defendant had in fact suffered at the hands of Launder by reason of his breaches of warranty. In the county court, apparently, the plaintiff went so far as to address to the judge an argument to the effect that, although a judgment had been obtained by the defendant against Launder, and was, of course, binding between those parties, nevertheless it was open to the plaintiff to say that the damages in respect of which that judgment had been obtained were in fact unliquidated, and that, so far as they were unliquidated damages, they could not in law be a set-off against the plaintiff's claim. Everybody has agreed that that argument was entirely untenable, but the material fact for the purposes of our decision is that that argument was addressed to the county court judge, and, therefore, that the case proceeded to decision upon the basis that nobody sought to dispute the substantial correctness of the figure representing the indebtedness of Launder to the defendant in respect of these unliquidated damages, and that it was the plaintiff himself who sought to go behind the judgment, if I may so, perhaps somewhat loosely, express it, and argue that, looking behind that judgment to the nature of the claim upon which it was founded, that claim was one which could not be set up against him. It seems to me to be unnecessary to consider the matter any further. The dilemma in which the plaintiff appears to be is that, if he desired to question in substance the amount of the damages recoverable by the defendant against Launder, he should have taken steps to raise the question. He did no such thing, and, on the other hand, he allowed the case to proceed upon the basis that, so far as the amount was concerned, he did not seek to raise any question at all. On the other hand, if it be said that the defendant thought to rely upon the judgment as binding against the plaintiff, one can only say that the evidence seems to be all the other way, and that it seems reasonably clear that the case was never put upon that basis, but upon the basis which I have indicated.

I arrive, therefore, at the conclusion that so far as the question of merger is concerned, it cannot be relied upon by the plaintiff as a defence to the set-off and counterclaim which was raised against him in the present action. In the result, therefore, the appeal ought to be dismissed.

**TALBOT, J.**—I am of the same opinion. The judgment obtained by the defendant against Launder was obtained after the assignment to the plaintiff, but before notice of it to the defendant. It is admitted that this claim of the defendant was of such a nature that it would in equity have been set off as against the assignees's claim. That admission could not be avoided in view of *Young* v. *Kitchin* (1) and *Newfoundland Government* v. *Newfoundland Rail. Co.* (2) to which reference has been made. The matter is now regulated by s. 25 (6) of the Supreme Court of Judicature Act, 1873, which contains these words in qualification of the rights of the assignee of a debt: "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed . . ." That, as explained by CLEASBY, B., in *Young* v. *Kitchin* (1) means, as, indeed, is obvious, "subject to all equities which would be enforced" (which would have *been* enforced would be more verbally correct) "in a court of equity."

The whole case as argued before us, conceding that admission, is this. It is said that the defendant has lost his right to a set-off because he has obtained a judgment which has binding effect as between him and Launder and that that judgment is not matter of set-off under the principles of equity and the Judicature Act, but has extinguished or superseded or merged the right which was a matter of set-off before it was obtained. It was argued that what appeared to be a very unattractive piece of mere technicality had a foundation in substance because whereas the amount to be set off in respect of an unliquidated claim would have to be ascertained by some inquiry in an action between the assignee and the defendant, as is apparently recognised at the end of the judgment in the *Newfoundland Case* (2), in which inquiry the assignee would be a party; on the other hand, the judgment might be obtained without his knowledge and in his absence. We are, therefore, invited to lay it down as law that, if a claim against an assignor which would be proper matter of set-off against the assignee has, after the assignment but before notice of it, been translated into a judgment, the right of set-off has gone. No authority for such a proposition has been brought to our notice, and it appears to me to be quite contrary to the principles upon which, before the Judicature Act, courts of equity dealt with this matter. They are very clearly stated in a passage, which has been frequently quoted as declaring the law on this matter, from the judgment of JAMES, L.J., in *Roxburghe* v. *Cox* (4). He says (17 Ch.D. at p. 526):

> "An assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception."

In the present case this judgment was obtained before notice of the assignment. Moreover, it is, I entirely agree, plain that the merger of the defendant's cause of action against the assignor under the judgment operates only as between the parties to that cause of action ; it cannot deprive the defendant as against the assignee of any right of set-off which could have been founded on the cause of action itself.

With regard to the other argument on behalf of the plaintiff, I desire to reserve my opinion as to exactly how far it was open to the plaintiff to challenge the accuracy of the judgment in point of amount. It is quite clear that, as a matter of estoppel, the assignee is not estopped by the judgment obtained by the defendant against the assignor, but I do not feel sure that a court of equity would allow the set-off of such a judgment debt as this due from the assignor before notice of the assignment, I mean as a judgment debt, and it may be that such a judgment could only be challenged by the assignee on the ground of collusion or fraud. It is quite unnecessary to decide that question in the present case, because here it appears that either the plaintiff made no attempt to challenge the accuracy of the judgment, or, if he did, the court decided against him on that point, and, if it did decide against him on that point, that would be a decision of fact as to which there is no appeal to

this court. In my opinion, on the facts as found by the county court judge, the allowance of the set-off was perfectly right in law, and I agree, therefore, that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Field, Roscoe & Co.*, for *J. Lee & Son*, Bishop's Stortford; *Beardall & Co.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

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## WOODWARD *v.* OLDFIELD

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), May 2, 3, 1927]

[Reported [1928] 1 K.B. 204; 96 L.J.K.B. 796; 136 L.T. 731; 91 J.P. 115; 43 T.L.R. 488; 25 L.G.R. 296; 28 Cox, C.C. 363]

*Education—School attendance—Duty of parent to secure attendance—"Parent"—Child in "actual custody" of mother—Father in prison—Education Act*, 1921 (11 & 12 *Geo.* 5, *c.* 51), *ss.* 54 (1), 170 (12).

The appellant was the mother of a mentally defective female child of twelve years of age, who resided with her and was in her custody. The appellant's husband, the father of the child, was serving a sentence of penal servitude and the local education authority, being satisfied that the appellant was not making suitable provision for the education of the child, required the appellant to send the child to a special school provided by them and certified by the Board of Education as suitable for mentally defective girls. The appellant, without reasonable excuse, failed to send the child to the school. On a summons against the appellant under s. 54 (1) of the Education Act, 1921, for an order requiring the child to be sent to the school, the appellant contended that the justices had no power to make the order as "the parent" of the child within that subsection was the father and he had neither been asked for his consent nor had he failed without reasonable excuse to send his child to the school.

**Held:** that as the child's father was not in a position to comply with the requirement, and as the child was in the "actual custody" of the appellant, the justices had power to make an order against the appellant.

Per AVORY, J.: Parent in s. 54 (1) means the parent who de facto has the custody or control of the child and not the parent who de jure has that custody or control.

**Notes.** Special educational treatment is now provided for pupils suffering from mental or physical disability under s. 8 (2) (c), s. 33 (2), and s. 56 of the Education Act, 1944, and Sched. I to the Education (Miscellaneous Provisions) Act, 1948 (and see 13 HALSBURY'S LAWS (3rd Edn.) 650 et seq.). The Education Act, 1921, s. 42, which places on the "parent" of a child the duty to educate it, has been replaced by s. 42 of the Education Act, 1944, and s. 170 (the definition section) of the Act of 1921 by s. 114 of the Act of 1944.

Considered: *Plunkett* v. *Alker*, [1954] 1 All E.R. 396.

As to the duty of a parent to secure a child's education see 13 HALSBURY'S LAWS

(3rd Edn.) 555, and for cases see 19 DIGEST 564 et seq. For Education Acts, 1921 and 1944, see 8 HALSBURY'S STATUTES (2nd Edn.) 140, 145. A

Cases referred to:

(1) *Hance* v. *Burnett* (1880), 45 J.P. 54, D.C.; 19 Digest 564, *61.*

(2) *R.* v. *Judge Radcliffe, Ex parte Oxfordshire County Council*, [1915] 3 K.B. 418; 84 L.J.K.B. 2196; 113 L.T. 991; 79 J.P. 546; 31 T.L.R. 610; 13 L.G.R. 1192, D.C.; 33 Digest 272, *1897.* B

**Case Stated** by Somerset justices.

A complaint was preferred on Oct. 11, 1926, by the respondent, Norman Oldfield, of Weston-super-Mare, deputy clerk of Somerset County Council, on behalf of the local education authority for the county of Somerset, under the Education Act, 1921, s. 54, against the appellant, Marion Ann Woodward, for that she on Oct. 4, C 1926, at the parish of Burnham-on-Sea in the said county, being the parent of a certain defective child named Marion Lilian Woodward, over seven years of age, was on Sept. 18, 1926, required by the local education authority to send the child to the special school provided by them at Sandhill Park, Bishop's Lydeard, in the said county, being a school certified by the Board of Education as suitable for mentally defective girls, and that she had failed without reasonable excuse to do D so. The local education authority applied for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive her.

The complaint was heard at petty sessions on Oct. 18 and Nov. 1, 1926, when the following facts were proved or admitted. The appellant was the mother of the child, Marion Lilian Woodward, and the child then was over the age of seven years, E to wit, of the age of twelve years, and was residing and at all material times resided with, and was in the actual custody of, her said mother. The mother was stone deaf. The father of the child was Harry Edward Woodward, who at all material times was serving a sentence of penal servitude and was imprisoned at His Majesty's Prison at Maidstone until the last week of April, 1927. The consent in writing of the child's father or of the appellant to the child's being sent to the special F school hereinafter mentioned had not been obtained. The child was a defective child within the meaning of that word as used in Part V of the Education Act, 1921, and the Somerset County Education Committee, acting as the local education authority for elementary education under powers delegated to them by the county council in pursuance of the Act, were satisfied, after consultation with the appellant, that she was not making suitable provision for the child's education, whereupon G they required the appellant to send the child to a certified school suitable for such child, to wit, the special school at Bishop's Lydeard. The appellant failed without reasonable excuse to send the child to such school. The school was not within reach of the child's residence and was a boarding school. By letter dated Sept. 21, 1926, the appellant, in reply to a letter to her from the local education authority, dated Sept. 18, 1926, refused to consent, and before the justices refused to consent, to H the child's being sent to the said school. It was proved to the justices' satisfaction that the appellant unreasonably withheld her consent to the child's being sent to the school, and they were not satisfied that such consent was withheld with the bonâ fide intention of benefiting the child.

The appellant contended that, under the terms of the statute, the justices had no power in law to make an order that the child should be sent to the said school I on the grounds following: (i) that the parent of the child within the meaning of s. 54 of the Education Act, 1921, was the father and not the mother of the child, if the father was alive and could be found, and no consultation had ever taken place between the local education authority and the father of the child; (ii) that no request had ever been addressed by the local education authority to the father of the child that he should send the child to the said school; (iii) that there was no evidence before the justices that the father had failed without reasonable excuse to send the child to the said school; (iv) that there was no evidence that the consent

in writing of the father of the child had ever been requested, or obtained, or unreasonably withheld. The respondent contended that the child was in the actual custody of the appellant and that the appellant was the "parent" of the child, and therefore that the justices had power to make the order.

The justices were of opinion that the contentions of the respondent were correct and that those of the appellant were incorrect, and, accordingly, they made the order mentioned.

*E. H. C. Wethered* for the appellant.

*Croom-Johnson, K.C.*, for the respondent.

**LORD HEWART, C.J.**—This is a Case stated by justices for the county of Somerset. It arises upon a complaint preferred by the respondent, who is deputy clerk of the county council of Somerset, on behalf of the local education authority under s. 54 of the Education Act, 1921, against the appellant. The complaint was that on Oct. 4, 1926, the appellant, being the parent of a certain defective child named Marion Lilian Woodward, over seven years of age, was required by the local education authority to send the child to a special school provided by the authority at Sandhill Park, being a school certified as suitable for mentally defective girls, and that the appellant had without reasonable excuse failed so to do. Thereupon the local education authority applied for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive her. That complaint being heard by the justices at the petty sessions, there appeared to the justices to be no reasonable excuse why the child should not be sent to a special school, and, accordingly, the justices ordered that she should be sent to a named school within a named period. The appellant appeals from that order, and the question is whether in arriving at the conclusion set out in the Case the justices came to a correct determination in point of law.

The appellant is the mother of Marion Lilian Woodward, and that child, being twelve years old, at all material times resided with and was in the actual custody of her mother, who is stone deaf. The father of the child at all material times was serving a sentence of penal servitude, his release being expected to take place in April, 1927. The Case finds as a fact that the consent in writing of the child's father or of the appellant to the sending of the child to the special school had not been obtained. More than that, the child was a defective child within the meaning of that word as used in Part V of the Act of 1921, and the county education committee, acting as the local education authority, were satisfied, after consultation with the appellant, that she was not making suitable provision for the child's education. Accordingly, in pursuance of the provisions of the Act, the education authority required the appellant to send the child to a certified class or school, and the Case finds as a fact that the appellant failed without reasonable excuse to send the child to that school. Correspondence passed between the education authority and the appellant, and on Sept. 21, 1926, the appellant refused to give her consent to the sending of the child to a school, and in an important finding of fact the justices say:

> "It was proved to our satisfaction that the appellant unreasonably withheld her consent to the said child's being sent to the said certified school, and we were not satisfied that such consent was withheld with the bonâ fide intention of benefiting the said child."

The appellant gave evidence on oath. She said that she believed the child would be better at home in her charge than at school, where she would be liable to be punished, and that the child was quite capable of doing housework. The appellant's evidence was to some extent corroborated by a registered medical practitioner, but, having weighed the evidence, the justices came to the conclusion which has been already stated.

Two points have been urged on behalf of the appellant. The first point is that there was no evidence upon which the justices could properly come to the finding

of fact which I have just read, namely, that the appellant withheld her consent unreasonably and not with the bonâ fide intention of benefiting the child. With regard to that submission it appears to me that the evidence upon the one side and upon the other was before the justices. It is fairly and clearly summarised in the Case, and I think it is clear that the justices upon conflicting evidence came to a conclusion to which they were entitled to come. The second contention is the real point of substance in this case, and it is that, notwithstanding that the father was at all material times serving a sentence of penal servitude at Maidstone, nevertheless he was within the meaning of the statute the parent referred to; that nothing had happened to impose upon him any disability in relation to this matter; and that, as his consent had neither been asked nor received, the condition precedent had not been fulfilled—namely, that which required that before the education authority took the step referred to here the consent of the parent must first be obtained, or, in the alternative, unreasonably withheld. Is it true to say that within the meaning of the term in this part of the statute the father in such circumstances continues to be the parent whose consent, whether given or withheld, is the material consent? That question depends upon this statute, and not upon the use of like terms in some other statutes, and under this statute it is provided by s. 42 at the beginning of Part IV of the Act as follows:

> "It shall be the duty of the parent of every child between the ages of five and fourteen, or, if a byelaw under this Act so provides, between the ages of six and fourteen, to cause that child to receive efficient elementary instruction in reading, writing, and arithmetic."

When one turns to the definition section in this Act, s. 170, one finds that the expression "parent" in relation to a child or young person "includes guardian and every person who is liable to maintain or has the actual custody of the child or young person." It is not denied in the argument before us on behalf of the appellant that at the time when the father was detained in prison and the child was in the actual custody of the mother it was the mother who would have been liable if she had neglected the duty imposed on the parent by s. 42.

Reference may usefully be made upon that point to *Hance* v. *Burnett* (1), a case under the Elementary Education Act, 1876, s. 4. It was held there that the mother of a child having the actual custody and control of the child was liable for neglecting to cause the child to attend school while her husband was at sea, whether he was the father of the child or not. In giving judgment Lord Coleridge, C.J., said:

> "I observe that it is not found in the Case that this was the child of the husband. If it had been his child I think nevertheless that owing to the father's absence, as the child was in the actual custody of the respondent, she was liable to see to the child being sent to school, otherwise the children of the seafaring population might be wholly neglected. The words of the statute sufficiently comprehend the present case and the justices ought to have convicted."

Those observations, as it seems to me, are apposite to the present matter, and indeed when one turns to s. 54 of the Education Act, 1921, under which the proceedings now under examination were launched, the matter is, I think, still more plain. By s. 53 of the Act it is provided:

> "The duty of a parent under Part IV of this Act to cause his child to receive efficient elementary instruction shall, in the case of a defective or epileptic child over seven years of age in any place where a special class or school certified by the Board of Education for defective or epileptic children, as the case requires, is within reach of the child's residence, include the duty to cause the child to attend such a class or school, and a parent shall not be excused from this duty by reason only that a guide or conveyance for the child is necessary."

A It might, indeed, be said that the admission that in the circumstances of this case the mother would have been liable in the case of a normal child for omitting to perform the duty laid down in s. 42 carries with it the proposition that she has the duty as the parent in the circumstances of a case under s. 54 which provides as follows:

B "If a local education authority for elementary education are satisfied, after consultation with the parent of a defective or epileptic child over seven years of age, that the parent is not making suitable provision for the child's education, they may require the parent of the child to send the child to a certified class or school suitable for the child, and, if he fails without reasonable excuse to do so, may by complaint apply to a court of summary jurisdiction for an order C requiring the child to be sent to a certified class or school. . . ."

To apply that section to the circumstances of this case, if, by reason of the fact that the father remains the father notwithstanding that he is in prison, he is to be the parent referred to, the consequences become a little grotesque. The education authority must satisfy themselvs after consultation with the person undergoing penal servitude that he, being in that place and in those circumstances, D is not making suitable provision for the child's education. The education authority must then require the convict undergoing penal servitude to send the child to a certified class or school suitable for the child, and it is only if the convict fails to do so without reasonable excuse that they may by complaint apply to a court of summary jurisdiction. What could be a more reasonable excuse, if the father were the parent referred to, than that he was not in a place where it was possible for E him to comply with the suggestion? The result would be that the defective child would have to be neglected until the period of penal servitude, whatever it might happen to be, came to an end, because only on its expiration would the father be deprived of the reasonable excuse.

There are other sections of the Act which seem to me to enforce the same con- F clusion, and I think here the test as to the meaning of the word "parent" is whether there is a person otherwise satisfying the definition in s. 170 who is liable to maintain or has the actual custody of the child or young person. That is not to say for a moment that in other circumstances and under the provisions of other statutes the father in such circumstances as the present may not retain the rights of a paternal parent. Reference has been made to *R.* v. *Judge Radcliffe* (2), and, G in particular, to the passage in the judgment of the court [1915] 3 K.B. at p. 423, but it is to be observed with reference to that case that the matter there in question was the presentation of a petition, an affirmative act by the parent or guardian, and the statute had provided that where the petition was not presented by the parent or guardian the order was not to be made without the consent in writing of the parent or guardian unless it was proved to the satisfaction of the judicial H authority that such consent was unreasonably withheld or that the parent or guardian could not be found. It seems to me that the reasoning in that case under the terms of that statute is not applicable to the special provisions of this Act with reference to the education of a defective child. It appears to me that the justices were entitled to come to the conclusion of fact to which they came, and that in the interpretation which they put on the law they were right. I think, therefore, I that this appeal ought to be dismissed.

**AVORY, J.**—I am of the same opinion. I think that in order to give practical effect to this statute it is necessary that we should hold that the expression "the parent" in s. 54 of the Education Act, 1921, means the parent who de facto has the custody or control of the child, and not the parent who de jure has the custody or control of the child. It would be impossible, as my Lord has pointed out, otherwise to give any effect to s. 54, because where the father is undergoing penal servitude it could always be said by him that he had a reasonable excuse for

not complying with the requirement made upon him. Particularly, from sub-s. (3) of that section it is obvious that the section contemplates a parent who in fact has the custody or control, and not one who merely in law has it, because that sub-section provides:

> "Nothing in this section shall be construed as affecting the power of a parent to withdraw a child from school on proof to the satisfaction of the local education authority that he will make suitable provision for the child's education in some other way."

It appears to me that we ought to apply the decision of the court in *Hance* v. *Burnett* (1), where the father was at sea, and not the decision in *R.* v. *Judge Radcliffe* (2), where the father was at home and de facto had the custody and control of the child. In this case, no doubt, it would have been open to the justices to come to a contrary conclusion as to the mother's reasons for not consenting to the child's being sent to a school, but, since they found the fact as they did, it is impossible for this court to interfere with their finding, and I, therefore, agree that the appeal should be dismissed.

**SHEARMAN, J.**—I am of the same opinion. We are asked in this case to construe s. 54 of the Education Act, 1921, with regard to an alleged defective child. In my judgment, the words "the parent" in this section mean the parent who has "the actual custody of the child." Those are the words in the definition section. The difficulty that I felt during the argument of the case was the considered decision in *R.* v. *Judge Radcliffe* (2), which arose out of s. 6 of the Mental Deficiency Act, 1913, because one is most desirous, if it can be avoided, not to have different meanings given to the same words in cognate sections. On consideration I have come to the conclusion that that case does not in the least confiict with the decision that we are giving. No doubt, where both husband and wife are living together the person having the actual custody would be the husband. In *R.* v. *Judge Radcliffe* (2) the wife and husband were living together, and the court quite properly said that the husband was the person having the actual custody. Therefore the authorities are not in line.

*Appeal dismissed.*

Solicitors: *Calder Woods & Sandiford*, for *A. Chambers Harris*, Burnham, Somerset; *Maude & Tunnicliffe*, for *G. I. Simey*, Weston-super-Mare.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

# LEYTON URBAN DISTRICT COUNCIL *v.* WILKINSON

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), February 21, 23, 1927]

[Reported [1927] 1 K.B. 853; 96 L.J.K.B. 383; 137 L.T. 10; 91 J.P. 64; 43 T.L.R. 326; 71 Sol. Jo. 293; 25 L.G.R. 188]

B

*Court of Appeal—Divisional Court—Appeal from—Case stated by magistrates—Preliminary objection to hearing upheld by Divisional Court.*

An appeal lies to the Court of Appeal from a decision of a Divisional Court of the [Queen's] Bench Division upholding a preliminary objection to their hearing an appeal by Case Stated against the decision of a magistrates' court C on a claim by a local authority to recover expenses of work done by them under the Public Health Acts.

*Corporation—Recognisance by—Appeal by Case Stated against magistrates' decision—Recognisance by agent—Form of recognisance.*

A corporate body can enter into a recognisance to prosecute an appeal to the High Court by Case Stated against the decision of a magistrates' court by D an agent whom it has duly authorised to act on its behalf for that purpose. It must be stated in the recognisance that it has been entered into by the agent on behalf of the corporation, that it binds the goods of the corporation, and that the corporation is bound by the conditions of the recognisance.

Decision of Divisional Court, [1927] 1 K.B. 615, affirmed.

E **Notes.** Section 3 of the Summary Jurisdiction Act, 1857, has been replaced by s. 90 of the Magistrates' Courts Act, 1952.

Distinguished: *Lawrence* v. *Martin*, [1928] 2 K.B. 454.

As to legal proceedings by a corporation see 9 Halsbury's Laws (3rd Edn.) 91 et seq., and as to the jurisdiction of the Court of Appeal see ibid., 417 et seq. For cases see 13 Digest (Repl.) 333 et seq., and 16 Digest 183 et seq. For Supreme F Court of Judicature (Consolidation) Act, 1925, s. 31, see 5 Halsbury's Statutes (2nd Edn.) 357, and for Magistrates' Courts Act, 1952, s. 90, see ibid., vol. 32, p. 493.

Cases referred to:

(1) *Crush* v. *Turner* (1878), 3 Ex.D. 303; 47 L.J.Q.B. 639; 38 L.T. 595; 43 J.P. 4, 26 W.R. 673, C.A.; affirmed, sub nom. *Turner* v. *Crush* (1879), 4 App. Cas. 321; 48 L.J.Ex. 481; 40 L.T. 661; 43 J.P. 540; 27 W.R. 553, H.L.; 13 G Digest (Repl.) 476, *998*.

(2) *Cortis* v. *Kent Water-works Co.* (1827), 7 B. & C. 314; 5 L.J.O.S.M.C. 106; 108 E.R. 741; 13 Digest (Repl.) 257, *836*.

(3) *R.* v. *Manchester Corpn.* (1857), 7 E. & B. 453; 26 L.J.M.C. 65; 28 L.T.O.S. 369; 21 J.P. 165; 3 Jur. N.S. 839; 5 W.R. 373; 119 E.R. 1315; 13 Digest (Repl.) 329, *1353*.

H (4) *Southern Counties Deposit Bank, Ltd.* v. *Boaler* (1895), 73 L.T. 155; 59 J.P. 536; 11 T.L.R. 568; 15 R. 566; 13 Digest (Repl.) 333, *1383*.

**Appeal** from a judgment of the Divisional Court on a Case stated by justices for Essex.

A complaint was preferred by the Leyton Urban District Council, the appellants, I under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, against C. T. Wilkinson, the respondent, claiming £51 15s. 7d., the amount of expenses incurred by the appellants in relaying defective branch drains of premises owned by the respondent and also a single private drain at the rear of the premises. The justices ordered the respondent to pay £27 19s. 11d., the expenses incurred by the appellants in relaying the branch drains, but they declined to order payment of the expenses incurred by the appellants in regard to the single private drain. The clerk to the appellants applied to the justices under s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary

Jurisdiction Act, 1879, to state a Case, and he entered into the following recognisance: A

"Be it remembered that on May 26, 1926, John Atkinson, of Town Hall, Leyton, clerk to the Leyton Urban District Council, personally came before me, one of his Majesty's justices of the peace for the said county, and acknowledged himself to owe our Sovereign Lord the King the sum following, namely, the sum of £100, to be levied on his several goods and chattels, lands, and tenements, if he the said principal fail in the condition hereon endorsed." B

The condition endorsed was as follows:

"If, therefore, the said John Atkinson, after the said court of summary jurisdiction shall have stated a Case setting forth the facts and the grounds thereof as aforesaid for the opinion of the [High Court], shall prosecute without delay such his appeal and submit to the judgment of the said court thereon, and pay such costs as may be awarded by the same, then the said recognisance to be void or else to stand in full force and virtue." C

When the case came before the Divisional Court the respondent took the preliminary objection that the recognisance did not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857 [see now Magistrates' Courts Act, 1952, s. 90], since it was entered into, not by or on behalf of the appellants, but by a man named John Atkinson, who was described as the clerk to the council, but nowhere spoke on behalf of the council, but, on the contrary, used language referring to himself and "his" appeal. The Divisional Court held that that was not such a recognisance as was required by the statute, upheld the preliminary objection, and dismissed the appeal. The appellants appealed to the Court of Appeal. D E

*Sir James O'Connor, K.C.*, and *G. W. H. Jones*, for the respondent, submitted that the appeal did not lie.

*Montgomery, K.C.*, and *William Allen*, for the appellants, were not called on to argue. F

**BANKES, L.J.**—This preliminary point has been very carefully brought before us by the learned counsel, but, I think that the only construction that can be put upon s. 31 of the Act of 1925 is that it reproduces, in substance, the somewhat patchwork condition of things under which it was held that a subsequent statute which gave the Divisional Court a right to grant leave to appeal must be taken to have impliedly overriden, because it did not repeal, a previous statute which provided that the decision of that court should be final. The position was this. Under the Summary Jurisdiction Act, 1857, if a Special Case was stated, it was specially and distinctly provided by s. 6 that the decision of the court to which the appeal was made was final. Then s. 45 of the Supreme Court of Judicature Act, 1873, provided that the determination of the appeal by the Divisional Court should be final unless special leave to appeal was given. Counsel has said that the difference between the state of things existing before the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, and the state of things existing after the passing of that Act is that by that Act the statutes under which that curious previous position existed were all repealed. That is quite true; but what was reproduced? I am quite certain that the draftsman of the Supreme Court of Judicature (Consolidation) Act, 1925, did not intend to restrict the jurisdiction of the Divisional Court by no longer admitting a jurisdiction to give leave to appeal. He may have done it by misapprehension or mistake, but in s. 31 he defined the jurisdiction by providing that no appeal should lie. Under sub-s. (1) (d), in substance, he reproduced what was the equivalent of the provision in s. 6 of the Summary Jurisdiction Act, 1857. When he came to sub-s. (1) (f) he in terms reproduced the provision of s. 1 (5) of the Supreme Court of Judicature (Procedure) Act, 1894. It is true that he did not in terms repeat the provisions G H I

of s. 45 of the Act of 1873, but, I think, having regard to the fact that the Act of 1925 is a consolidation Act, we must read paras. (d) and (f) together, and read them together in the same sense as that applied in *Crush* v. *Turner* (1) in reference to the statutes in force at the time of that decision, namely, as not depriving the Divisional Court of the right to give leave to appeal, given by para. (f), in spite of the provision in para. (d) that its decision is to be final.

For these reasons, I think, the preliminary objection fails and that the appeal must proceed.

**SCRUTTON, L.J.**—Counsel for the respondent has stated the rather puzzling sequence of these statutes so clearly that he has succeeded in convincing me that he is wrong.

The Summary Jurisdiction Act, 1857, provided, by s. 6, that on Special Cases from magistrates the opinion of the superior court of law should be finally conclusive on all parties. In 1873, the Judicature Act, by s. 45, provided that the decision of the court on such appeals from inferior courts should be final unless special leave to appeal from the same to the Court of Appeal were given by the Divisional Court. It did not repeal the Act of 1857. Whereupon, there came *Crush* v. *Turner* (1). In that case the question was what was the effect of two statutes standing on the Statute Book. One statute—namely, the Appellate Jurisdiction Act, 1876, s. 20—was saying that the decision of the court should be final, and the other, the Supreme Court of Judicature Act, 1873, s. 45, was saying that the decision should be final unless special leave to appeal was given. The court held that the latter statute prevailed and that there was a right of appeal if special leave was given by the Divisional Court. Then came the Act of 1894 which repeated s. 45 of the Act of 1873. I have no doubt that if one went into the statutes sufficiently, one would find a reason why it was repeated; but, at any rate, s. 1 (5) of the Judicature (Procedure) Act, 1894, provided that the decision of the Divisional Court should be final unless leave to appeal were given. Then came the Supreme Court of Judicature (Consolidation) Act, 1925, which, by s. 31 (1) (f), repeated the provisions of s. 1 (5), of the Act of 1894, but not the provisions of s. 45 of the Act of 1873, apparently, for the reason that all the subject-matter of it was already contained in s. 1, sub-s. (5) of the Act of 1894, and it did repeat, in s. 31 (1) (d), the provision of s. 20 of the Appellate Jurisdiction Act, 1876, that all appeals which were final should not go beyond the Divisional Court. It seems to me that the position would then be exactly the same as it was when *Crush* v. *Turner* (1) was decided. One statute provided that no appeal lay from the decision of the court, and another statute provided that there should be an appeal by leave. It appears to me that *Crush* v. *Turner* (1), which was affirmed by the House of Lords, leaves provision of the Act which gives leave to appeal the governing provision. The other view would require us to think that by mistake in a consolidating Act the existing power of appeal had been altered. I prefer to interpret the Supreme Court of Judicature (Consolidation) Act, 1925, as continuing the existing power of appeal rather than taking away the power of appeal. Therefore, I think the preliminary point fails.

**ATKIN, L.J.**—I agree.

*Preliminary objection overruled.*

The hearing of the appeal then proceeded.

*Montgomery, K.C.*, and *William Allen* for the appellants.

*Sir James O'Connor, K.C.*, and *G. W. H. Jones*, for the respondent, were not called on to argue.

**BANKES, L.J.**—I begin by saying that there are no merits whatever in the objections to the hearing of this appeal, but we have to decide the question of law which has been raised.

The appellants—the Leyton Urban Council—were parties to a proceeding before justices as prosecutors, and the justices decided in a way which did not satisfy them. They thereupon determined to appeal by way of a Special Case, and they applied to the justices to state a Special Case. Under the provisions of s. 3 of the Summary Jurisdiction Act, 1857, where this procedure is adopted, it is necessary that the appellants, which the district council were in this case, at the time of making such application, and before the Case is stated and delivered to them by the justices or justice, should enter into a recognisance. The appellant council passed the necessary resolution giving their clerk authority to enter into a recognisance on their behalf, and he thereupon attended before the justices. What exactly happened we do not know, because the details of that were not brought before the Divisional Court, and we do not think it right to allow materials to be brought before us at this late stage, one effect of which would be to attempt to contradict the written record. The result of the clerk appearing before the justices was that a formal recognisance was drawn up, and that recognisance is, I venture to think, manifestly insufficient as a recognisance entered into by the clerk on behalf of the council. The form is the proper form for an individual entering into a recognisance on his own behalf. It recites that Mr. Atkinson, the town clerk, appeared personally before a justice of the peace, and then it sets out the condition of the recognisance which states by way of recital:

> "And whereas the said [John Atkinson] being dissatisfied with the said determination as being erroneous in point of law, hath applied to the said court, pursuant to s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, to state and sign a Case setting forth the facts and grounds of such determination, for the opinion thereon of the King's Bench Division of His Majesty's High Court of Justice; if, therefore, the said John Atkinson, after the said court of Summary jurisdiction shall have stated a Case setting forth the facts and grounds thereof as aforesaid for the opinion of the [High Court], shall prosecute without delay such his appeal and submit to the judgment of the said court thereon. . . ."

Mr. Atkinson was not dissatisfied with the justices' decision; it was the appellants who were dissatisfied. That is obviously insufficient as a recognisance on behalf of the Leyton Urban Council. It does not purport to bind them, it does not purport to refer to their appeal; it does not purport to refer to their willingness to abide the result of the judgment and to pay the costs. In my opinion, so far as that point is concerned, the Divisional Court could not come to any other conclusion than the one at which they have arrived.

This appeal is made to us, and the grounds of the appeal are in substance these: The Leyton Urban Council are a statutory corporation; a corporation, whether statutory or otherwise, cannot enter an appearance in person; a recognisance is a thing which contemplates a personal appearance; it follows, therefore, that an urban council cannot enter into a recognisance, and it can be no objection that the recognisance is not in the proper form, because, never mind what form it is in, it would be a nullity; the council cannot enter into any form of recognisance. That is the first step. The second step is, that being so, the statute must be read as though it had no application to the district council, because the law is, as, we say, that district councils are free to appeal without any of the conditions imposed by the statute as conditions precedent to a right to appeal. That is the form in which the appeal is presented to us, and it depends upon the accuracy of the three contentions: First, that a corporation cannot appeal personally; secondly, that the recognisance must contemplate a personal appearance; and, thirdly, if those two propositions are established the statute is to be ignored.

I quite accept that by our common law a corporation could not appear personally. I quite accept that by the common law a recognisance no doubt contemplated a personal appearance of the person entering into the recognisance, but both of those

A are provisions of the common law, and judges in olden times appear to have been faced with the difficulty which arose when statutes were introduced under which corporations could become prosecutors and appellants, and, if appellants, were under the obligation of entering into a recognisance. One knows that it frequently happens in the study of our common law that when the judges were faced with difficulties of that kind, there being no statutory provision, they got over the B difficulties by making some extension, or variation of the common law. That is how the common law got extended. It seems to me that, being faced with the difficulties arising with regard to corporations there were three ways open to the court. They might either have said: "There cannot be any appeal at all because the corporation cannot enter into a recognisance." Of course, that would have raised great difficulties. They might have said: "We will construe the statute as C having no application to persons who cannot comply with all its requirements." That was a way which was sometimes adopted, but it led, apparently, to endless difficulties, or they might have adopted a much simpler method and have said: "It is quite true that, strictly speaking, the common law contemplates the personal appearance of the person who enters into the recognisance, yet in face of this difficulty, what is there to prevent us saying that this is one of the cases in which D a corporation may appear by attorney? There are many instances of cases where a corporation appears by attorney, in the same way as there are many cases in which a corporation, statutory or otherwise, makes contracts. Why should not we adopt that method?"

I think, in looking into the cases, it is quite plain that that is the practice which E has been adopted without question for a great number of years. It was hinted at by BAYLEY, J., in *Cortis* v. *Kent Water-works Co.* (2). BAYLEY, J. says (7 B. & C. at p. 331):

> "If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognisance."

F Then we have *R.* v. *Manchester Corpn.* (3) in which, I think, COLERIDGE, J., has in mind the kind of thing to which I have been referring, when he talks about the practice which had been adopted which might not be a strict compliance with the law. That means, I understand, the common law, but he says that it was evaded rather than overcome—in other words, the judges in their wisdom found a way round. He says (7 E. & B. at p. 458):

G

> "Moreover, in the correlative case, and on the supposition that the corporate body had been the prosecutors removing the indictment, there would have been a difficulty in strictly complying with the statute, because they could not enter into a recognisance, although we are aware that in practice this is evaded by one or more members of the body entering into one for them; evaded we H say, rather than overcome."

That was in 1857, and then we come to 1895, *Southern Counties Deposit Bank, Ltd.* v. *Boaler* (4), and I am taking the report in 59 J.P. 536. There Mr. Boaler, who was very cute in taking points, objected that the recognisance entered into in that case by the appellant, the company, was not in order. He succeeded, not because I the corporation could not enter into a recognisance, but because the director who did it on their behalf was not properly authorised by a resolution. In that case Mr. Levett, whom everyone remembers as a great lawyer, had got the old authorities, and he was contending on the authority of *Cortis* v. *Kent Water-works Co.* (2) on very much the same lines as part of the argument of counsel for the appellants to-day, and that provoked from WRIGHT, J., this statement of his view, and it is a valuable view because one knows of the familiarity of WRIGHT, J., with the practice on such points as these. When *Cortis* v. *Kent Water-works Co.* (2) was cited, WRIGHT, J., said (59 J.P. at p. 536):

"That depends on an antiquated notion that a corporation cannot enter into a recognisance, and that, therefore, an enactment requiring an appellant to enter into a recognisance cannot apply to a corporation."

So firmly is the practice established that without hesitation—I may say without the slightest hesitation—all over the country recognisances are accepted on behalf of corporations who are desirous to appeal, and must enter into recognisances, and in other cases where recognisances are necessary. So well is it established and accepted, that people have not apparently troubled to think out what is the right form in which a person should enter into a recognisance as attorney on behalf of a corporation, and unfortunately, in this case, as I have no doubt in thousands of others there was taken the common form which is applicable not to a person entering into a recognisance on behalf of a corporation, but to a person entering into a recognisance on his own behalf. They have, therefore, got into this difficulty, which I hope may not occur again, because there are no merits in the point, and it has prevented the hearing of this appeal. Whether the appeal would have been successful I do not know, but it would have been better and more satisfactory to everybody if it could have been heard. For these reasons this appeal fails, and must be dismissed with the usual consequences.

**SCRUTTON, L.J.**—I agree. Whatever may have been the old law at the time when there were no limited companies and not a great many corporations, and the rules of the common law were very rigid, for sixty or seventy years now the practice has been to allow companies or corporations to enter into recognisances by an authorised agent. In *Southern Counties Deposit Bank, Ltd.* v. *Boaler* (4), a recognisance was held bad because the agent was not authorised, but it seems to me that the recognisance that the agent enters into must be one binding his principal. You do not get a satisfactory recognisance that A. as an appellant shall prosecute and make his, A.'s, goods liable by filling in a form that B. enters into a recognisance and make his, B.'s, goods liable. The difficulty in this case has arisen, and I daresay it has arisen in a number of magistrates' clerks' offices all over the country, if the truth were known, because the taking of a recognisance has been looked upon as a not very important matter, and the clerk dealing with it has not taken the trouble to think what exactly he is doing when somebody who is not an appellant comes and proposes to enter into a recognisance. This recognisance is entered into by the appellants' clerk who acknowledges himself—not the corporation—"to owe our Sovereign Lord the King . . . £100 to be levied on his"—that is, the clerk's "several goods and chattels." Then it goes on: "if the said principal" —and the clerk is not the principal—"fail in the condition herein endorsed . . . the condition of the within written recognisance is" so and so. It further recites: "whereas [the clerk] being dissatisfied with the said determination . . ." It does not matter whether the clerk is dissatisfied with the determination; the question is whether the principals are dissatisfied with the determination. The clerk binds himself to prosecute his appeal, to submit to the judgment of the court, and to pay the costs. That is not the thing that it is desired to attain. It is not desired that the clerk shall prosecute, or that the clerk shall submit to judgment, or that the clerk shall pay the costs. What is desirable is that the appellants, the corporation, shall prosecute, shall submit to judgment, and shall pay such costs. For these reasons, which are, I think, the reasons substantially given in the judgments of the Divisional Court, and without going into the very interesting, but, I think, obsolete authorities with which counsel for the appellants has favoured us for some time, I am of opinion that this appeal should be dismissed.

**ATKIN, L.J.**—There are many proceedings which take place nowadays in courts of summary jurisdiction to which corporations in one form or another are parties, and it often happens that, as a condition of something or other being done in the course of the proceedings, or in the course of an appeal, a recognisance has got

to be entered into by a corporation, so that it is a matter of considerable embarrassment that there should be any doubt whether a corporation can or cannot enter into a recognisance. I think the time has come to declare that, whatever the law may have been, at the present moment it is that a corporation can enter into a recognisance by its duly authorised agent, and such a recognisance must be a recognisance on behalf of the principal, binding the goods of the principal, and binding the principal by the conditions of the recognisance whatever they may be. In order properly to execute such a recognisance, it is proper to see that the agent shall be duly authorised, and it is unnecessary to point out the different kinds of corporations, and the limits under which some of them exist as to giving authority to their agents. Sometimes it has to be done under seal, and sometimes it has not. All I say is that they now can enter into a recognisance by a duly authorised agent. In this case it appears to me quite plain that the corporation did not enter into a recognisance by a duly authorised agent, but a person who purported to be authorised to make a recognisance entered into a recognisance by which he bound himself to perform the conditions which were mentioned in the recognisance. There does not seem to me to be a compliance with the statute. For these reasons I think that the judgment of the Divisional Court was correct, and that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, for *John Atkinson, Leyton; Appleton & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

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## HEYN *v.* OCEAN STEAMSHIP CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), March 23, 24, 1927]

[Reported 137 L.T. 158; 43 T.L.R. 358; 17 Asp. M.L. Cas. 228; 27 Lloyd, L.R. 334]

*Shipping—Carriage by sea—Loss or damage to cargo—Liability of shipowners—"Fault of agents or servants of carrier"—Theft by stevedores employed by independent firm engaged to discharge cargo—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22), schedule, art. IV (2) (q).*

Under art. IV, r. 2 (q), of the schedule to the Carriage of Goods by Sea Act, 1924, a carrier of goods by sea is relieved from liability for the loss of or damage to goods resulting from any cause "arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier . . ." Stevedores employed by an independent firm who are engaged by a shipowner to discharge a vessel are his "agents or servants" within this rule.

*Statute—Construction—Word given other than its natural meaning to accord with supposed policy of Act.*

Per MACKINNON, J.: I am not satisfied that a judge has a right to alter the words of an Act of Parliament when that alteration is suggested, not to make sense of the defective language used in the Act, but by reason of the supposed policy of the Act, and, therefore, I am not satisfied that it would be right to treat the "or" in r. 2 (q) as if it had been "and."

**Notes.** As to art. IV of the schedule to the Carriage of Goods by Sea Act, 1924, see 30 HALSBURY'S LAWS (2nd Edn.) 614–617 and 23 HALSBURY'S STATUTES (2nd Edn.) 884, and for cases see 41 DIGEST 496 et seq.

**Action** tried before MACKINNON, J., without a jury.

The plaintiffs were the owners of a number of cases of cloth shipped in the defendants' steamship *Eumaeus* in December, 1925, for carriage from Liverpool to Shanghai. By the bill of lading the shipowners were to have the protection of the Carriage of Goods by Sea Act, 1924. The steamer arrived at Shanghai in the second week of January, 1926, and commenced discharge on the day after her arrival, the work of discharge being carried out by stevedores who were independent contractors. At night the ship was brilliantly lighted and a strict watch was kept, but in the morning of Jan. 13, 1926, the quartermaster on watch saw some Chinese coolies dragging cases of cotton across a barge at the side of the steamer towards a junk. The alarm was given and it was discovered that six cases of cloth were missing. Investigation showed that the preparations for the theft were elaborate and could only have been made by persons conversant with the interior structure of the steamer. The police recovered three cases, the contents of which were badly damaged, but the other three were not traced. The plaintiffs sought to recover from the shipowners £82, the value of the goods lost and damaged. The shipowners pleaded the Carriage of Goods by Sea Act, 1924, art. III (2) of the schedule of which provides:

> "Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

By art. IV (2):

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from. . . . (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

It was contended that the stevedores were not the agents or servants of the defendants, and that the evidence showed that the ship's officers and crew had taken every precaution to guard the property.

*Raeburn, K.C.*, and *H. Atkins* for the plaintiffs.
*Miller, K.C.*, and *James Dickinson* for the defendant shipowners.

**MACKINNON, J.**—In this case the plaintiffs as endorsees of a bill of lading sue the defendants for the loss of or damage to two cases of cloth. There were eight cases of cloth entrusted to the defendants, each case containing six rolls of cloth, and it is in respect of two or those that this action is brought. The defendants rely by way of defence upon the Carriage of Goods by Sea Act, 1924, art. IV (2) (q) of the schedule.

The vessel was discharging cargo at Shanghai on Jan. 12 with her starboard side alongside the quay. At 3 o'clock on the morning of Jan. 13 the quartermaster on watch on deck happened to look over the port side, which was the river side, and saw some men upon a lighter, which was lying alongside the port side of the vessel, dragging or carrying something across that lighter to a native junk which was lying outside the lighter. Suspecting some thieving from the ship he raised an alarm, and the men made off in the junk and were pursued by the police. They escaped, but eventually one or other of them was found by the police, and three bundles of cloth were discovered in their possession. Investigation having been made, the following facts were discovered. These cases of cloth had been stowed and carried in the ship in the deep tank underneath the space called the after centre

castle. It was apparent from the traces of their operations that a man or men had, down in that deep tank, opened some of these cases of cloth and had then lifted or pulled the rolls of cloth up the ladders to the after centre castle. They had then taken them through a door which goes from the after centre castle into the starboard coal bunker, dragged them across the saddleback into the port coal bunker, and then dragged them to a door in the side of the ship on the port side of the port coal bunker, and so lowered three of them into the lighter. At that point they were discovered and their plot frustrated. I am satisfied on the evidence that the door between the after centre castle and the starboard coal bunker was securely fastened when the ship ceased discharging on Jan. 12, and also that the door at the side of the port bunker opening out to the side of the ship was also securely fastened. The door between the after centre castle and the starboard coal bunker is fastened on both sides, that is to say, in order to open it there must be some men working on both sides of the door, and it is a necessary inference from what I have found that the people who were engaged in this robbery were at least two or more, and that one or more of them must have been on each side of the door, that is to say, someone remained concealed on the cargo side of the bunker and someone remained on the bunker side of the door when the discharge had ceased on the evening of Jan. 12. There was evidence, and I accept it as accurate, of the careful precautions taken by the defendants to guard against anything in the way of pilfering. There was a member of the English crew down in the cargo space watching the coolies at work, and when work finished for the day he told me, and I accept it, that he went through his usual duty to the best of his ability, seeing that all the stevedore workmen went ahead of him up to the ladder, and that he then saw that the door into the starboard coal bunker was properly shut. Further precautions were also taken for guarding the ship during the night. There was an officer on watch and a quartermaster on watch. The ship was brilliantly lit by arc lights, and that the precautions taken on deck during the night were proper and efficient is, I think, shown by the fact that at the critical moment when these depredators were on the eve of the most successful part of their enterprise, namely, taking the stuff away in their native craft, they were detected and stopped.

In these circumstances the question arises whether the defendants are liable in respect of this loss. I should have said the nature of the loss is this. The thief or thieves, probably thieves, cut up a considerable amount of this cloth in order to use it as ropes to haul up the other bundles out of the deep tank, and then to haul them for this considerable distance through the starboard bunker and over the saddleback. They had hauled up altogether sixty-six bales, which were found on the port bunker ready to be taken away in the junk, but there were missing from the cases down in the hold six more, a total of seventy-two bundles of cloth. Three bundles were recovered by the police from the men who fled, which left three bundles unaccounted for, and those three bundles probably are equivalent to the amount of cloth that the thieves tore up to use as ropes to assist them. It is really in respect of the damage to the plaintiffs' property by the cloth being torn up and soiled by being dragged through the bunker and so forth, damage to the cloth rather than its actual disappearance, in respect of which this claim arises. It is agreed that the amount of damage sustained by the plaintiffs, if the defendants are liable is £82, a not very important amount ; but it is said this case is to be treated as a test action.

The whole question depends, first, on the interpretation of this clause in the schedule of the Carriage of Goods by Sea Act, and, secondly, on whether upon the facts that clause, properly interpreted, relieves the defendants. Article IV (2) (q) provides this :

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (q) Any other cause arising without the actual fault or

privity of the carrier, or without the fault or neglect of the agents or servants of the carrier . . .'' A

It is admitted that this loss or damage arose without the actual fault or privity of the defendants, and upon the clearest meaning of words in the English language this provision would appear to provide, and in my judgment does provide, a defence to the defendants. The words are:

B

''Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier . . .''

It says: ''or,'' not ''and.'' It has been suggested—it is suggested, I see, by Mr. Porter and Mr. McNair in SCRUTTON ON CHARTERPARTIES (12th Edn.)—that the word ''or'' must mean ''and,'' for, they say:

C

''It is inconceivable that a carrier, whose fault or privity caused a loss, should escape liability because his servants had not been negligent.''

Reversing that to apply to this case, they would say ''It is inconceivable that a carrier, whose servants or agents have been negligent, should escape liability merely because there has been no actual fault or privity on his part.'' The truth is, the suggestion is not that ''or'' must mean ''and''; it is quite impossible for ''or'' D ever to mean ''and.'' The suggestion really is that ''or'' was printed or used by mistake for ''and,'' and that the terms of the Act of Parliament ought to be amended by substituting the word ''and'' for the word ''or.'' I am not at all satisfied that it is the duty or the right of any judge to alter the words of an Act of Parliament, more particularly when that alteration is suggested, not by reason of the necessity of making sense of the defective language used in the Act, but by E reason of a consideration of what may be supposed to have been the policy of the Act, and this suggestion that ''or'' was used by mistake where ''and'' was meant is really a suggestion based upon the supposed policy of the Act. I am not at all satisfied that it would be right to make this alteration and to treat this section as though ''or'' should have been printed ''and.'' But this point was not argued before me and was not in argument relied upon by the defendants. I observe that F the defendants, having set up r. 2 (q), allege as grounds for bringing themselves within it that the cause of the said loss arose without their actual fault or privity and/or without the fault or neglect of their agents. The whole case has been argued before me on the assumption that this clause ought to be read as though ''and'' was substituted for ''or.'' In those circumstances, I propose to deal with the case upon that basis, though I desire to add that so far as I am concerned I G do not regard this as any decision upon my part, and if the point were raised again before me and were taken and argued, I should feel myself at liberty to re-consider the question that I have indicated, namely, whether it is possible for a court to amend the words actually used by the legislature so as to alter the word ''or'' and substitute the word ''and,'' it being in my view quite impossible for ''or,'' a disjunctive word, ever to mean ''and,'' a conjunctive word. H

On that basis there is this further to be noticed. Counsel for the plaintiffs relied very strongly upon the fact that r. 2 (q) goes on:

''but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.'' I

I do not think those words add anything to the position that would exist without them. In any case, quite apart from express provision, this primâ facie is a loss or damage which, if unexplained, would be a liability of the defendants, and if the defendants are to escape from that liability they must show that they come within the statutory exception, and, therefore, even if these words about the burden of proof had not been inserted in that clause at all, I think the common law would impose that burden upon the defendants.

Have the defendants established that this loss through the action of these thieves occurred without the fault or neglect of the agents or servants of the carrier? I have said, and I think it is established, that to the best of their ability the ship's officers and the English crew took all reasonable precautions that they could to guard against what in Shanghai unhappily is notorious, namely, the extreme pertinacity and ingenuity of native thieves. But there is this aspect about it—whoever were the people engaged in this theft they must have had a considerable knowledge of the inner workings and geography of this vessel. To begin with, presumably they knew that there was this cargo down in this place which was the sort of stuff worth taking and capable of being taken. They must have known of this rather difficult and tortuous passage from the lower hold where the cargo was, up through the hatches into the centre castle space, through the door again of the starboard bunker and over the saddleback and out through the door in the port side of the ship, and the people who seem to be most likely to have that knowledge and be concerned in it were some of the stevedores who were working in the hold. Furthermore, in accordance with the account that was given of the precautions that were taken one or other of these stevedores, either as actual wrongdoers or as confederates, seem to be the most likely to have been able to conceal themselves in the way I have described which was necessary to carry out this elaborate plot. On the facts I am inclined to draw the inference that probably the people who were doing this were some of the stevedores, or, at any rate, were in confederation with them, but it certainly is not established that they were not. The stevedores were the actual servants of an independent Chinese stevedore contractor. Some agreement was made by the shipowners with a firm or company called Chop Dollar Stevedores, 71, Hwa Kee Road, Hankow, and that firm did the work through their workmen, and rendered an account which is before me, for discharging the cargo. The further question then arises whether those stevedores are to be treated as the agents or servants of the shipowners within the meaning of this clause. It is perhaps an arguable point, but I think that they are. It was suggested by counsel for the defendants that the agents or servants of the carrier did not include the employees of an independent contractor who was doing this work of discharging the ship. But I think that is putting too narrow a meaning upon these words "agents or servants of the carrier." The discharging of the cargo out of the ship so as to be delivered to the consignees is part of the duty of the carrier at common law and part of the duty which is referred to in the earlier part of this schedule as the duty of the carrier: see art. III 3 (2) of the schedule to the Act, which provides:

> "Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

It is, therefore, one of the duties of the carrier to discharge the goods on which art. IV imposes a limitation of his liability and if he employs an independent stevedore contractor to carry out the duty of discharging the cargo, I think the workmen of that independent stevedore contractor are the agents or servants of the carrier within the meaning of this provision.

The result is that I think the defendants have failed to discharge the onus of proving that this damage occurred without the fault or neglect of their servants or agents in the sense that they have not proved that it did not occur without the fault or neglect of some or other of the stevedores. In the result I think that there must be judgment for the plaintiffs for the agreed amount of £82 with costs.

Solicitors: *Denton, Hall & Burgin; Stokes & Stokes* for *Cameron, MacIver & Davie*, Liverpool.

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

A

## GILBEY *v.* GILBEY

[Probate, Divorce and Admiralty Division (Lord Merrivale, P.), December 13, 1926, January 17, 1927]

[Reported [1927] P. 197; 96 L.J.P. 55; 137 L.T. 31; 43 T.L.R. 283]

B

*Divorce—Maintenance of wife Amount—Proportion of income to be applied for wife's maintenance—Large income of husband—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (2).

C

In exercising the power conferred by s. 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, of awarding permanent maintenance to a wife, the court is not bound by any arithmetical rule derived from the practice of the Ecclesiastical Courts in determining the amount of the maintenance. Where the husband's income greatly exceeds the requirements of the matrimonial home, the amount of the income affords no definite guidance in fixing the sum required to provide the wife with the necessaries, comforts and advantages incidental to her station in life.

D

**Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), has been replaced by s. 19 (3) of the Matrimonial Causes Act, 1950.

Approved: *Stibbe* v. *Stibbe*, [1931] P. 105. Referred to: *Horniman* v. *Horniman* [1933] P. 95; *Acworth* v. *Acworth*, [1942] 2 All E.R. 704.

As to the amount of maintenance to be awarded to a wife, see 12 Halsbury's Laws (3rd Edn.) 436–438; and for cases see 27 Digest (Repl.) 616 et seq. For the Matrimonial Causes Act, 1950, s. 19, see 29 Halsbury's Statutes (2nd Edn.) 407.

E

Cases referred to:

(1) *Sykes* v. *Sykes*, [1897] P. 306; 66 L.J.P. 162; 77 L.T. 150; 13 T.L.R. 579; 41 Sol. Jo. 713, C.A.; 27 Digest (Repl.) 491, *4305*.

(2) *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 14 T.L.R. 96; 27 Digest (Repl.) 619, *5785*.

(3) *Hulton* v. *Hulton*, [1916] 1 P. 57; 85 L.J.P. 137; 114 L.T. 449; 32 T.L.R. 319, C.A.; 27 Digest (Repl.) 617, *5770*.

F

**Motion** to vary a registrar's report as to maintenance.

The parties had entered into a separation deed in 1912, under which the husband agreed to pay the wife £1,600 per annum during their joint lives with a provision that, should the husband predecease the wife, his executors should pay her £800 per annum during the remainder of her life. On Mar. 23, 1926, the wife obtained a decree nisi for dissolution of her marriage on the ground of the husband's cruelty and adultery. The decree was made absolute on Sept. 29, 1926. On April 9, 1926, the wife filed a petition for permanent maintenance. The registrar, in his report, found that, for the purposes of the inquiry, the husband's gross income was something over £24,000, derived mainly from a business concern, and he submitted that the husband should be ordered to secure to the wife for her life the annual sum of £3,500, less tax, and to pay to her during joint lives or until further order the annual sum of £500 less tax. The wife moved for an order that the registrar's report should be varied by increasing the amount to be secured for permanent maintenance from £3,500 to £4,500.

G

H

*R. F. Bayford, K.C.*, and *T. Bucknill*, for the wife.

*Victor Russell* for the husband.

I

*Cur. adv. vult.*

Jan. 17. **LORD MERRIVALE, P.,** read the following judgment: The marriage of the parties has been dissolved and the wife seeks an order for permanent maintenance. The gross amount of the husband's income, in respect of which this application is made, is something over £24,000, derived mainly from his interest in a business concern. The registrar, after hearing the parties, submits that the husband should

be ordered to secure to the wife for her life £3,500 per annum, less tax, and to pay to her during the joint lives or until further order the further annual sum of £500, less tax, and that the usual reference be made for the purpose of settling the necessary deed. Before the registrar, the husband claimed that the wife's maintenance should be determined by, and with regard to, the terms of a separation deed made in 1912, in the lifetime of the husband's father, which secured the wife an income of £1,600 during the joint lives, and £800 for her life in case she should survive. The registrar rightly took the view that this deed, made in view of an intended continuance of the marriage state, could not govern the decision of the court, and the husband's contention was not insisted on before me, save to the extent to which the amount of the agreed income bears on the question of the wife's accustomed mode of life and usual scale of maintenance before the petition for divorce.

On the wife's behalf, it was contended before me that, after a divorce, as after a judicial separation, regard must be had to a rule derived from the practice of the Ecclesiastical Courts, so that, in a normal case, a wife who has succeeded on a petition against her husband and obtained dissolution of the marriage, shall be secured one-third of his income. I was invited to proceed on the footing of a rule of settled application in cases where the total income in question is below, say, £15,000 per annum, and, on consideration of cases like *Sykes* v. *Sykes* (1), *Kettlewell* v. *Kettlewell* (2) and *Hulton* v. *Hulton* (3), to exercise a discretion as to the increased annuity to be awarded in respect of a larger fortune, and, moreover, to say that the increased burden of taxation in this country and the decreased value of money since these several cases were decided justify and require re-consideration of the limits within which the suggested rule ought to be regarded as obligatory.

On the husband's behalf it was submitted that regard is had in all cases to the sources and the permanent or precarious character of the income in question ; and reliance was placed, as before mentioned, on the separation deed as evidence of an agreed scale of living. It is always necessary to bear in mind in cases like the present, that the practice as to alimony which was observed in the Ecclesiastical Courts does not govern, as of course, the amount of maintenance after dissolution of marriage. By virtue of the terms of the Matrimonial Causes Act, 1857, s. 16, s. 17 and s. 22, it must be duly regarded here in awarding alimony on judicial separation and in some other cases, though subject always to the judicial discretion of the court. As to any permanent provision after dissolution of marriage, the rule applicable is that contained in the statutes which confer and control the power of the court to award such maintenance, formerly the Matrimonial Causes Act, 1857, s. 32, the Matrimonial Causes Act, 1866, s. 1, and the Matrimonial Causes Act, 1907, s. 1 (1), now re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. These deal with maintenance and support. What is to be secured is such gross or annual sum as the court shall deem reasonable having regard to the fortune, if any, of the wife, the means of the husband and the conduct of the parties, or a monthly or weekly sum for maintenance and support. It is, no doubt, true that the considerations of good sense and fairness which apply in fixing alimony must have due weight in determining the proper award for maintenance, if such an award is required. The considerations urged on behalf of the wife can properly be taken into account in determining the reasonable sum which is to be fixed. But the assumption of a fixed arithmetical rule, and an indispensable process of applying that rule simpliciter, or in a form dependent for its modifications on other arithmetical considerations, is erroneous, in that it disregards the nature of the duty imposed on the court by the statutes. In the discharge of this duty, the court is not bound by the practice of the Ecclesiastical Courts.

A third of the husband's means might well be what is required for the wife's maintenance. It is likely to be so when those means consist of an income which has sufficed for, and has been expended on, the requirements of the matrimonial home. But when, beyond everything called for by such requirements in the most comprehensive view of them, he possesses an ample fortune of which he can dispose

for external purposes, the amount of his income affords no definite guidance as to what sum is required for his personal, domestic and social expenses, and what sum will supply to his sometime wife the necessaries, comforts, and advantages incidental to her station in life. It is useful, too, to bear in mind, in distinguishing the award of permanent maintenance from the award of alimony in judicial separation, that alimony in the Ecclesiastical Courts was limited to the joint lives of the parties and that, under the express terms of the statutes, permanent maintenance may be secured for the life of the petitioner, as it will be in this case. The annuity or periodical payment for life is obviously the better and more advantageous provision.

The judgment of Lord St. Helier in *Kettlewell* v. *Kettlewell* (2), and the award of maintenance made in *Hulton* v. *Hulton* (3), illustrate the true view as to maintenance. Each case deals with a petitioner where the divorced respondent was a man of large fortune, and in each what was deemed reasonable was so deemed, not with regard to a notional rule granting to the petitioner a life interest in a defined proportion of her husband's fortune, but on the broader grounds indicated in the statute. In *Kettlewell* v. *Kettlewell* (2) the maintenance provided was at the rate of £3,000 a year against an income of £19,000. In *Hulton* v. *Hulton* (3) it was £5,000, reducible to £3,000 on re-marriage, against an income estimated by the petitioner at £60,000, and admitted to be £29,000. A test was applied in *Kettlewell* v. *Kettlewell* which had been suggested in the Court of Appeal in *Sykes* v. *Sykes* (1), which has often been found useful and is useful here: Would the proposed maintenance have been an adequate jointure if the petitioner had become the widow of the respondent? I am satisfied that the submission of the registrar has been arrived at with proper regard to the law applicable and to the facts of the case, and, whether I regard it in the light of the decisions to which I have referred, or independently in order to form my opinion of what is reasonable, I am satisfied of the adequacy of the maintenance proposed. I accordingly confirm the report.

Solicitors: *Lewis & Lewis; Baileys, Shaw & Gillett.*

[*Reported by* R. Wavell-Paxton, Esq., *Barrister at Law.*]

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## FLETCHER *v.* FLETCHER

[Probate, Divorce and Admiralty Division (Lord Merrivale, P.), October 18, 1927]

[Reported [1928] P. 20; 97 L.J.P. 1; 138 L.T. 135; 91 J.P. 208; 44 T.L.R. 13; 71 Sol. Jo. 846]

*Husband and Wife—Summary proceedings—Appeal—Security for costs—Wife's summons dismissed by justices—Power of court to order security for wife's costs—Summary Jurisdiction (Separation and Maintenance) Acts*, 1895 (58 & 59 *Vict.*, *c.* 39), *s.* 11, *and* 1925 (15 & 16 *Geo.* 5, *c.* 51)—*R.S.C. Ord.* 59, *r.* 16, *r.* 17, *Ord.* 65, *r.* 6.

The practice laid down by *Sirrell* v. *Sirrell* (1) of ordering security for the wife's costs when the husband appeals against an order made by justices on a complaint against him by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, does not apply in a case where a wife appeals against the dismissal of her summons under those Acts, and she is, therefore, not entitled to obtain an order against her husband for security for the costs of her appeal.

**Notes.** The Summary Jurisdiction (Married Women) Act, 1895, s. 11, provided that the rules which applied to appeals were those made under the Matrimonial Causes Act, 1878, s. 4. That provision was repealed by the Administration of Justice Act, 1925, s. 29 (4) and Sched. V, but the combined effect of that Act and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 103, was to continue the procedure in operation at the passing of the Act of 1895.

Considered: *Re Thomsett, Thomsett* v. *Thomsett*, [1936] 3 All E.R. 649.

As to appeals from magistrates' courts, see 12 HALSBURY'S LAWS (3rd Edn.) 508 et seq., and for cases see 27 DIGEST (Repl.) 729 et seq. For the Summary Jurisdiction (Married Women) Act, 1895, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 854.

Cases referred to:

(1) *Sirrell* v. *Sirrell*, [1911] P. 38; 80 L.J.P. 8; 104 L.T. 79; 27 T.L.R. 115, D.C.; 27 Digest (Repl.) 734, *7011*.

(2) *Earnshaw* v. *Earnshaw*, [1896] P. 160; 65 L.J.P. 89; 74 L.T. 560; 60 J.P. 377; 12 T.L.R. 249, 386, D.C.; 27 Digest (Repl.) 701, *6703*.

(3) *Stokes* v. *Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 T.L.R. 553; 55 Sol. Jo. 690, D.C.; 27 Digest (Repl.) 712, *6796*.

(4) *Blackledge* v. *Blackledge*, [1913] P. 9; 82 L.J.P. 13; 107 L.T. 720; 77 J.P. 427; 29 T.L.R. 120; 57 Sol. Jo. 159; 23 Cox, C.C. 230, D.C.; 27 Digest (Repl.), 712, *6799*.

(5) *Shufflebotham* v. *Shufflebotham* (1923), 128 L.T. 642; 67 Sol. Jo. 297; 39 T.L.R. 206, C.A.; 27 Digest (Repl.) 592, *5537*.

**Summons** adjourned by the registrar to the judge in chambers. On June 30, 1927, the wife made an unsuccessful application to the justices at the Bury Borough Police Court for an order for maintenance against her husband on the ground of his desertion under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 and 1925. On July 28, 1927, she again summoned her husband in the same court, alleging desertion and wilful neglect to maintain, which summons was also dismissed. The wife gave notice of appeal to the Divisional Court of the Divorce Division and on Aug. 16, 1927, she took out a registrar's summons against the husband to show cause why he should not provide the sum of £40 as security for the costs of her appeal. The husband opposed the application and the registrar adjourned it to the judge in chambers. The summons was heard by the judge in chambers on Oct. 17, 1927, and was adjourned by him into court, the judge referring to the fact that the application, being for security for the costs of an appeal, should strictly have been made to a Divisional Court.

*F. S. Laskey* for the wife, referred to *Earnshaw* v. *Earnshaw* (2).

*Noel Middleton* for the husband, referred to *Stokes* v. *Stokes* (3), *Blackledge* v. *Blackledge* (4), *Sirrell* v. *Sirrell* (1), and *Shufflebotham* v. *Shufflebotham* (5).

**LORD MERRIVALE, P.**—The wife, the appellant, took proceedings before justices on the ground of desertion to obtain provision for her maintenance, and she was unsuccessful. As an appellant from the court below she now moves under the statute, which is to be read with the Summary Jurisdiction (Married Women) Act, 1895, that the husband may be ordered to give security for her costs of the appeal. In the ordinary jurisdiction of this Division as between husband and wife there is an inveterate practice of ancient origin whereby the common law presumption is acted on that a wife has, primâ facie, no means of her own for providing for her necessaries. Out of that common law presumption there arose a practice whereby in this court, if the wife was a suitor, or if she was a respondent, and if there were no grounds in the relative means of the parties for refusing the order, she obtained an order almost as of course that provision should be made for the conduct on her part of the litigation on which she had embarked.

The real question in the present case is whether the principle which underlies this practice must be held to apply to an appeal to this Division by a wife who

has been unsuccessful in the court below in proceedings under the Summary Jurisdiction Acts. There is no precedent which provides that, as a matter of course, or as a matter of discretion, an order for security for costs should be made against the husband in such a case. Until the decision of the court in *Sirrell* v. *Sirrell* (1) there was, as far as I am aware, no decided case in which it was held that the general practice of the court in respect of security for the costs of a case in which the wife was a suitor must be held to apply in cases of appeal under the Summary Jurisdiction Acts, but in *Sirrell* v. *Sirrell* (1) it was held that where a wife has been successful in the court below, if the husband appeals to this Division, the practice of the Division applies to direct him to give security for her proper costs. The decision has been embodied in the practice of the court and has been followed ever since, and followed, as far as I know, without anything in the nature of objection. It is the everyday practice now that, where the wife, who has made application under the Summary Jurisdiction Acts, has succeeded below, the husband shall not be allowed to proceed with his appeal without giving security for her costs, but different considerations obviously apply where the wife has been the applicant below and has been unsuccessful. In the first place, she is not a suitor in this court within the ordinary definition of a suitor in the divorce jurisdiction. She is a complainant alleging the failure of justice before the bench of justices. There is nothing in the statutes which encourages the application. So far as the statutes and the rules of the High Court applicable in common law practice throw any light on the matter, as counsel for the husband pointed out, on the whole they are rather opposed to such an application as is made here, because it obviously is an application which could not succeed in an ordinary appeal in the King's Bench Division. It is a common law jurisdiction. The practice of the Court of Appeal in respect of appeals from the King's Bench Division which is incorporated by reference in one of the rules certainly would not avail to give the wife the security which she seeks here. I do not say that that was made conclusively clear in *Shufflebotham* v. *Shufflebotham* (5) which has been referred to. It is a matter of common knowledge that, where a wife has been a litigant in this court and has appealed, although her costs have been provided for under the general jurisdiction of the court, if the case goes to the Court of Appeal the procedure of the Court of Appeal operates. The matter has ceased to be a proceeding in this jurisdiction, to which the old rules of common law jurisdiction apply. There is no statutory authority for the order which is sought here. There is no precedent in any decided case, and there is nothing in the established practice of the Division which renders it necessary or proper that the order which is sought in this case should be made. I must hold that this application is outside the settled practice of the court under the decision in *Sirrell* v. *Sirrell* (1), is not warranted either by statute or by any decided case, and, therefore, must fail.

I may point out that there are great facilities now under the Poor Persons Rules for poor persons to come into litigation. It is quite open to the wife, if she is eligible, to take proceedings under the Poor Persons Rules. Moreover, if the wife has good grounds for appeal, it may be that the appeal will be a necessary, and that the husband is under the common law liability to the solicitor who takes up the wife's case. That has nothing to do with the jurisdiction or the practice with regard to the wife's costs in this court.

Solicitors: *Thompson, Quarrell & Attneave*, for *Pickstone & King*, Radcliffe; *Gregory Rowcliffe & Co.*, for *Hall & Smith*, Bury.

[*Reported by* R. Wavell-Paxton, Esq., *Barrister-at-Law.*]

# RANSON *v.* BURGESS

[King's Bench Division (Lord Hewart, C.J., Shearman and MacKinnon, JJ.), May 12, 1927]

[Reported 137 L.T. 530; 91 J.P. 133; 43 T.L.R. 561; 25 L.G.R. 378; 28 Cox, C.C. 425]

*Gaming—Lottery—Publication of proposal or scheme—No sale of tickets—Lottery Act*, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

For an offence to be committed under the Lotteries Act, 1823, s. 41, it is enough that there is a publication either of a scheme or of a proposal for the sale of tickets in a lottery, and it is not necessary that the actual sale of the tickets should have begun.

**Notes.** The Lottery Act, 1823, was repealed by the Betting and Lotteries Act, 1934, s. 32 and Sched. II. See now s. 22 of the 1934 Act. Followed: *A.-G.* v. *Walkergate Press, Ltd.*, *A.-G.* v. *Bloomfield*, *A.-G.* v. *Carlton* (1930), 142 L.T. 408.

As to offences in connection with unlawful lotteries, see 18 Halsbury's Laws (3rd Edn.) 241–242; and for cases see 25 Digest 457–459. For the Betting and Lotteries Act, 1934, s. 22, see 10 Halsbury's Statutes (2nd Edn.) 801.

Case referred to:

(1) *Dew* v. *D.P.P.* (1920), 89 L.J.K.B. 1166; 124 L.T. 246; 85 J.P. 81; 37 T.L.R. 22; 18 L.G.R. 829; 26 Cox, C.C. 664, D.C.; 25 Digest 458, *464*.

**Case Stated** by an alderman of the City of London, sitting as a court of summary jurisdiction.

The respondent, a detective inspector of the City of London police, preferred an information against the appellant charging that he on Oct. 26, 1926, in the City of London, unlawfully published a certain proposal or scheme for the sale of tickets or chances in a lottery not authorised by any Act of Parliament, entitled "Weekly Nap with free Football Doubles," contrary to s. 41 of the Lotteries Act, 1823. On the hearing on Dec. 31, 1926, the following facts were proved:—(a) On Oct. 26, 1926, the respondent, in response to a letter written by him in the name of Fred Martin, received from the appellant an envelope which contained, among other documents, the following:—(i) A white envelope containing two printed letters. (ii) Some specimen tickets and envelopes. The material part of one of the said letters was as follows:—

"F. Ranson.

RAY SMITH,
Printer and Publisher,
65, Farringdon-Street,
London, E.C.4.

Dear Sir,—I have now completed new arrangements for special information from Newmarket, Epsom, and other racing centres, for my 'Special Weekly Naps.' This information will prove itself very reliable and is worth following. . . .

To purchasers of the weekly Naps you will give a free competition with money prizes, and no charge is made for the competition.

I have pleasure in enclosing samples of tickets and envelopes. The printing is of the highest class, and the tickets cannot be tampered with.

Sets of these tickets can be obtained as follows:—

WEEKLY NAP WITH FREE FOOTBALL DOUBLES.

First Division only—231 tickets and envelopes printed as desired. Price 10s. 0d.

(Prices followed for other larger series up to 5,778 tickets for £5 10s., and also for 'Free Football Trebles.')

**All the above tickets are named, not numbered.**

REMEMBER others may copy my ideas, but no other firm can be in a position to issue my reliable weekly Naps.

Tickets and weekly Naps are ready 21 days in advance.

All orders post free. Terms—Cash with order.

Yours faithfully,

RAY SMITH."

The tickets enclosed had on the back a numbered list of football teams. The front was in this form :—

"WEEKLY NAPS.
Sopron and Nous Verrons.
Free Football Double.
Add Scores Together.
Saturday, August 28, 1926.
Your teams this week are Nos.
4 & 14
on this list.

This voucher must be produced within seven days if claiming a prize. In the event of a tie, prize divided."

(b) On Nov. 8, 1926, the respondent sent to the appellant a postal order for 10s. and returned therewith one specimen ticket and envelope, and in reply received on Nov. 9 a bundle of 231 tickets and envelopes for which payment had been made by the said postal order. (c) There were twenty-two Football Teams in the First Division and, therefore, a complete set of tickets in respect of the same to secure that each combination of two should be different was 231. The "Winning Nap" was constant on each of these tickets, whilst the combination of football teams was different. (d) The appellant contemplated that these tickets were to be sold by the respondent, each in its envelope, the purchaser having no choice of the football teams on the ticket which he bought, and that a prize should be paid to the holder of the ticket which bore the names of the two football teams scoring most goals, and that a consolation prize should also be given by the respondent. (e) After the sale to the respondent by the appellant of the tickets and the envelopes the appellant took no further interest in the matter; that was to say, the appellant did not take or intend to take any money for the sale of separate tickets at 6d. each, nor did he hold himself liable for providing the prize.

It was contended on behalf of the appellant—(i) That all that he had done was to sell in the ordinary commercial sense certain pieces of printed paper which might or might not be afterwards employed in the conduct of a lottery. (ii) That the mere publication of tickets to the respondent in this manner did not amount to a proposal or scheme for the sale of tickets or chances in a lottery within the meaning of s. 41 of the Lotteries Act, 1823, any more than that the sale of tickets to the inspector was a sale of tickets or chances in a lottery. (iii) That in order to bring the appellant within the prohibition in s. 41 it was necessary to show that he was taking some part in the actual conduct of a lottery then in being. Reference was made to the Ready-Money Football Betting Act, 1920, and it was contended that if the legislature had intended to prohibit at the source the printing of tickets and other material which might be used in the conduct of a lottery, some enactment relating to lotteries similar to that relating to ready-money football betting would be in force. *Dew* v. *D.P.P.* (1) was cited, and it was contended that in all reported cases except that case the publication alleged was a publication by way of public announcement or advertisement of a lottery actually being conducted. It was contended on behalf of the respondent that the facts proved established the offence charged, and that the matter which was published by the appellant to the respondent amounted to a proposal or scheme for the sale of the tickets, and that each purchaser of a ticket would obtain, in addition to the "Weekly Nap," the chance that his ticket might contain the names of the two football teams scoring most goals and thereby he would become entitled to the prize offered.

The alderman was of opinion that the appellant had published to the respondent a proposal or scheme for the sale of tickets or chances in a lottery not authorised by any Act of Parliament. The scheme published by the appellant to the respondent was that these tickets were to be sold by the respondent, each in its envelope, the purchaser having no choice of the football teams on the ticket which he bought, and that a prize should be paid to the holder of the ticket which bore the name of the two football teams scoring most goals, and that a consolation prize should also be given by the respondent. He, therefore, convicted the appellant and ordered him to pay a fine of £25 and a further sum of £10 10s. for costs, or in default to be imprisoned for three calendar months. The appellant now appealed.

*Oliver, K.C.*, and *G. B. McClure* for the appellant.

*E. Percival Clarke* for the respondent.

**LORD HEWART, C.J.**, stated the facts, and continued: It is not denied that those documents which were sent on Oct. 26, 1926, being really samples of the bulk sent on Nov. 8, 1926, were documents deliberately designed for what has been described as the paraphernalia or apparatus of a lottery. The scheme of the lottery is made quite obvious by those documents. It was that the purchaser, for example in the case of First Division football, of 231 tickets, for which he paid 10s., might re-sell them individually at 6d. apiece. The total number of combinations in relation to twenty-two football teams competing in the manner represented being 231, the purchaser of one of those 231 tickets must get the particular statement of the winning result which would entitle him to a prize. Counsel for the appellant, with his usual frankness, has admitted that, if the matter had been carried out to its conclusion, that is to say, if the moment had been reached when the sale of these tickets had actually begun, it could not be denied that they were tickets in a lottery and that there was a sale of tickets in a lottery; but, he says, as there was not yet an actual lottery in existence, and as what was in contemplation was not a definite and specific matter, this prosecution was misconceived, although it might be that there was good reason for commencing some other kind of prosecution against the appellant. That is the submission which was made to the alderman and it is succinctly expressed in the Case. It was contended that in all the reported cases, except one, the publication alleged was publication by way of public announcement or advertisement of a lottery actually being conducted. In my opinion, that argument, which has been laid fully before us in the present case, proceeds on too narrow a view of s. 41 of the Lotteries Act, 1823. That section provides as follows:

> "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries, authorised by any foreign potentate or State, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid,"

that person is liable to certain penalties. It seems to me clear that that section covers a considerable variety of things, some of which are in futuro. For example, the very words employed show that the lottery referred to may be in the future—a lottery "to be drawn in any foreign country"; and, having said that, the section goes on: "or in any lottery or lotteries except such as are or shall be authorised"; and what it deals with is not only the sale of a ticket or a chance, or a share of a ticket or a share of a chance, but it also deals with (i) a publication of a scheme, and (ii) a publication of a proposal. The words "proposal" and "scheme" seem to me most naturally to indicate that there may be a certain ingredient of futurity, and I cannot see any ground whatever for saying that, because the sale of tickets had not actually begun, this was not the publication of a proposal or scheme for

the sale of tickets in a lottery to be begun. I do not think that it is in the least necessary that the actual lottery should have advanced so far that the sale of tickets had already begun; it is enough that there was the publication either of a scheme or of a proposal for the sale of tickets in a lottery to be begun, and it is conceded that here the lottery must have begun as soon as a ticket was first sold.

*Dew* v. *D.P.P.* (1) seems to me to be in point. There a person had sent to a printer, for the purpose of being printed, a draft circular containing a proposal for the sale of tickets in a lottery, and that circular was printed, and it was held that the person publishing the proposal, the printer, was liable to be convicted, even though no copy of the circular ever reached any person to whom it was afterwards addressed. LORD READING, giving the judgment of the court, said (124 L.T. at p. 247):

> "Those statements are to my mind sufficient to support the conviction. They show that the circulars containing a proposal and scheme for the sale of tickets in a lottery were printed by a company. To that company the envelopes were sent by the appellant. The circulars were ordered by the appellant, and were printed and prepared for posting. The payment for the printing of the circulars and for their preparation for posting was made by the appellant by means of cheques signed by another person. A large number of circulars were printed and stamped ready for posting and were posted, but all were prevented from reaching the addressees, and there is no evidence that any circular was ever delivered to or reached any addressee. . . .When the draft circular was received by the printers for reproduction and it was reproduced, some printer must have read at least one circular, but it has been argued that that is not publishing a proposal. The fallacy in that argument is that publishing a proposal means nothing more than making known a proposal to someone other than the person who originates it. As soon as it is established that the proposal was made known to another person, the proposal has been published. It is clear that this proposal was made known to the printer, and therefore there was a publication to the printer."

I cannot help thinking that that doctrine applies also the other way round. A man who goes to the printer to have the scheme printed, publishes the scheme to the printer, why is it any the less true that a printer, who has, let us say, in stock a great number of ready-made schemes for lotteries, publishes one of those schemes as soon as he communicates that scheme to any other individual? There are various ways in which this offence may be put. On one view of the facts, the printer and the recipient of his printing might be said to be working together in a lottery; on another view it might be said the printer is publishing a proposal for the sale of tickets in a lottery; and on another view it might be said the printer is proposing a scheme for the sale of tickets in a lottery, and it seems to me to be quite immaterial that the lottery referred to is a lottery thereafter to be brought into actual public operation by a sale of tickets which has not yet begun.

In my opinion, the alderman came to the right conclusion in this case, and I think that this appeal fails.

**SHEARMAN, J.**—I am of the same opinion. When one looks at the plain words of the statute, I think the acts charged come clearly within it. The appellant published a "proposal" for the sale of lottery tickets, and he also, in the circular he sent, made quite clear what the "scheme" of the proposed lottery was. I think the case comes most clearly within both these words of the Act, and, therefore, the conviction was right.

**MACKINNON, J.**—I agree.

*Appeal dismissed.*

Solicitors: *Bateman & Co.; City Solicitor.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

# ALLISON *v.* ALLISON

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Hill, J.), June 27, July 11, 27, 1927]

[Reported [1927] P. 308; 96 L.J.P. 181; 137 L.T. 823; 43 T.L.R. 823; 71 Sol. Jo. 682]

*Divorce—Restitution of conjugal rights—Periodical payments—Security—Husband's reversionary interest—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 187 (2).

An order to secure periodical payments under s. 187 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, can only be made in respect of payments already or at the same time ordered, and, therefore, the court has no power, in a suit for restitution of conjugal rights, to order a husband to secure to his wife a proportion of the income to be derived by him in the future from a reversionary interest when it falls into possession.

*Tangye* v. *Tangye* (1), [1914] P. 201, explained and followed.

**Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 187 (2), is replaced by s. 22 (4) of the Matrimonial Causes Act, 1950.

As to periodical payments on disobedience to order to cohabit, see 12 HALSBURY'S LAWS (3rd Edn.) 440–441; and for cases see 27 DIGEST (Repl.) 634–637. For the Matrimonial Causes Act, 1950, s. 15, s. 20 and s. 22, see 29 HALSBURY'S STATUTES (2nd Edn.) 402, 408, 409.

Cases referred to:

(1) *Tangye* v. *Tangye*, [1914] P. 201; 83 L.J.P. 164; 111 L.T. 944; 30 T.L.R. 649; 58 Sol. Jo. 723; 27 Digest (Repl.) 635, *5959*.

(2) *Hyde* v. *Hyde* (1865), 4 Sw. & Tr. 80; 34 L.J.P.M. & A. 63; 12 L.T. 235; 13 W.R. 545; 164 E.R. 1445; 27 Digest 680, *6493*.

**Appeal** summons adjourned into court for argument.

On Jan. 24, 1927, the wife obtained an order for restitution of conjugal rights against her husband. The order was not obeyed, and on Feb. 24, 1927, she presented a petition for periodical payments under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 187. Her petition alleged (inter alia) that the husband had a reversionary interest under the will of his father, subject to the life interest of his mother, in a sum of approximately £20,000 and in the proceeds of sale of a house. The order made by the registrar on the petition contained a direction that the husband should secure to the wife during their joint lives one-third of the income to be derived from his reversionary interest when it fell into possession. The husband appealed against this part of the order, contending that the court had no power, on a petition for periodical payments, to order him to secure any part of the income to be received from his reversionary interest.

*H. B. Durley Grazebrook* for the husband.

*Noel Middleton* for the wife.

*Cur. adv. vult.*

July 27. **HILL, J.**, read a judgment in which he dealt with other grounds of appeal not material to this report, and continued: The contention as to the reversionary interest raises a difficult question, whether, in proceedings in respect of disobedience to a decree of restitution of conjugal rights, there is power to order an immediate dealing with a reversionary interest of the husband by making him secure in the present to the wife a part of such reversionary interest. It may well be that the general powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925 s. 190 (2) include such a power in cases of divorce and nullity of marriage. But that section has no reference to restitution of conjugal rights. That is dealt with in s. 190 (4), and s. 187, which must be read with s. 196. Section 190 (4) merely provides that

"where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just."

This re-enacts the corresponding provision in the Matrimonial Causes Act, 1857, s. 17, and it was decided in *Hyde* v. *Hyde* (2) that the husband could not be ordered under the section to give security for payment of alimony. Section 187 is the relevant section. It empowers the court to order periodical payments, and to order that the husband shall secure to the wife the periodical payments. Section 196 gives power to vary any order for periodical payments. It seems to me that an order to secure them can only be made in respect of periodical payments already or at the same time ordered. The periodical payment must be first fixed in amount and then ordered to be secured. That is inconsistent with the existence of a power to order the immediate securing of a prospective periodical payment of uncertain amount, that may hereafter be ordered.

The point is, I think, covered by authority. In *Tangye* v. *Tangye* (1) a decision on the Matrimonial Causes Act, 1884, s. 2, which is identical in terms with the Supreme Court of Judicature (Consolidation) Act, 1925, s. 187, SIR SAMUEL EVANS said ([1914] P. at p. 211):

"The third head of submission in the registrar's report is that 'one-third of the husband's interest under his father's will to come into possession after the death of his mother be secured for the benefit of the petitioner for her life.' This does not comply with the provisions of the section, and is not a proper order for periodical payments. If and when the husband's reversionary interest under his father's will comes into possession and provides him with more capital or income, an application can be made for an increase of the amount under s. 4 of the Act. Such an application could also be made if the husband sold his reversionary interest (if he has the power to do so) before it fell into possession."

It was suggested in argument that the only objection to the submission of the registrar's report in that case was that it directed security for the benefit of the petitioner for her life instead of during the joint lives. I do not so understand the judgment. I do not think that this is the only objection that SIR SAMUEL EVANS was taking to the submission. I think that what SIR SAMUEL EVANS said means this: that the order for security cannot be made until the reversionary interest comes into possession or is sold, and it can then be made in conjunction with an increase in the periodical payments. I think also that this accords in principle with the difference which the court has always considered to exist between decrees putting an end to the marriage and decrees which do not put an end to the marriage. When a decree for restitution of conjugal rights is made, it must always be the assumption of the court that the decree will some day or other be obeyed, and the arrangements, therefore, that are made are properly tentative arrangements, alterable from time to time; whereas, where a marriage is finally declared null or is dissolved, it is more natural that some permanent arrangement should be made. The result so far is that the order for periodical payments was properly made, but that the direction that the husband now secure any proportion of his reversionary interest must be omitted.

Solicitors: *Stokes & Stokes*, for *Criddle, Ord & Muckle*, Newcastle-upon-Tyne; *Johnson, Weatherall, Sturt & Hardy.*

[*Reported by* R. WAVELL-PAXTON, ESQ., *Barrister-at-Law.*]

A

# DE LA GARDE *v.* WORSNOP & CO.

[Chancery Division (Clauson, J.), May 13, 16, 1927]

[Reported [1928] Ch. 17; 96 L.J.Ch. 446; 137 L.T. 475; 71 Sol. Jo. 604]

B *Arbitration—Stay of legal proceedings—Agreement for sale of business subject to condition expressed in agreement—Submission of disputes to arbitration—Condition not fulfilled—Arbitration Act*, 1889 (52 & 53 *Vict.*, *c.* 49), *s.* 4.

The defendants, by an agreement in writing, entered into a contract with the plaintiff for the sale to him of their business of the manufacture and sale of electric batteries. It was provided by cl. 5 of the agreement that the contract C should be subject to the condition that the batteries should fulfil, to the reasonable satisfaction of the purchaser, certain tests then being carried out. There was also a clause providing that any dispute as to the agreement, or any clause, matter or thing therein contained, or the intention or construction thereof, should be referred to arbitration under the Arbitration Act, 1889. The plaintiff paid a deposit, but later refused to complete the purchase, alleging that, in con- D sequence of the non-fulfilment of the condition, he was no longer bound by the agreement. The defendants referred the dispute to the arbitrators, but the plaintiff issued a writ claiming a declaration that the agreement was determined and no longer binding on the parties and repayment of his deposit. The defendants thereupon issued a summons asking for a stay of the proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889.

E **Held:** if, in fact, the condition had not been fulfilled, the plaintiff's obligation under the contract had come to an end, not by reason of the occurrence of some event outside the consideration of the parties, but in accordance with the terms of the contract itself, and, therefore, the agreement to refer the dispute to arbitration was still binding between the parties and the action must be stayed.

F **Notes.** The Arbitration Act, 1889, s. 4, has been replaced by s. 4 (1) of the Arbitration Act, 1950.

As to stay of proceedings see 2 Halsbury's Laws (3rd Edn.) 21 et seq., and for cases see 2 Digest (Repl.) 477 et seq. For the Arbitration Act, 1950, s. 4, see 29 Halsbury's Statutes (2nd Edn.) 93.

Cases referred to:

G (1) *Smith, Coney and Barrett* v. *Becker, Gray & Co.*, [1916] 2 Ch. 86; 84 L.J.Ch. 865; 112 L.T. 914; 31 T.L.R. 151, C.A.; 2 Digest (Repl.) 499, *473*.

(2) *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 42 T.L.R. 359; 31 Com. Cas. 199; 17 Asp. M.L.C. 8, P.C.; 2 Digest (Repl.) 518, *621*.

(3) *Grey & Co.* v. *Tolme and Runge* (1914), 31 T.L.R. 137; 59 Sol. Jo. 218, C.A.; H 2 Digest (Repl.) 483, *383*.

(4) *Piecy* v. *Young* (1879), 14 Ch.D. 200; 42 L.T. 710; 28 W.R. 845, C.A.; 2 Digest (Repl.) 451, *189*.

(5) *Kitts* v. *Moore*, [1895] 1 Q.B. 253; 64 L.J.Ch. 152; 71 L.T. 676; 43 W.R. 84; 39 Sol. Jo. 96; 12 R. 43, C.A.; 2 Digest (Repl.) 498, *469*.

I **Procedure Summons.**

By an agreement dated July 29, 1926, and made between the defendant company, as vendors, and the plaintiff, as purchaser, it was agreed that the vendors should sell and the purchaser should purchase certain property and assets of the defendant company, comprising the goodwill, letters patent, trademarks, stock-in-trade and other property relating to the business of the manufacture and sale of Alklum electric batteries carried on by the defendant company at Halifax in the county of York. The consideration for the sale was £15,000 of which £750 was paid as a deposit on the signing of the agreement and as part payment of the purchase money,

and the remainder of the consideration was to consist of shares in a company about to be formed. Clause 5 of the agreement was as follows: A

"The agreement is subject to the conditions following: (i) That the tests which are now being carried out by or on behalf of the purchaser prove to his reasonable satisfaction that the Alklum electric batteries now being made by the vendors are capable of fulfilling the claims made by them (ii) that the said batteries as so made do not infringe any existing patents." B

Then there were provisions that the agreement should be completed on Nov. 30, 1926, and that the defendants should retain possession of the property until completion and in the meantime carry on the business and maintain the same as a going concern. Clause 11 of the agreement provided that, if any dispute should arise between the parties as to the agreement, or any clause, matter, or thing C therein contained, or the intention, or construction thereof, or in anywise relating thereto, the same should be referred to arbitration under the Arbitration Act, 1889. The £750 deposit was provided, of which £500 was deposited in the names of the plaintiff and one Carl L. Berg, who was on that account made a formal defendant to the action. In December, 1926, the plaintiff refused to complete the purchase, D alleging that his experts reported that the tests they had made of the batteries failed to substantiate the statements made about them by the defendants on the faith of which, as the plaintiff alleged, he had entered into the agreement. The defendants, on the other hand, maintained that the tests mentioned in cl. 5 were tests in course of being made by or on behalf of the plaintiff previous to the execution of the agreement, and that the plaintiff had assured the defendants, before the E execution of the agreement, that those tests were proving satisfactory, and would be finally completed within a few days, and that it was on the faith of that assurance that they had agreed to the condition in cl. 5 being inserted, and that, in the month of August, 1926, the plaintiff represented to them that the tests were completed to his satisfaction. The plaintiff disputed the defendants' statement of the facts and maintained that they were aware that he departed for America in July, 1926, F in order to have the tests made, and that the tests referred to in the agreement were not completed. On Mar. 10, 1927, the defendants gave notice of the pending dispute to the arbitrators appointed under the submission, and requested them to proceed in the reference. On Mar. 15, 1927, the plaintiff issued the writ in the action, claiming (i) a declaration that the agreement had been determined and was no longer binding on the parties thereto, and (ii) payment to the plaintiff of the £750 G deposit. On Mar. 24, 1927, the defendants issued this summons against the plaintiff asking that all further proceedings in the action might be stayed until further order pursuant to s. 4 of the Arbitration Act, 1889.

*Edward Clayton*, K.C., and *Wilfrid Hunt*, for the defendants, referred to *Smith, Coney, and Barrett* v. *Becker, Gray & Co.* (1).

*Spens*, K.C., and *W. F. Swords* for the plaintiff, referred to *Hirji Mulji* v. *Cheong* H *Yue Steamship Co.* (2), *Grey* v. *Tolme and Runge* (3), *Piercy* v. *Young* (4), RUSSELL ON ARBITRATION (11th Edn.) p. 70, and *Kitts* v. *Moore* (5).

**CLAUSON, J.,** stated the facts and continued: It has been contended on behalf of the plaintiff that the conditions relating to the testing of the batteries stated in cl. 5 of the agreement has not been fulfilled, and that he is no longer bound by his I agreement to purchase; and it is on that footing, as appears from the endorsement on the writ, that this action has been commenced. The defendants, however, apply, as they are entitled to do, under s. 4 of the Arbitration Act, 1889, to stay the action and to refer the matter to arbitration. Primâ facie, if I am satisfied on construing the document that the question between the parties is a matter which is comprised in the submission effected by the arbitration clause, then I think it is not inaccurate to say that, assuming it to be reasonably clear that there is some question in issue other than a pure question of law—for, if that were the case, the court would,

A according to the ordinary practice, probably, though not certainly, retain the action —it is my duty to stay the proceedings in that action with a view to the matter going to arbitration.

The point which is made by the plaintiff who opposes this application is this: he says that the subject-matter in dispute is the question whether the first condition referred to in cl. 5 has, or has not, been fulfilled, and that that is a matter within B the arbitration clause. He says that, if that condition has not in fact been fulfilled —and he says that it has not—the contract is at an end, and that it is settled by authority which is binding on this court that, if the contract is at an end, the arbitration clause contained in that contract is no longer effective and can no longer be treated as a binding submission, and, accordingly, the provisions as to the stay of the action in the Arbitration Act, 1889, would not apply. In my opinion, that C argument is based on a fallacy. If it be the fact that the condition has not been fulfilled, the result no doubt is this, that the obligation of the plaintiff to purchase has come to an end and cannot be enforced against him; but it has come to an end, not by reason of the occurrence of some event outside the consideration of the contracting parties, but by reason of certain events which have occurred, and which, by reason of the non-fulfilment of a condition, namely, the condition stated in cl. 5, D subject to which the contract was expressly made, has resulted in his no longer being under an obligation to purchase.

This dispute, whether or not, according to the true construction of cl. 5, in the light of the circumstances which have occurred, the plaintiff is or is not released from his obligation to purchase, seems to me to be a dispute arising as to a "clause, E matter or thing in this agreement contained or otherwise relative thereto." The plausibility of the plaintiff's argument arises out of the fact that there are cases where a contract having been entered into with an arbitration clause comes to an end, not because one of the parties to the contract is, according to its terms as construed with reference to the events which have happened, released from his primary obligation under it, but because the contractual relation between the parties is F destroyed, either owing to some fraud or some entirely external circumstance supervening, such a circumstance as supervened in the case in the Privy Council, which has been referred to of *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2), where the contract had been frustrated by reason of the interposition of the Government by requisitioning the ship which was the subject-matter of the contract. It is true that if, for some reason of that kind, that is to say, by reason of something occurring G dehors the contract, the contract is brought to an end; when it is brought to an end the clause providing for submission to arbitration will die with it, but that does not seem to me to be this case. I see no reason for doubting that this submission clause is still a binding contract between the parties, and that, in this particular case, there are plainly rights arising from the contract originally entered into which have to be worked out as between the parties. That, indeed, is really H recognised by the plaintiff, when, in the endorsement of his writ, he claims the return of the deposit which has been paid under the contract.

It appears to me that the defendants' application is justified, and that no course is open to me except to stay proceedings in the action, and refer the matter to arbitration. The order that I make will be: Stay all further proceedings in this action until further order. Order that the plaintiff do pay the defendants' costs I of this application, and that the residue of the costs of the action be in the discretion of the arbitrators.

Solicitors: *Reid, Sharman & Co.; Sheard, Breach, Wace & Roper.*

[*Reported by* J. C. T. RAINS, ESQ., *Barrister-at-Law.*]

A

# TALLACK *v.* TALLACK AND BROEKEMA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), March 14, 28, April 8, 1927]

[Reported [1927] P. 211; 96 L.J.K.B. 117; 137 L.T. 487; 43 T.L.R. 467; 71 Sol. Jo. 521]

B

*Divorce—Settlement of wife's property—Jurisdiction—Wife domiciled abroad—No property within jurisdiction—Submission to jurisdiction—Appearance to petition for settlement—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16, *Geo. 5, c.* 49), *s.* 191 (1).

The jurisdiction of the court under s. 191 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to order a settlement of property of a wife divorced for adultery is, primâ facie, limited to property of a woman domiciled in England and subject by reason thereof to the jurisdiction of English tribunals. The exercise of such jurisdiction over a woman, whether feme sole or feme covert, who is not domiciled in England, or in respect of property beyond the jurisdiction, depends on the general principles of international law which govern national jurisdictions.

C

D

Appearance to a petition for a settlement, qualified at all stages of the proceedings thereon by a distinct denial of the existence of jurisdiction, cannot be regarded as a submission to the exercise of the jurisdiction so denied.

E

**Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 191, has been replaced by s. 24 of the Matrimonial Causes Act, 1950.

Considered: *Goff* v. *Goff*, [1934] P. 107. Referred to: *Shearn* v. *Shearn*, [1930] All E.R. Rep. 310.

As to the settlement of the property of a wife in fault, see 12 HALSBURY'S LAWS (3rd Edn.) 441–444; and for cases see 27 DIGEST (Repl.) 637–640.

F

For the Matrimonial Causes Act, 1950, s. 24, see 29 HALSBURY'S STATUTES (2nd Edn.) 411.

Cases referred to:

(1) *Lorriman* v. *Lorriman and Clair*, [1908] P. 282; 77 L.J.P. 108; 99 L.T. 314; 24 T.L.R. 575; 52 Sol. Jo. 499; 27 Digest (Repl.) 637, *5994*.

(2) *Noel* v. *Noel* (1885), 10 P.D. 179; 54 L.J.P. 73; 33 W.R. 552; 27 Digest (Repl.) 654, *6160*.

G

(3) *March* v. *March and Palumbo* (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366; 15 W.R. 799; 27 Digest (Repl.) 641, *6032*.

(4) *Ponsonby* v. *Ponsonby* (1884), 9 P.D. 122; 53 L.J.P. 112; 5 L.T. 174; 32 W.R. 746, C.A.; 27 Digest (Repl.) 641, *6035*.

(5) *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670; 10 T.L.R. 62; 11 R. 340, P.C.; 42 Digest 688, *1032*.

H

(6) *Sydney Municipal Council* v. *Bull*, [1909] 1 K.B. 7; 78 L.J.K.B. 45; 99 L.T. 805; 25 T.L.R. 6; 11 Digest (Repl.) 322, *6*.

(7) *Carterett* v. *Pettie* (1676), Cas. temp. Finch, 242; 2 Swan. 323, n.; 23 E.R. 133; sub nom. *Cartwright* v. *Pettus*, 2 Cas. in Ch. 214, L.C.; 11 Digest (Repl.) 378, *417*.

(8) *Foster* v. *Vassall* (1747), 3 Atk. 587; 26 E.R. 1138, L.C.; 20 Digest 235, *30*.

I

(9) *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161; 98 E.R., Ex.Ch.; 11 Digest (Repl.) 450, *886*.

**Motion** to confirm and vary a registrar's report on a husband's petition for a settlement of a wife's property under s. 191 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

On Oct. 17, 1924, the husband obtained a decree nisi against his wife on the ground of her adultery, and damages to the amount of £1,000 were awarded against the

co-respondent. There were two children of the marriage, born in 1916 and 1919 respectively, custody of whom was granted to the husband. The suit was undefended and neither the wife nor the co-respondent had entered an appearance. The husband's domicil of origin was English, that of the wife Dutch ; during their married life they lived and had their domicil in England. The co-respondent was a Dutchman, domiciled in Holland. In November, 1924, the damages were paid into court ; the money for this purpose was provided by the wife, the co-respondent being without means. On July 27, 1925, the decree nisi was made absolute. In August, 1925, the wife and the co-respondent were married and took up their residence in Holland, the wife thus resuming her Dutch domicil. On Mar. 23, 1926, the wife obtained leave on summons to enter an appearance in the suit, notwithstanding decree absolute, so that she might be heard on the questions of the disposal of the damages and of access to the children. On April 8, 1926, the husband issued a summons for payment out to him of the £1,000 in court and for leave to file a petition out of time asking that the wife should make a settlement on each of the children. In her evidence, filed in opposition to this summons, the wife alleged that the £1,000 in court had been provided by her under an arrangement that the amount should be settled on the children. This was denied by the husband. At the hearing of the summons on June 21, 1926, leave was given to the husband to file a petition for a settlement, otherwise the summons was ordered to stand over generally. On June 29, 1926, the husband accordingly filed a petition for a settlement by the wife under s. 191 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, in which he alleged that the wife was possessed of property exceeding £12,000 in value from which she derived an income of £600 per annum, and that his own income was about £500 per annum. To this petition the wife filed an answer. She stated that her total income did not exceed £400 per annum, that she was compelled to support her present husband, who was a student at Delft University and had no means, and that she was now paying the premiums on two educational policies of insurance which had been taken out for the benefit of the children. She asked that the £1,000 in court should be settled on the children. From the evidence filed on the summons and on the motion, it appeared that the wife's property consisted wholly of foreign securities, and that she had no property within the jurisdiction of the English court. At the hearing of the petition before a registrar, counsel appeared for the wife and objected that the court had not jurisdiction to order a settlement of her property, she being domiciled in Holland and having property only in Holland. He stated that he appeared to the petition for a settlement under protest as to the jurisdiction. The registrar in his report submitted that: (i) The £1,000 in court should be paid out to the husband. (ii) The wife should be ordered to settle the sum of £100 per annum on each of the children of the marriage for life, and that out of such sums the premiums on the educational policies should be paid. (iii) The wife should pay the costs of the proceedings out of her separate estate. The husband now moved the court to confirm the registrar's report as to the payment out of the £1,000 in court, and to vary the submitted order for an settlement by ordering the wife to lodge in court within twenty-one days a sum of £4,000, and to settle one-half of this sum on each of the children.

*R. Ritson* for the husband, referred to *Lorriman* v. *Lorriman and Clair* (1), *Noel* v. *Noel* (2), *March* v. *March and Palumbo* (3) [LORD MERRIVALE, P., *Ponsonby* v. *Ponsonby* (4)].

*D. Cotes-Preedy*, *K.C.*, and *C. C. Trotter* for the wife referred to *Noel* v. *Noel* (2).

[*Dr. Bisschop*, a member of the Amsterdam and English Bars, gave evidence as to the Dutch law relating to the effect of foreign judgments in Holland and as to the jurisdiction of the Dutch courts to deal with questions of maintenance after divorce. The substance of his evidence is fully stated in the judgment.]

*Cur. adv. vult.*

April 8. **LORD MERRIVALE, P.,** read the following judgment: The matters in question in this case arise under the power which was granted to the court by the Matrimonial Causes Act, 1857, s. 45, and the Matrimonial Causes Act, 1860, s. 6 and s. 7, to order a settlement of property of a wife, divorced for adultery, for the benefit of her husband or children. The sections in question are now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925. Questions of difficulty arise which are not provided for in terms in the statutes, and as to which there is no authority of decided cases. [His Lordship stated the facts, and continued:] At the hearing of the motion counsel appeared for the husband to support his new application. Counsel appeared for the wife to protest against the exercise of the jurisdiction over the wife's property in Holland, and to resist the application for payment out of the £1,000 in court. On the wife's behalf, evidence of Dutch law was given in explanation of the effect of marriage in Holland on property possessed by either spouse at the time of marriage, and as to a jurisdiction existent in Holland under which orders could be made against parents in respect of the maintenance of children, special local committees being entrusted with this authority. Information was given on both sides as to the details and whereabouts of the wife's property. Under the Dutch Code of Civil Procedure, execution may not be had in Holland under foreign judgments except in cases expressly provided for by Netherlands law. Proceedings in other than the excepted cases must be taken anew before one of the local courts. No suggestion was made before me that the present case falls within any statutory exception. It was shown, however, that under Dutch law, a citizen of the Netherlands who brings an action in England and fails on the merits will be precluded from suing again in Holland in respect of the same alleged cause of action. It was also shown that, notwithstanding appearance and defence in an action brought in England against a Dutch citizen and judgment against him at the hearing, certain Netherlands tribunals have held themselves bound to refuse to enforce the judgment as such, and to leave the plaintiff, if he so desires, to proceed de novo in Holland to enforce his claim. As regards settlements of property between spouses and disputes between parents as to their obligations towards their children, the evidence was that no jurisdiction such as that invoked in the present case exists in Holland, and that the "Guardianship Councils" which are appointed by the State in each province, to deal with such questions have power only to direct periodical payments for the maintenance and education of children.

The evidence given on the wife's behalf satisfies me that, as between Dutch spouses, whether during marriage or after divorce, no orders as to property such as are here sought by the husband could be made by any court in the Netherlands, and that no judge or court there would or could, under the Civil Code, give effect in Holland to an order made here in terms of the husband's application. No evidence was given of the existence in England of any property of the wife in respect of which an order of this court could be enforced. In replying on the argument made on behalf of the wife, counsel for the husband accepted the conclusion that no such property exists, and so far as regards the husband's claim for a settlement he relied on a contention that the wife had voluntarily submitted to the jurisdiction of the court by her entry of an unconditional appearance to the petition, and that, in a proceeding in personam, such a submission binds the party to the acceptance of the eventual judgment of the court.

The dispute which has arisen between the parties as to the sum of £1,000 paid into court under the decree for damages has been inconveniently and perhaps not without intent, linked up by the husband's advisers for discussion and decision along with the question of settlement. I will dispose of it now. In view of the husband's evidence, of the findings of fact in the report and the situation of the children of the marriage, the order proper to be made is that proposed by the registrar for payment out of the £1,000 in question to the husband.

The remaining questions on the husband's motion depend on the meaning and

effect of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1), construed as part of the English law of divorce. To what extent can an English court, consistently with the general principles of international law which govern national jurisdictions—apart from submission by a defendant—exercise jurisdiction in personam over a defendant domiciled abroad so as to bind him or her by its decree, or establish a charge on his or her property or alter his or her proprietary rights in property outside the jurisdiction? Does the appearance as defendant of a foreign subject before the court for the purpose of disputing the jurisdiction empower the court to adjudicate on claims against the defendant so as to bind him by judgment in personam? Is the claim of the husband here a claim in an action in personam? If the court has and ought to exercise jurisdiction in personam in such a case, can it and ought it to assume power to alter the property in the defendant's assets not within its jurisdiction?

The relevant sections of the statutes are the first matter for consideration. Their effect is, perhaps, somewhat misunderstood. It is probably correct to say that s. 45 of the Matrimonial Causes Act, 1857, neither created a cause of action nor set up a new right in equity. In 1857 and long afterwards, a delinquent wife, so long as she was covert, could not sue or be sued. Nor was any equitable tribunal empowered to treat her matrimonial offence as founding any pecuniary demand or interest in her property. The power given to the court in divorce to redistribute settled property of a wife because of a matrimonial offence was absolutely new. The jurisdiction was statutory and had no precedent in the Ecclesiastical Courts. It was anomalous, in that nothing like it had existed at common law or in equity. In some respects it was penal. One of the difficulties in the present case could not arise under the Act of 1857, because the wife, being a domiciled Englishwoman by reason of her marriage, was manifestly subject to the jurisdiction of the court until after decree of dissolution of marriage. A decree of dissolution was formerly, and under the Act of 1857, made on the hearing of the petition. Decree nisi was introduced by the Act of 1860. The jurisdiction as to property remained a jurisdiction to be exercised when decree absolute was made, but the intervening period was available for any interlocutory proceedings which might be sanctioned. One unforeseen difficulty under the Act of 1857 had to be provided against and was provided against under the Act of 1860 by a provision, viz., s. 6, that, notwithstanding any new coverture, a divorced woman's indenture as to her property, if made pursuant to an order of the court, should be "deemed valid and effectual." Bearing in mind that the jurisdiction in divorce is a jurisdiction limited to England and Wales and dependent on domicil, it cannot, I think, be said that the statutory authority invoked by the husband is on the face of it, and necessarily, an authority which extends to a woman—whether feme sole or feme covert—who is not in fact domiciled here. It is, perhaps, not immaterial on the question of construction that the power which was conferred on the court by statute for service of process out of the jurisdiction (Matrimonial Causes Act, 1857, s. 42) is a power in relation to the husband in a suit and not to a proceeding such as is under consideration here. As to the property of a guilty wife, which is subjected by the statutes in question to the jurisdiction of the court, it is sufficient to say generally that, primâ facie, what is dealt with is property of a woman domiciled in England subject by reason of her domicil to the jurisdiction of English tribunals.

Apart from any submission by the wife to the jurisdiction sought to be invoked, and in the absence of any express statutory provision which directs the exercise of the jurisdiction over a wife not domiciled in England or in respect of property beyond the jurisdiction, the power of the court to do that which is prayed by the husband depends on general principles, based in part at least on the comity of civilised States. SIR ALBERT DICEY in his work THE CONFLICT OF LAWS (4th Edn.), pp. 27, 33, states two applicable principles in these words:

"General Principle No. II—English courts will not enforce a right otherwise

duly acquired under the law of a foreign country." . . . (c) Where the enforcement of such right involves interference with the authority of a foreign State within the limits of its territory."

"General Principle No. III—The courts of any country have jurisdiction over (i.e., have a right to adjudicate upon) any matter with regard to which they can give an effective judgment, and have no jurisdiction over (i.e., have no right to adjudicate upon) any matter with regard to which they cannot give an effective judgment."

Applying the first of the tests stated by SIR ALBERT DICEY, it seems to me clear that the property in Holland of the wife, a married woman domiciled in Holland, cannot be partitioned by an English court without infringing the authority of the Netherlands law over the domestic affairs of families domiciled in Holland. To apply the second test formulated by SIR ALBERT DICEY, this question must be answered: Can this court give an effective judgment as to the wife's property so as to bind the property? It is not clear that the judicial tribunals of the Netherlands are able to give effect at all to judgments of foreign courts, even in personal actions, against defendants living in Holland. But, having regard to the terms of the Civil Code, and the evidence of Dr. Bisschop, I am satisfied that a decree of this court purporting to partition the property of the wife would be an idle and wholly ineffectual process. Reference may, perhaps, usefully be made on this part of the matter to *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (5).

The application of the husband for an order for a payment into court was used as the basis of an argument that, even if a decree here for a settlement of the wife's property would be ineffectual in Holland, an order on her for payment into court of a sum of money, with a view to an order later for a settlement, would come within the description of a judgment in personam, and ought therefore, to be made. The wife, it was said, has appeared, and is subject to a personal judgment ; and such a judgment should be granted ex debito justitiæ, even though she may not obey it, and no execution on it may be obtainable. This contention fails on various grounds. The prayer of the petition as filed set forth no cause of action which would found an action in personam properly so called : see *Sydney Municipal Council* v. *Bull* (6). The wife's appearance to the petition was not an appearance to meet the present claim. I am not persuaded that an appearance to such a petition as the present, qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with propriety be regarded as a submission to the exercise of the jurisdiction so denied. I am satisfied that the proposed interlocutory order would not be enforced in Holland. I was referred by way of authority to cases in this court where jurisdiction undoubtedly existed: *March* v. *March and Palumbo* (3), *Ponsonby* v. *Ponsonby* (4), *Noel* v. *Noel* (2), and *Lorriman* v. *Lorriman and Clair* (1). Such cases throw no light on the questions really in issue. There is some guidance, perhaps, in some old authorities where, with regard to disputed jurisdiction, the principle was discussed before the existing rules as to jurisdiction were formulated. In *Carterett* v. *Pettie* (7), a defendant resident in Ireland who appeared before the Court of Chancery and demurred to the jurisdiction was ordered to answer a bill for an account for waste committed in Ireland, because

"wheresoever the defendant may by personal coercion be compelled to perform the act decreed, there, after answer put in, the court shall proceed to a decree."

In *Foster* v. *Vassall* (8) (3 Atkyns, at p. 589), the same ground is stated in respect of suits in equity as to matters outside the jurisdiction, in these words,

"as the defendant is here the courts do agere in personam and may, by compulsion on the person, and process of the court, compel him to do justice."

LORD MANSFIELD, in *Mostyn* v. *Fabrigas* (9) (1 Cowp. at p. 176), drawing the distinction as regards presence and absence of jurisdiction, and contrasting actions for personal wrongs and actions in respect of property abroad—in that case realty—used these words :

"The substantial distinction is where the proceeding is in rem, and where the effect of the judgment cannot be had, if it [that is the proceeding] is laid in a wrong place."

The compulsory process referred to in the Chancery cases is not available here at the instance of the husband. The wife is beyond its reach. Nor has she appeared in a suit so framed with regard to a personal cause of action that, after judgment, attachment would be the penalty of default of obedience. I may add this: I have purposely refrained from consideration of the proper order for settlement if such an order could properly be made.

It was ultimately urged on the husband's behalf that ex debito justitiæ some order ought to be made on the prayer of the motion with its amended claim, so as to enable the husband to take proceedings at his own risk in Holland; and, alternatively, it was submitted that no final judgment adverse to the husband's claim should be made, in case hereafter he may find the wife possessed of property within the jurisdiction. To the first submission I am unable to accede. As to the second, any inchoate rights the husband may have under the statute will be sufficiently considered if I limit the operative order of the court to that part of the registrar's report which relates to the disposal of the damages, and as to the rest of the petition declare that, in the absence of evidence of the existence within the jurisdiction of any property of the wife subject to be dealt with thereunder, the court makes no order. The order to be drawn up will be framed accordingly.

Solicitors: *Pearce & Nicholls; T. D. Jones & Co.*

[*Reported by* R. Wavell-Paxton, Esq., *Barrister-at-Law.*]

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## Re A.B.'s PETITION

[Probate, Divorce and Admiralty Division (Lord Merrivale, P.), November 4, 1927]

[Reported [1928] P. 25; 97 L.J.P. 37; 138 L.T. 302; 44 T.L.R. 52; 72 Sol. Jo. 31]

*Divorce—Costs—Security for wife's costs—Husband's petition for divorce on ground of wife's adultery—Wife's admission of adultery, but denial of adultery with named co-respondent—Wife's right to payment of and security for costs —No payment into court.*

The husband petitioned for divorce on the ground of his wife's adultery with a named co-respondent. The wife admitted adultery resulting in the birth of a child, but denied adultery with the co-respondent. On application by the wife for payment of and security for costs, the husband contended that there was substantially no defence to the petition on the ground that the wife's admission to the birth of a child was equivalent to an admission of adultery.

**Held:** the husband would be ordered to give security for such costs as the judge might order at the trial and there would be no order for payment into court.

**Notes.** Applied: *Vincent* v. *Vincent* [1953] 2 All E.R. 978. Referred to: *Evans* v. *Evans*, [1953] 1 All E.R. 70.

As to security for wife's costs, see 12 Halsbury's Laws (3rd Edn.) 358–361; and for cases see 27 Digest (Repl.) 504 et seq.

Case referred to : A

(1) *Russell* v. *Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; 27 Digest (Repl.) 318, *2649*.

**Summons** adjourned into court.

The husband presented a petition for dissolution of his marriage on the ground of his wife's adultery with a named co-respondent, from whom he claimed damages. B In response to a request for particulars of his charges he stated (inter alia) that he would rely on the fact that, on a certain date, the wife had given birth to a child. The wife in her answer denied that she had committed adultery as alleged in the petition ; she admitted that she had given birth to a child as alleged in the particulars but denied that the co-respondent was the father. The answer of the co-respondent was a general denial. The wife in due course made the usual application C for the payment of her costs up to the setting down of the cause and for security for her costs of the trial. This application was opposed by the husband on the ground that the wife's admission of the birth of a child was equivalent to an admission of adultery and that there was substantially no defence to his petition. The registrar ordered an affidavit of merits to be filed by the wife and her solicitor. In this affidavit, the wife repeated her admission of the birth of a child and her denial D that the co-respondent was the father, and her solicitor stated that she refused to disclose the name of the father but had expressed her willingness to do so to the judge at the trial. The registrar thereupon made an order against the husband for payment of and security for costs. The husband appealed on summons to the judge, who adjourned the summons into court.

*F. L. C. Hodson* for the husband. E
*H. B. D. Grazebrook* for the wife.

**LORD MERRIVALE, P.**—The authority of the court to order an aggrieved husband, or a husband alleging himself to be aggrieved, to secure the costs of a wife who is alleged to be guilty, although it is a most valuable power of the court F in the interests of justice, is exceedingly capable of being oppressively used. I do not say that it is being oppressively used in this case, but when I became aware of the circumstances of the case, having in mind what I have said with regard to the possible effects of the jurisdiction, I thought it was desirable that this case should be argued in open court.

The husband alleges adultery of his wife and says that she has given birth to a child whose paternity he denies. That is as far as he can go, having regard to the G decision some time ago in *Russell* v. *Russell* (1). It appears now that the wife does not suggest that he is the father of that child. She says that, at the hearing of the case, she will be ready to inform the judge who is the father, but she desires, it is said, to defend herself against the charge of adultery with the co-respondent. That may well be so. I do not know, and it is not my present business to inquire. H The case is a peculiar case. It is not within the class of simple cases, out of which the jurisdiction in the Ecclesiastical Courts grew up, and in respect of which the jurisdiction of this division was intended to be exercised. It is a class of case which arises out of more complex conditions than those to which the jurisdiction was designed to apply. It has been properly said for the wife : "She is charged with adultery ; she denies that she has committed it with the alleged paramour ; I she wants to defend herself." Although the case is of a peculiar kind there is something in the nature of a prescriptive right on cause shown to secure to the wife the means of defence.

I propose to do that in this case, without knowing its merits at present, by accepting the offer which was made on behalf of the husband to give sufficient security for any costs which he may ultimately be ordered to pay, but I do not propose to order a payment into court. A sum in court is apt to find its way out of court in some way or another. I propose to order security. The registrar will fix

the proper security, and it will be security for such costs as the judge may order at the trial.

Solicitors: *Corbin, Greener & Cook*, for *Arthur Neal & Co.*, Sheffield; *Jaques & Co.*, for *E. S. Spencer*, East Retford.

[*Reported by* R. Wavell-Paxton, Esq., *Barrister-at-Law.*]

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## IMPORTERS CO., LTD. *v.* WESTMINSTER BANK, LTD.

[Court of Appeal (Bankes, Atkin and Lawrence, L.JJ.), May 31, June 1, 1927]

[Reported [1927] 2 K.B. 297; 96 L.J.K.B. 919; 137 L.T. 693; 43 T.L.R. 639; 32 Com. Cas. 369]

*Bank—Negligence—Receipt of payment for customer of crossed cheque—"Account payee"—Cheque fraudulently endorsed by third party—Transmission to clearing bank for collection—Payment by drawer's bank—Third party's bank credited—"Receives payment"—"Customer"—Duty of clearing bank to payee—Bills of Exchange Act*, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 82.

The plaintiffs were London merchants who had one S. as their agent to buy goods in Germany. It was the plaintiffs' practice to draw cheques on their bank in London, the N. and P. bank, made payable to the suppliers, crossed generally and marked "account payee only," in Germany, and send the same to S. for delivery to the payees. S. fraudulently endorsed the cheques, forging the name of the payees and signing his own name underneath. He then paid the cheques into his account with the H. bank, Dresden, who sent them for collection to their London agents, the defendant bank, who passed the cheques through the Clearing House, received the amounts thereof from the N. and P. bank, and credited those amounts to the H. bank. In an action by the plaintiffs against the defendant bank for damages for the conversion of the cheques,

**Held:** the defendant bank "received" the proceeds of the cheques within s. 82 of the Bills of Exchange Act, 1882; they received them "for a customer" within s. 82, for a bank which sent cheques to a clearing bank for clearance was a "customer" of the clearing bank within the section; and they did so without negligence since, assuming that they had any duty to investigate whether or not they were collecting for the payee named on the cheques, nothing in the crossing of or the endorsement on the cheques would lead the defendant bank to suppose that the H. bank were not going to account for the proceeds to the payee mentioned on the face of the cheques; and, therefore, it being admitted that they had acted in good faith, the plaintiffs' action failed.

Per Atkin, L.J.: The duty of a clearing bank in respect of a cheque marked "account payee" may very well be fulfilled if they are satisfied that there are endorsements on the cheque which are consistent with the bank who has sent it for clearance accounting for the proceeds to the payee mentioned on the face of the document.

**Notes.** As to the collection of crossed cheques see 2 Halsbury's Laws (3rd Edn.) 179 et seq., and for cases see 3 Digest 205. For Bills of Exchange Act, 1882, see 2 Halsbury's Statutes (2nd Edn.) 505.

Cases referred to: A

(1) *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank, Ltd.* v. *Gordon*, [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; sub nom. *London City and Midland Bank, Ltd.* v. *Gordon, Capital and Counties Bank, Ltd.* v. *Gordon*, 8 Com. Cas. 221, H.L.; 3 Digest 240, *676*.

(2) *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank, Ltd.*, [1904] 2 K.B. 465; 73 L.J.K.B. 742; 91 L.T. 175; 52 W.R. 670; 20 T.L.R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281; 3 Digest 240, *677*. B

**Appeal** by plaintiffs from an order of MacKinnon, J., in an action in the Commercial Court tried by him without a jury.

The facts appear in the judgment of Greer, L.J. C

By s. 82 of the Bills of Exchange Act, 1882:

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." D

*Pritt, K.C.*, for the plaintiffs.

*Rayner Goddard, K.C.*, and *D. B. Somervell* for the defendants were not called on to argue.

**BANKES, L.J.**—This is an appeal from a judgment of MacKinnon, J. The case for the plaintiffs has been very fully put before us, but, in my opinion, the judgment of the learned judge was quite right. The circumstances in which the action was brought are these. The plaintiffs are an English company carrying on business in England, having business relations with firms in Germany. They employed an agent in Germany, a man named Schultz, and the course of business as between the plaintiffs and the German firms was that the plaintiffs drew cheques in favour of the different firms for goods supplied, those cheques were sent to Schultz, and his business was to have handed the cheques to the persons in whose favour they were drawn. Schultz, instead of handing the cheques to the payees, kept them himself. He endorsed them by forging the names of the payees to the cheques, and then paid them into an account which he had with a firm of bankers called Heilmann, who carried on business at Dresden. Heilmann employed the Westminster Bank, the defendants, to clear the cheques for them, and the defendants did clear them. I think they were fourteen altogether in number. The cheques were passed on in due course, through the Clearing House, to the bank upon which they were drawn, the National Provincial Bank of England, and in due course the defendants received through the Clearing House the proceeds of those cheques. The plaintiffs' cause of action was that the defendants, by so doing and so receiving the proceeds of the cheques, had converted them, and that they were bound to pay over the proceeds of the cheques to the plaintiffs by way of damages for that conversion. The defendants' case was this: "We, as bankers, are protected by s. 82 of the Bills of Exchange Act, 1882, in that we acted in good faith, which was not disputed; in that we acted without negligence, which was disputed; in that we received a payment for a customer, which, again was disputed"; and the question that the learned judge had to decide was whether, on those three matters, the defendants had brought themselves within the protection of the section. E F G H I

The cheques were all crossed cheques, and they were all drawn to account of "payee only," and the contention of the plaintiffs is that that endorsement amounts to a direction to anyone who is dealing with the cheques, that they are only to be dealt with in such a way that the proceeds of the cheques must pass into the account of the payee; that anybody who disregards that direction is acting contrary to the express direction on the face of the cheque; and that, if the direction is disregarded,

A he must be taken to be acting negligently, and, if a bank, to be without the protection given to bankers by s. 82. The defendants' answer to that contention is this. "True it may be that that form of crossing is a direction to some bankers—it is a direction to the banker of the person in whose favour the cheque is drawn—but it has no application to our case at all, because we are merely clearing bankers, and it is not in our power to comply with the direction, because the cheque comes B into our possession in such circumstances that we cannot control the ultimate destination of the money, and, therefore, cannot act upon the direction." Counsel for the plaintiffs says: It is all very well to say that, but it does not avail you. If you choose to take a cheque in this form, as collecting banker, you must do one of two things: you must either refuse to do the business at all because you cannot comply with the direction, or, if you do the business, you must do it knowing that C you are doing something which is irregular and disregarding the direction, and you, therefore, as a matter of business, and as wise people, ought only to undertake the business in cases where, knowing it is irregular, the person for whom you are doing the business is of sufficient standing to indemnify you if any trouble arises." With great submission, that contention, it seems to me, renders this class of business altogether impossible. If what LORD MACNAGHTEN said in *Capital* D *and Counties Bank, Ltd.* v. *Gordon* (1), that bankers may fairly be said to bring themselves within the provisions of s. 82 if they are only doing the particular form of business in the ordinary course in which such business is done, is not applicable to every case of this class—and I do not pretend to say that it is—at any rate it is, an indication that, not necessarily a conclusive test, but a very fair test, whether E bankers can bring themselves within the protection of s. 82, is to see whether they are carrying on a particular class of business in the way in which such business is invariably done, by the class of persons who conduct the particular class of business.

The evidence on behalf of the Westminster Bank was given by people of high quality, whose evidence was not contradicted, and who spoke to what, according F to their view, was the universal way of doing this particular class of business. What in substance they said, dealing in the first instance with these cheques, but going a little further in cross-examination, without possibly having considered all the consequences, was: "We are collecting bankers merely, and, therefore, we concern ourselves only with considering whether the mandate we have got to collect is sufficient. We satisfy ourselves as to that by looking at the endorsement, which G is to us our mandate, and we do not concern ourselves with either the form of the cheque or anything else that is upon the cheque." Whether they went too far in saying that, and whether they could justify that in all circumstances, I am not prepared to say, but I do say that it is immaterial in this case because, assuming for the moment that their duty might be to scrutinise the cheque, at any rate to see whether or not it is not on its face in proper form, in my opinion, there H is nothing upon either the face or the back of the cheques that would have put them upon inquiry in this case. Therefore, upon the assumption that I am right in thinking that the learned judge was correct when he came to the conclusion that the disregarding of the particular form of endorsement in this case by the defendant bank, having regard to the position they occupied as a collecting bank merely, was not in itself negligent, and assuming that he was right also in holding, as I I think he was, that, even if the bank had a duty to scrutinise the cheques sufficiently to ascertain that there was nothing either on the face or on the back of them, to put them on inquiry, then I think that the bank did discharge the onus which lay upon them and showed that they acted in this matter without negligence. I do not propose to go through the authorities to which our attention has been drawn. There is no case which deals with this particular point—how far a collecting bank is under a duty to regard the direction contained in a cheque crossed in this form "account payee." The point taken for the plaintiffs is that these endorsements should have put the bank upon inquiry because of the way in which Schultz's

name appears on them. In every case the endorsement took this form. The endorsement, first of all, was an endorsement in the name either of the person or of the firm, or of the person trading under a firm name, in whose favour the cheque was drawn. That name appeared first. In every case Schultz wrote his own name under that of the drawee, and it is said: "That ought to have put the bank upon inquiry because there was nothing that indicated that Schultz, or whoever he was, was signing per pro, or in what capacity he was signing." But I cannot see the force of that argument because there was nothing to indicate that the original drawee had not in the first instance endorsed the cheque in blank which then was passed on and endorsed by Schultz in blank. There is nothing on the face of the cheque to indicate that the endorsement of the drawee had to be put on it by someone acting as an agent or servant, and I fail to appreciate the force of the argument that there was anything here in the form of the endorsement which ought to have put the bank upon inquiry. That disposes of the contention that the bank failed to establish that they acted without negligence.

Then it is said: "At any rate they were not receiving payment for a 'customer'." We must remember that we are sitting here as a Court of Appeal from a judge who tried this action without a jury, and we should only reverse that judge if we were quite satisfied that he had drawn an inference which was unwarranted by the facts. It is true that the whole history with reference to the transactions between the parties was not sifted to the bottom, but the case was fought upon the footing that the ordinary bank practice in such matters as these is common knowledge in the Commercial Court and to a learned judge such as the judge who tried this action, and it seems to me to be impossible to condemn the inference which the learned judge drew from the facts and from what is common knowledge about banking practice—that the defendant bank was not receiving payment for itself. I think, therefore, that on that point the appeal fails. Then it is said: "They were not receiving payment for a customer even if they were not receiving payment for themselves. Heilmann was not their customer." What does the expression "customer of a bank" cover? The most ordinary meaning, I suppose, that one would attach to the expression "customer of a bank" is a person who keeps an account at the bank. He is obviously a customer of the bank. But banks do various kinds of business, and in all those various kinds of business, the persons with whom they do the business may properly be called customers, and they can properly be called customers whether they are individuals or whether they are banks. In the present case this business of collecting cheques is done between bank and bank, and it seems to me to be impossible to contend, as a matter of law, that the bank for whom the defendants in this case were doing this class of business, were not, in reference to that business, their customer. I fail to appreciate the force of the argument that Messrs. Heilmann were not the customers of the defendant bank. On all the points, therefore, I find that the learned judge was right, and that this appeal fails, and must be dismissed with costs.

**ATKIN, L.J.**—I agree with the judgment that was delivered by the learned judge and with the judgment which has just been delivered by my Lord. The only question is, whether or not the defendants bring themselves within the protection of s. 82 of the Bills of Exchange Act. The onus of bringing themselves within the section rests upon them, and they have to show that they, in good faith and without negligence, received payment for a customer of a crossed cheque. The first question is whether or not they received this money, because that is one of the essentials in the section. Counsel for the plaintiffs succeeded in inducing the principal official of the defendant bank to concede that there was a difference between a collecting bank and a receiving bank and that they were not the receiving bank. Therefore, says counsel, I have proved out of your mouth that you did not receive this money within s. 82, but I think he was too successful there. I think the defendants' witnesses were using a phrase with a mere view of distinguish-

A ing between the bank which initially receives the cheque and the bank that clears it. Notwithstanding that distinction, it cannot be disputed that the defendant bank received the money from the paying bank in the course of collecting.

The other question that was raised was this. It is said: "You have not shown that in this case you received the money without negligence." Counsel says that there are two ways in which the bank failed to acquit themselves of negligence. B He says, in the first place, that these cheques were drawn payable to the account of the payee only and the defendant bank did not investigate the question whether or not they were collecting merely for the account of the payee. In reference to that he refers to the endorsement to which it is said they ought to have given their attention, and says that they were not collecting the money for the account of the payee. What is the meaning of a cheque to the account of the "payee only"? C I do not know any better statement of it than the statement made by BINGHAM, J., a very great authority on questions of commercial practice, and particularly banking practice, in *Akrokerri (Ashanti) Mines, Ltd.* v. *Economic Bank, Ltd.* (2), that the paying bank have nothing to do with the application of the money when it has been paid to the proper receiving banker. The words "account payee" are a mere direction to the receiving banker as to how the proceeds of the cheque are to D be dealt with after its receipt. It appears to me that when one is considering the question of negligence, one has to consider the particular facts of the case and the parties upon whom the duty to take care is imposed. I think it is desirable to point out that the Bills of Exchange Act, first of all, expressly provides that a crossed cheque can only be paid by the bank on whom it is drawn, or, if crossed specially, to the banker to whom it is crossed, and it also expressly contemplates E that where a banker receives a crossed cheque, that banker may cross it to another for collection. Therefore, the position of a banker who receives a cheque in the ordinary course of business is well recognised by the legislature. By s. 77 (5) it is provided:

> "Where a cheque is crossed specially, the banker to whom it is crossed may F again cross it specially to another banker for collection."

By s. 79:

> "(1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) Where the banker on whom a cheque G is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid . . ."

H Section 80 provides for protection to banker and drawer where a cheque is crossed. Everybody knows that in the ordinary course of practice, crossed cheques are cleared through the Clearing House, and there is only a certain limited number of banks—I think the number given in evidence was ten—which are what are called clearing banks. It follows that all the other banks in the country, if they desire to clear crossed cheques, have to send them to a clearing bank, who are the persons I contemplated in the Bills of Exchange Act as the agents for collection. It was proved in evidence that clearing bankers, and the defendants are clearing bankers, receive thousands of cheques in a day for clearance through the clearing house. That being the state of business which everybody must contemplate, it seems impossible to expect a very close and accurate survey of all the circumstances connected with each cheque dealt with by the clearing banker. But counsel for the plaintiffs got the representatives of the defendant bank to say that they were under no obligation to look at the cheques at all, except to see whether there was an endorsement to them, and that that was in order. I do not think it is necessary

to accept that view. For my part I think they also have to bear in mind that, A
though clearing bankers have to deal with a considerable number of cheques, still they are dealing with very valuable and negotiable instruments representing enormous sums of money and that they have some responsibility to the persons whose property those negotiable instruments are, and if an instrument came into the hands of the clearing banker without there being any endorsement which would confer a right upon any body to part with it—in the case of a bill drawn to order, B
without any endorsement at all—I think the clearing banker might very well find himself in a difficulty if he sought to establish by his servant that he had no duty to look at the back of the bill except to see whether there was an endorsement to him. But that is not this case. When one looks at the cheques in this case, one finds that there is a complete set of endorsements, and the position, it seems to me, of a clearing bank in respect of a cheque which is marked "account payee" may C
very well be that, as long as there are endorsements upon the cheque which are consistent with the bank who are sending it forward for clearance dealing with it in compliance with the direction it bears, that is sufficient. I do not propose at the present moment to deal with the question, which has not been argued, what is meant by "account payee only," or collection for a customer, which is a different point. All that it is necessary to say is that these documents are such that it seems D
to me that it was quite possible, and indeed probable, that the official who scrutinised the endorsements, would pass them, if satisfied that the bank with whom he was dealing were in fact going to account for the proceeds to the payee mentioned on the face of the document. That seems to me to be sufficient. It is said that the clearing bank must be satisfied that the bank who sent the cheque to them for E
clearance, must hold the account of the payee. I am not satisfied even that that is true, because one knows very well that cheques are drawn occasionally "account payee" and sent to a person who has not a banking account. I do not agree that those cheques are of no value to that person. I see no reason at all why such a person cannot request somebody who has a banking account to present the cheque for him and get it cleared for him. I agree that there is a duty upon the bank F
who takes a cheque in those circumstances to see that, in fact, they are collecting the money for the account of the payee and that the proceeds, when they have received them, will go to the payee. But that seems to me to be entirely a different matter. Therefore, I think, in this case there is no evidence of negligence on that point.

Then it was suggested that there was evidence of negligence because the endorse- G
ments in themselves, if looked at, would have attracted suspicion. I think it is unnecessary to say anything further in respect of that, except that, if one looks at the endorsements on these cheques, there is nothing to attract the attention of a person who, as I say, has only got the duty of doing that which is proper on the part of a bank which has to collect thousands of cheques in the course of a day.

It is said that these cheques were not collected for a "customer." It is said H
that from the evidence one must infer that the bank were holders for value of the cheque, and did not collect for their customer, the German firm of Heilmann. The evidence on that point seems to me to be that Heilmann had what appears to be an ordinary drawing account with the Westminster Bank. They may call it by a different name because Heilmann are a bank, but it was an account to which, when Heilmann sent cheques for collection, they were credited. Heilmann drew I
upon the account, and in every respect it seems to me that there was an ordinary account. If there is an ordinary account and nothing more and crossed cheques are sent to the bank, with a request to credit them to the account, primâ facie the bank which receives those cheques and collects them collects them for the customer and does not become a holder for them of value, and if it is sought to show that the position which you would ordinarily infer from that set of circumstances has in some way been altered, I think that the plaintiffs ought to prove what they seek to infer. There is, in my opinion, no evidence from which it can be inferred that

the defendant bank were holders for value of the cheques and collected them in that capacity.

The only other point was that Heilmann in any case, were not a customer, because they were a bank. I think that, so far as I can see on the evidence, they were customers in every sense of the word. They had a drawing account with the Westminster Bank. But if they were not and if they were in a different position, it seems to me that if a non-clearing bank regularly employs a clearing bank to clear its cheques, in the ordinary relation that exists in banks between those two persons the principal non-clearing bank is a customer of the clearing bank.

A further point may well arise on the section, inasmuch as one knows that a bank must employ a clearing bank as its agent for collection if the cheque is to be cleared through the clearing house. I think it may very well be that the agent for collection collects for a customer when the cheque is collected for the benefit of the customer of the non-clearing bank. But that is a point which has not been argued and which it is not necessary to decide. I think there are analogous cases, some such cases as we dealt with the other day when we dealt with the question of the servants of a carrier, and there was authority for saying that the servants of the sub-contractor might yet be the servants of the carrier, which would justify that argument. However, it is unnecessary to decide that. It seems to me that the evidence supports the finding of the learned judge in this case in every respect, and, therefore, I agree that this appeal should be dismissed with costs.

**LAWRENCE, L.J.**—I agree.

*Appeal dismissed.*

Solicitors: *Buckeridge & Braune; Travers Smith, Braithwaite & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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## BEHNKE *v.* BEDE SHIPPING CO., LTD.

[KING'S BENCH DIVISION (Wright, J.), January 12, 13, 14, 18, 1927]

[Reported [1927] 1 K.B. 649; 96 L.J.K.B. 325; 136 L.T. 667; 43 T.L.R. 170; 71 Sol. Jo. 105; 32 Com. Cas. 134; 17 Asp. M.L.C. 222]

*Ship—Sale—"Chattel personal"—Enforcement of contract—Specific performance —Sale of Goods Act*, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 52, *s.* 62.

A ship is a "chattel personal" within s. 62 of the Sale of Goods Act, 1893, which defines "goods" as including "all chattels personal other than things in action and money," and, therefore, on the sale of a ship, the provisions of the Act must be complied with. A ship, moreover, is a specific chattel, and, therefore, "specific goods" within s. 52 of the Act, and so a contract for the sale of a ship can be enforced by a decree of specific performance.

**Notes.** Section 4 of the Sale of Goods Act, 1893, was repealed by the Law Reform (Enforcement of Contracts) Act, 1954: see 34 HALSBURY'S STATUTES (2nd Edn.), 757.

As to what are "goods" within the Sale of Goods Act, 1893, see 29 HALSBURY'S LAWS (2nd Edn.) 10 et seq., and as to sale of ships generally see ibid., vol. 30, p. 184 et seq. For cases see 39 DIGEST 362–364 and 41 DIGEST 169 et seq. For Act of 1893 see 22 HALSBURY'S STATUTES (2nd Edn.) 988.

Cases referred to:

(1) *Re Blyth Shipbuilding and Dry Docks Co., Forster* v. *Blyth Shipbuilding and Dry Docks Co.*, [1926] Ch. 494; 95 L.J.Ch. 350; 134 L.T. 643, C.A.; 39 Digest 499, *1166*.

(2) *Sir James Laing & Sons, Ltd.* v. *Barclay, Curle & Co., Ltd.*, [1908] A.C. 35; 77 L.J.P.C. 33; 97 L.T. 816; 10 Asp. M.L.C. 583, H.L.; 39 Digest 497, *1152*.

(3) *Claringbould* v. *Curtis* (1852), 21 L.J.Ch. 541; 39 Digest 678, *2640*.

(4) *Hart* v. *Herwig* (1873), 8 Ch. App. 860; 42 L.J.Ch. 457; 29 L.T. 47; 21 W.R. 663; 2 Asp. M.L.C. 63, L.JJ.; 41 Digest 171, *113*.

**Action** for specific performance of a contract for the sale of a ship by delivery of the ship to the plaintiff. The defendants pleaded that no binding contract had been reached, and, alternatively, that, if there were a binding contract, it was not enforceable by reason of s. 4 of the Sale of Goods Act, 1893, inasmuch as there was no sufficient memorandum, that a ship was not "goods," and, even if it were so held, there could be no specific performance on the sale of a ship under s. 52. The facts as found by the learned judge appear in the judgment.

*Langton, K.C.*, and *Carpmael* for the plaintiff.
*Miller, K.C.*, and *Sir Robert Aske* for the defendants.

*Cur. adv. vult.*

Jan. 18. **WRIGHT, J.**, read a judgment in which he said: This is an action tried before me on Jan. 12, 1927, without pleadings under an order of the vacation judge, dated Jan. 5. The plaintiff, a German shipowner, claimed against the defendants, the owners of the British steamship *City*, a declaration that he purchased the *City* by contract from the defendants, an order for specific performance of that contract, an injunction, and, in the alternative, damages. The defendants deny the contract, and, in the alternative, say that it is not enforceable by reason of s. 4 of the Sale of Goods Act, 1893, and, in any event, that it is not a case in which specific performance ought to be decreed.

[His Lordship reviewed the evidence and continued:] I have found that a contract for the sale and purchase of the *City* was concluded between the defendants and plaintiff, but it is contended that it is not enforceable by reason of s. 4 of the Sale of Goods Act, 1893. It is curious that it has not been decided whether a ship comes within the description of goods under that section. Section 62 of the Act defines goods as including "all chattels personal other than things in action and money." A ship is clearly a chattel personal. It is true that some provisions of the Act do not apply to it, for example, the rule as to market overt. A British ship is also a chattel which is subject to special rules as to registration and transfer under the Merchant Shipping Act, though a British ship sold to a foreigner would come in a different category. Section 4 of the Act relates to the antecedent contract, not the actual transfer, and ought logically to apply to so valuable a chattel as a ship. A contract for the building of a ship was held by Romer, J., to be a contract for the sale of goods within the Act in *Re Blyth Shipbuilding and Dry Docks Co.* (1); cf. *Sir James Laing & Sons, Ltd.* v. *Barclay, Curle, & Co., Ltd.* (2). I hold that s. 4 of the Act applies.

I think the contract is enforceable. It remains to consider what is the proper remedy. The plaintiff claims a decree of specific performance; this claim is strongly contested on behalf of the defendants. It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship. Section 52 of the Sale of Goods Act gives the court a discretion, if it thinks fit, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act. In Fry on Specific Performance (6th Edn.) p. 37, note 4, it is said a ship is probably within the general principle: see *Claringbould* v. *Curtis* (3), which, however, is the case of a barge and contains no

A distinction of principle. *Hart v. Herwig* (4) seems to imply that a man who has contracted to purchase a ship is primâ facie entitled to have it—that is, by an order for specific performance. In the present case there is evidence that the *City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, built in 1892, but her engines and boilers were practically new, and such as to satisfy the German regulation, and hence the plaintiff could, B as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now be sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done. What is the position between the defendants and the other buyers, whose contract C was later in time than that of the plaintiff, is irrelevant in this action.

I have not overlooked the argument of senior counsel for the defendants, based on the clauses in the contract which provide that before completion of payment of the balance of the purchase price the buyer was to have the option of inspecting the vessel afloat and of requiring the sellers to place her in dry dock for inspection, and of requiring the sellers to repair certain damage, if any were found. He con- D tended that as the court will not decree specific performance of a contract to do work or perform services, these clauses constitute a bar to a decree here. But I think this contention is not sound. The defendants are neither dry-dock owners nor ship repairers. All they could be required to do would be to give the appropriate orders to a dry dock owner or ship repairer if necessary. But the plaintiff may not require inspection or dry-docking (which, if no damage be found, will be at his own E expense), and no damage requiring repairs may be discovered. Thinking, as I do, that justice can only be satisfied by an order for specific performance, I do not find in the clauses referred to, the only ones relied on by senior counsel for the defendants, any ground why I should not make the decree. There will be judgment, therefore, for the plaintiff, with a declaration that he purchased the *City* from the defendants and a decree that the contract shall be specifically performed, F and costs.

Solicitors: *Stokes & Stokes*, for *Bramwell, Clayton & Clayton*, Newcastle-on-Tyne; *Botterell & Roche*, for *Botterell, Roche & Temperley*, Newcastle-on-Tyne.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

# PATRICK *v.* RUSSO-BRITISH GRAIN EXPORT, CO., LTD.

[KING'S BENCH DIVISION (Salter, J.), June 12, 13, 29, 1927]

[Reported [1927] 2 K.B. 535; 97 L.J.K.B. 60; 137 L.T. 815; 43 T.L.R. 724; 33 Com. Cas. 60; 28 Lloyd, L.R. 358]

B

*Contract—Breach—Damages—Measure—Foreseeable consequence of breach—Sale of goods—Loss of profit—Re-sale contemplated by both parties at time of contract—No goods of contract description available in market at or after time of breach.*

Sellers sold a quantity of wheat of a certain description to merchants. At the time of the contract both parties contemplated that the buyers would probably re-sell the wheat, and, in fact, the buyers re-sold it under the same description at a profit before it was due to be delivered to them. The sellers failed to deliver the wheat. At the date of the sellers' failure and subsequently, there was no wheat of the contract description available in the market.

C

**Held:** the measure of damages for the sellers' default was the buyers' loss of profit on the re-sale.

D

Second branch of the rule in *Hadley* v. *Baxendale* (1) (1854), 9 Ex. 341, applied. *Hammond & Co.* v. *Bussey* (2) (1887), 20 Q.B.D. 79, and *Grébert-Borgnis* v. *Nugent* (3) (1885), 15 Q.B.D. 85, followed.

E

**Notes.** The Court of Appeal decision in *Hall* v. *Pim* (8) referred to in the judgment was reversed by the House of Lords: see [1928] All E.R. Rep. 763.

Referred to: *The Arpad*, [1934] All E.R. Rep. 326.

As to the measure of damages in contract generally see 11 HALSBURY'S LAWS (3rd Edn.) 241 et seq., as to the measure of damages in cases where the buyer of goods has resold before the breach see 29 ibid. (2nd Edn.) 195–207, and for cases see 39 DIGEST 668–672.

F

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99.*

(2) *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 4 T.L.R. 95 C.A.; 39 Digest 476, *995.*

G

(3) *Grébert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 39 Digest 669, *2569.*

(4) *British Columbia, etc., Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 8 Digest (Repl.) 150, *951.*

(5) *Horne* v. *Midland Rail. Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex.Ch.; 8 Digest (Repl.) 153, *964.*

H

(6) *Lyon* v. *Fuchs* (1920), 2 Lloyd, L.R. 333.

(7) *Frank Mott* v. *Muller* (1922), 13 Lloyd, L.R. 492.

(8) *R. and H. Hall, Ltd.* v. *W. H. Pim Junior & Co., Ltd.*, ante p. 227; 137 L.T. 585; 32 Com. Cas. 144, C.A.; reversed sub nom. *Re R. and H. Hall, Ltd. and W. H. Pim (Junior) & Co.'s Arbitration*, [1928] All E.R. Rep. 763; 139 L.T. 50; 33 Com. Cas. 324; 30 Lloyd, L.R. 159, H.L.; 39 Digest 675, *2612.*

I

(9) *Williams* v. *Reynolds* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L.J.Q.B. 221; 12 L.T. 729; 11 Jur. N.S. 973; 13 W.R. 940; 122 E.R. 1278; 39 Digest 675, *2608.*

**Special Case** stated by arbitrators for the opinion of the court at the instance of the buyers under a contract for the sale of Russian wheat. The facts are sufficiently stated in the judgment.

*Jowitt, K.C.*, and *James Dickinson* for the buyers.
*Somervell* for the sellers.

*Cur. adv. vult.*

July 29. **SALTER, J.**, read the following judgment.—This is a Case stated by arbitrators under s. 7 of the Arbitration Act, 1889, and raises the question whether, in the circumstances stated, buyers of goods are entitled to claim loss of profit on re-sale as damages for non-delivery.

The material facts can be stated very briefly. (i) On Oct. 15, 1926, the sellers sold to the buyers 2,000 tons of Russian wheat as per sample, November shipment, at 56s. 9d., notice of appropriation to be given within ten days from date of bill of lading. (ii) When the contract was made it was in the contemplation of both parties that the wheat would probably be re-sold by the buyers, who are merchants. (iii) On Oct. 23, 1926, the buyers re-sold a similar parcel of 2,000 tons of Russian wheat on identical terms, except as to price, which was 60s. 6d. (iv) Under both contracts the last day for the sellers to give notice of appropriation was Dec. 10. On that day the sellers informed the buyers that it was impossible for them to perform the contract, and no appropriation or delivery was ever made. (v) On and after the date of the breach by the sellers it was impossible for the buyers to obtain 2,000 tons of Russian wheat, November shipment, conforming or approximately conforming to the sample. (vi) The value of the contract wheat at the date of the breach was 54s. (vii) The value at the date of the breach, of No. 1 Northern Manitoba wheat, November shipment, was 59s. On these facts the arbitrators have made three awards, the first based on the difference between contract price and re-sale price, the second on the difference between contract price and the value of the contract wheat at the date of the breach, and the third on the difference between contract price and the value of American wheat at the date of the breach. I have to determine which of these is the correct measure of the damages.

Where a seller of goods fails to deliver, he should pay to the buyer the value of the goods at the time when they should have been delivered. This is the normal measure of damages. It is the measure prescribed by the first branch of the rule in *Hadley* v. *Baxendale* (1) and enacted in s. 51 of the Sale of Goods Act, 1893. If at the date of the breach there is an open market for goods of that kind, then the market price is obviously the value to the buyer. If there is no market the value must be otherwise ascertained, and a re-sale price may be some evidence of that value. But it is clear that loss of profit on re-sale can never be recovered unless the buyer can bring himself within the second branch of the rule and can show special circumstances and a right to special damages such as is reserved by s. 54 of the Sale of Goods Act, 1893. The decisions which have explained and illustrated the second branch of the rule in *Hadley* v. *Baxendale* (1) show that the application of this part of the rule to the facts of a particular case involves the consideration of two questions, one of fact and one of law. The first question is: What did the parties forecast as the probable course of events in relation to the contract where it was made? The second question, a question of law, is this: What may the court reasonably suppose to have been in the contemplation of the parties as a probable result of the breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach? See *Hammond & Co.* v. *Bussey* (2).

To deal first with the question of fact. The finding of the arbitrators is: "It was common knowledge at the time the contract of Oct. 15 was entered into that the buyers were not millers but merchants, and it was at that time in the contemplation of the sellers or their agents and of the buyers that the wheat would probably be re-sold by the buyers." It has often been contended that a buyer can never recover loss of profit on re-sale as damages for non-delivery unless he can show a contract of indemnity. Where a contract contains a term that the promissor, if he shall not perform some term of the contract, shall pay a sum ascertained by

the contract or ascertainable under its terms, and the promisee claims payment accordingly, the promissor is not called on to make compensation for breaking the contract, he is called on to perform it. The statement of the rule in *Hadley* v. *Baxendale* (1) is followed immediately by this passage, which is essential to a proper understanding of the rule: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them." These words seem to me to relate to the assessment of compensation for breach of contract and to be inappropriate to an action for money due under a contract. On the other hand a bare notice is not enough. The buyer must satisfy the court that the seller understood that in the event of re-sale at a profit, he would be called on to pay loss of profit on re-sale in the event of non-delivery and was content to take the risk: see *British Columbia Sawmill Co.* v. *Nettleship* (4), *Horne* v. *Midland Rail. Co.* (5), *Grébert-Borgnis* v. *Nugent* (3). The arbitrators find that both parties contemplated that the buyers would probably re-sell. I think I must take this as meaning that they would probably re-sell at a profit. *Hammond & Co.* v. *Bussey* (2) is authority for holding that it is not necessary in order to entitle the buyer to recover loss of profit on re-sale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would certainly re-sell ; it is enough if both parties contemplate that the buyer will probably resell and the seller is content to take the risk. I think, therefore, that the arbitrator's finding is sufficient to support a claim for loss of profit on re-sale. It might well have been insufficient to support a claim for costs incurred in litigation with a sub-buyer or for penalties or damages paid to him.

As regards the second question, it is thus stated by FRY, L.J., in *Hammond* v. *Bussey* (2) (20 Q.B.D. at p. 100):

> "Having thus ascertained the special circumstances under which the contract was made, and the knowledge of the parties with regard to them, we come to the last question—namely, what may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?"

I think this means, what may the court suppose to have been contemplated by the parties as the probable result of the breach which actually occurred, in the circumstances in which it occurred, assuming them to have applied their minds to the contingency of such a breach? If so, the question in this case is: Considering that the parties contemplated a probable re-sale by the buyers at a profit, what would they have contemplated as the probable result if they had applied their minds to the contingency of a re-sale at a profit and a failure to deliver at a time when goods of the contract description and quality were unobtainable? The answer must be that the buyer would lose his profit on re-sale ; he may lose more, but he must at least lose that.

If there is a market available to the buyer no question of loss of profit on re-sale can arise. There are two classes of cases in which loss of profit has been claimed, although there is a market, on the ground that the market is not available to the

buyer. One is when the sale is of specific goods, and the buyer has re-sold the same goods. The other is where the contract of re-sale has the same delivery date as the contract of sale. Here it is not necessary to consider either class since there was no market at all. In *Grébert-Borgnis* v. *Nugent* (3) the buyer informed the seller that he was buying for the purpose of a contract which he had made, or was making, with a French customer. The buyer's right to recover his loss of profit was admitted in the Court of Appeal. It is difficult to see on what principle the present is to be distinguished from that case since the judgments in *Hammond & Co.* v. *Bussey* (2) show that the right to recover loss of profit may exist where the re-sale is contemplated by both parties as a thing that will probably occur in the ordinary course of business. In *Lyon* v. *Fuchs* (6) the seller knew that the buyer was buying for re-sale. The buyer did re-sell at a profit. That was breach of non-delivery and no market. The buyer recovered loss of profit on re-sale. In *Frank Mott* v. *Muller* (7) the facts were in substance the same and loss of profit on re-sale was recovered. *R. & H. Hall, Ltd.* v. *W. H. Pim Junior & Co., Ltd.* (8) was a sale and re-sale of specific goods, and breach by non-delivery. Rowlatt, J., held, on the construction of the contract of sale, that the parties contemplated a re-sale by the buyer, and a re-sale on identical terms except price, and allowed loss of profit. The Court of Appeal differed from Rowlatt, J., on the construction of the contract and were not satisfied that the parties contemplated a re-sale by the buyer, but there is nothing to suggest that they differed from the view that loss of profit would have been recoverable if there had been such contemplation. Counsel for the sellers relied particularly on *Williams* v. *Reynolds* (9), and the facts there were very similar to those in the present case. Cotton was sold to be delivered in August. The buyers re-sold at a profit the same quantity and quality of cotton to be delivered in August. The result was that when the seller made default on the last day of August it was too late for the buyer to go to the market and obtain goods to satisfy his sub-buyer. In support of a claim for loss of profit counsel urged that the buyers were not bound to get cotton for their sub-buyers before the end of August. On this Blackburn, J., observed (6 B. & S. at p. 497):

> "A prudent purchaser, relying on this contract, would, in making a contract with his vendees, have taken a margin of a week."

In giving judgment the same learned judge said (6 B. & S. at p. 505):

> "Though the purchaser might naturally rely on the seller's contract to enable him to fulfil his own, it is not necessary that he should do so; and if the seller was a slippery customer it would be imprudent to do it; in that case, the purchaser would, as a prudent man, go into the market and supply himself from thence. Here the plaintiff had reason to rely on the defendants, but that does not entitle him to throw upon them the loss of the profit he would have made."

In short, the court, though satisfied that the parties contemplated re-sale by the buyer, were not satisfied that they contemplated a re-sale on such terms that if the seller made default the buyer must be unable to satisfy his sub-buyer. It was a case in which the parties contemplated that in the event of non-delivery the buyer would buy against the seller, and only nominal damages were recoverable. In my opinion, loss of profit on re-sale is recoverable in the circumstances of this case. The first award is therefore right, and there must be judgment accordingly.

*Judgment accordingly.*

Solicitors: *Richards & Butler; Coward, Chance & Co.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

# R. *v.* CHURCH ASSEMBLY LEGISLATIVE COMMITTEE. Ex parte HAYNES SMITH

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Salter, JJ.), November 7, 8, 9, 1927]

[Reported [1928] 1 K.B. 411; 97 L.J.K.B. 222; 138 L.T. 399; 44 T.L.R. 68; 71 Sol. Jo. 947]

*Ecclesiastical Law—Church Assembly—Legislative Committee of Assembly—Consideration of Measures—No duty to act judicially—Prohibition—Certiorari Church of England Assembly (Powers) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 76), *s.* 3 (1).

Neither the Church Assembly of the Church of England nor the Legislative Committee of that Assembly has the duty to act judicially when considering measures which it is proposed to pass into law, and so neither certiorari nor prohibition will lie to these bodies in respect of their consideration of such measures.

Principles stated in *R.* v. *Electricity Comrs.* (1), [1924] 1 K.B. 171, applied.

**Notes.** The procedure for obtaining certiorari and prohibition is no longer by way of rules nisi and absolute for writs. Instead an applicant must now obtain leave to move, and then move, for the desired order. See R.S.C. Ord. 59, rr. 1–10.

Referred to: *Nakuda Ali* v. *Jayaratne*.

As to the Church Assembly not being a judicial body, see 13 HALSBURY'S LAWS (3rd Edn.) 56. For the Church of England Assembly (Powers) Act, 1919, see 7 HALSBURY'S STATUTES (2nd Edn.) 52.

Cases referred to:

(1) *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924], 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719, C.A.; Digest Supp.

(2) *R.* v. *Archbishop of York* (1888), 20 Q.B.D. 740; 57 L.J.Q.B. 396; 59 L.T. 443; 52 J.P. 709; 36 W.R. 718; 4 T.L.R. 483; 19 Digest 244, *270*.

(3) *Cardiffe Bridge Case* (1700), 1 Salk. 146; 91 E.R. 135; sub nom. *R.* v. *Inhabitants of Glamorganshire*, 12 Mod. Rep. 403; 1 Ld. Raym. 580; sub nom. *R.* v. ——, 1 Com. 86; 16 Digest 401, *2458*.

**Rule nisi for prohibition and certiorari.**

The rules nisi were granted for (i) a writ of prohibition to the Legislative Committee of the National Assembly of the Church of England to prohibit them from proceeding further with the Prayer-book Measure, 1927, and (ii) writs of certiorari to the said Legislative Committee and to the Church Assembly to bring up and quash the deposited Book annexed to the said Measure. The rules were obtained on the grounds (i) that the Prayer-book Measure, 1927, was not a Measure passed by the Church Assembly within the meaning of the Church of England Assembly (Powers) Act, 1919, and (ii) that the Measure was not passed by the Church Assembly in accordance with the requirements of art. 14 (1) of the Constitution thereof in that it was never debated by each of the Assembly's three Houses sitting separately. The applicant for the rules was Sir William Frederick Haynes Smith, K.C.M.G., of Turleigh, Bradford-on-Avon, Wiltshire, a member of the Church of England.

A Measure entitled the Revised Prayer-book (Permissive Use) Measure 1923 was introduced into the Church Assembly on Oct. 25, 1922, by order of the House of Bishops. It was expressed to have for its object the authorisation of "the alternative use of certain omissions from, additions to, and deviations from the Book of Common Prayer," and "the issue of supplementary forms of service in public worship in the Church of England, and for purposes connected therewith."

The Measure was considered by the House of Clergy, sitting separately on Jan. 31, 1923, and was approved by a large majority. It was considered by the House of Bishops, sitting separately, on April 16 and 17, 1923, and was approved by a large majority. It was considered by the House of Laity, sitting separately, on April 25 and 26, 1923, and was approved by a majority of 175 to 46. The Measure was next considered for revision by the Houses of Clergy and Laity sitting separately, and was then returned to the House of Bishops with the proposed amendments. Between October, 1925, and March, 1927, the House of Bishops carried out the work of revision and made a considerable change in the form of the Measure. After the revision by the House of Bishops had been completed the Measure was on July 5 and 6, 1927, finally considered by the Church Assembly, the three Houses sitting together under the chairmanship of the Archbishop of Canterbury.

A protest was made that the Measure was not the same Measure as was considered by the Church Assembly at an earlier stage. This protest was overruled by the Archbishop of Canterbury, as chairman, who ruled that the Measure was the same as the original Measure within the meaning of the Standing Orders, and the motion for approval was carried by 517 votes to 133. On July 13, 1927, the Book annexed to the Measure was deposited with the Clerk of the Parliaments, and the Legislative Committee of the Assembly, in pursuance of art. 11 of the Constitution and s. 3 (1) of the Church of England Assembly (Powers) Act, 1919, submitted the Measure to the Ecclesiastical Committee with comments and explanations in the form of a report.

It was contended in support of the rules that what had been done was to tack on to a Measure for a Prayer-book alternative to the Prayer-book of 1662 a Measure for the alteration of the Prayer-book of 1662.

By s. 1 of the Church of England Assembly (Powers) Act, 1919, the Church Assembly was defined by reference to a Constitution set forth in an appendix to addresses presented to the King by the Convocations of Canterbury and York on May 10, 1919. By art. 1 of the Constitution the purpose of the Church Assembly was defined as being "to deliberate on all matters concerning the Church of England and to make provision in respect thereof." Provisions were then made that the Assembly was to consist of three Houses, (i) the House of Bishops, (ii) the House of Clergy, and (iii) the House of Laity. The House of Bishops was to consist of the Upper House of Convocation, the House of Clergy was to consist of the Lower House of Convocation, and the House of Laity was to be elective. The Assembly was to meet at least once a year under the chairmanship of the Archbishop of Canterbury. By art. 10:

> "Nothing (except what relates only to the conduct of business) shall be deemed to be finally passed by the Assembly which has not received the assent of a majority of the members present and voting of each of the three Houses sitting together or separately, and accordingly at sittings of the Assembly, or of any two Houses—(1) Any motion relating solely to the course of business or procedure shall be determined by a show of hands; (2) any other motion may be similarly determined unless any ten members present demand a division by Houses, in which case the motion shall be lost unless it is carried by a majority of the members of each House present and voting."

By art. 11:

> "The Assembly shall appoint a Legislative Committee, including members of all three Houses to whom all measures which it is desired to pass into law shall be referred. The Legislative Committee shall thereupon take such action as may be authorised by statute in order that such measure may become law."

By art. 12:

> "The Assembly may make, revoke, or alter standing orders, consistent with this constitution, for the conduct of elections, and for the meetings, procedure

and business of the Assembly, and for joint sittings of any two Houses." A

By art. 14:

"The Assembly shall be free to discuss any proposal concerning the Church of England and to make provision in respect thereof, and where such provision requires Parliamentary sanction the authority of Parliament shall be sought in such manner as may be prescribed by statute: Provided that any measure touching doctrinal formulæ or the services or ceremonies of the Church of England or the administration of the Sacraments or sacred rites thereof shall be debated and voted upon by each of the three Houses sitting separately, and shall then be either accepted or rejected by the Assembly in the terms in which it is finally proposed by the House of Bishops. B

By s. 2 of the Church of England Assembly (Powers) Act, 1919: C

"(1) There shall be a committee of members of both Houses of Parliament styled "The Ecclesiastical Committee." (2) The Ecclesiastical Committee shall consist of 15 members of the House of Lords nominated by the Lord Chancellor and 15 members of the House of Commons nominated by the Speaker. . . ."

By s. 3: D

"(1) Every measure passed by the Church Assembly shall be submitted by the Legislative Committee to the Ecclesiastical Committee, together with such comments and explanations as the Legislative Committee may deem it expedient or be directed by the Church Assembly to add. (2) The Ecclesiastical Committee shall thereupon consider the measure so submitted to it, and may at any time during such consideration, either of its own motion or at the request of the Legislative Committee, invite the Legislative Committee to a conference to discuss the provisions thereof, and thereupon a conference of the two committees shall be held accordingly. (3) After considering the measure, the Ecclesiastical Committee shall draft a report thereon to Parliament, stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all his Majesty's subjects. (4) The Ecclesiastical Committee shall communicate its report in draft to the Legislative Committee, but shall not present it to Parliament until the Legislative Committee signify its desire that it should be so presented. (5) At any time before the presentation of the report to Parliament the Legislative Committee may, either on its own motion or by direction of the Church Assembly, withdraw a measure from further consideration by the Ecclesiastical Committee; but the Legislative Committee shall have no power to vary a measure of the Church Assembly either before or after conference with the Ecclesiastical Committee. (6) A measure may relate to any matter concerning the Church of England and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including this Act. . . ." E F G H

*Sir John Simon, K.C.*, and *Wilfrid Lewis* showed cause for the Legislative Committee.

*Bevan, K.C.*, and *F. H. L. Errington* showed cause for the Church Assembly.

*Sir Malcolm Macnaghten, K.C.*, and *R. Storry Deans* in support of the rules.

**LORD HEWART, C.J.**—In this case various questions which are doubtless of interest and importance in their proper place have been suggested in the course of the argument, but they do not seem really to arise on the rules under consideration. The court is not concerned with such questions as (i) what are the merits or demerits of the Constitution recognised by the Church of England Assembly (Powers) Act, 1919; (ii) whether the true effect of the statute and the Constitution taken together is to subtract large powers from Parliament and to confer on the bishops far-reaching powers of veto and initiative; (iii) whether it is a paradox or a commonplace to say that the offer of an optional alternative is the same I

thing as the imposition of a compulsory change ; (iv) whether a Measure which leaves the Prayer-book intact is the same as one which insists on fundamental changes in it ; or (v) whether the Church Assembly has accepted a Measure which ought never to have been proposed to it, or whether there has been referred to the Legislative Committee a Measure which ought never to be passed into law. Such questions, whatever their difficulty or importance, are not for this court. They have not been developed in argument because it has not appeared to be necessary to develop them. If they were to be examined it would be necessary to ascertain not only whether the conclusion of the argument flowed from the premises, but also whether the premises themselves were well founded.

There is a preliminary question which is of a decisive character. It is whether either the Legislative Committee or the Church Assembly is a body of the kind to which a writ or certiorari or prohibition ought to issue. The circumstances in which those discretionary writs are issued have often been considered. They were re-stated in concise and clear terms by Atkin, L.J., in *R.* v. *Electricity Comrs.* (1). Speaking of the matter which was then before the Court of Appeal the lord justice said ([1924] 1 K.B. at p. 204) :

> "The matter comes before us on rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

There follow in the judgment of Atkin, L.J., references to a series of cases on very different subject-matters in illustration of that cardinal proposition. The question, therefore, which the court have to ask themselves in the present case is whether either the Church Assembly or the Legislative Committee of the Assembly is a

> "body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially."

It is to be observed that in that phrase Atkin, L.J., used "and," not "or." That a body may, therefore, satisfy the test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects. There must be added to that characteristic the characteristic that the body has the duty to act judicially. That ingredient in such cases must never be absent. As, in earlier days, those writs were issued only to bodies which, without any harshness of construction, could be called courts, so to-day they do not issue except to bodies which are under the duty to act in a judicial capacity.

It is neither necessary nor useful to inquire whether the Church Assembly or the Legislative Committee can properly be said to have legal authority to determine questions affecting the rights of subjects. That question might well give rise to much controversy. Speaking for myself, I am disposed to take the view that the position of those bodies is rather to set in motion, in a preliminary way, proposals for legislation which may or may not mature into legislation. However that may

be, I am satisfied that it is not true to say that either of those bodies has the duty to act judicially. The opening words of the Constitution, recognised and given the force of law by the statute, are:

> "There shall be a National Assembly of the Church of England to deliberate on all matters concerning the Church of England and to make provision in respect thereof."

As part of the appropriate machinery the Assembly is required to appoint a

> " 'Legislative Committee' including members of all three Houses, to whom all Measures which it is desired should pass into law shall be referred."

It is further provided that

> "the Legislative Committee shall thereupon take such action as may be authorised by statute in order that such measure may become law."

In other words we are considering the machinery and internal economy of a deliberative assembly the function of which, so far as the present matter is concerned, is to deal with the earlier stages of that which, if the whole programme were carried out to the end, might become a statute. That does not seem to be a judicial body. It seems to be a deliberative or legislative body. Neither the Assembly nor its Legislative Committee is a body of the kind to which it would be appropriate to issue either a writ of prohibition or a writ of certiorari. In those circumstances I am of opinion that the rules should be discharged.

**AVORY, J.**—I agree that the rules should be discharged on the ground that neither writ will lie, either to the Church Assembly or to the Legislative Committee, in the circumstances of this case. There seems no ground for distinguishing between the writ of prohibition and that of certiorari. The practical difficulties of enforcing them may not be the same, but the same principle applies to both, the principle laid down in *R.* v. *Electricity Comrs.* (1). I shall only add to the passage already read these words from the judgment of BANKES, L.J.

> "These authorities are, I think, conclusive to show that the court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a court."

Adopting that principle, I am of opinion that neither of these bodies is a body exercising judicial functions, or determining judicially questions affecting the rights of subjects. The appellation "Legislative Committee" appears repugnant to the idea that they are exercising judicial functions. In my view, the purpose of the Church of England Assembly (Powers) Act, 1919, was to authorise the Church Assembly, through its Legislative Committee, to promote legislation subject to certain safeguards. That seems clear from the preamble to the Act:

> "Whereas the Convocations of Canterbury and York have recommended in addresses presented to his Majesty on the tenth day of May, 1919, that, subject to the control and authority of his Majesty and of the two Houses of Parliament, powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England. . . . And whereas it is expedient subject to such control and authority as aforesaid that such powers should be conferred on the Church Assembly, &c."

It has been suggested that what was done in this case invaded, or purposed to invade, the right of members of the Church to have the Book of Common Prayer used without amendment of any kind. Even if that is so, no right has been judicially determined by either of those bodies. Standing Order XXXII (d) provided that, when the House of Bishops had concluded all the stages of a measure, except the stage of final approval, they were to submit it for the consent of the Convocations of Canterbury and York to its presentation to the Assembly for final approval. If the Convocation of either province withholds its consent, the Measure

A cannot be proceeded with. It is admitted that no writ of prohibition or certiorari would lie to the Convocation of Canterbury or York, yet, if the applicant is right, the curious result would follow that prohibition might lie to the Assembly after the Measure had been approved by Convocation. It has been suggested that *R.* v. *Archbishop of York* (2) is a decision based only on the antiquity of Convocation, but the true ground of the decision is to be found in the concluding words of the judg-
B ment of Lord Coleridge, C.J.:

> "Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere."

Those words seem just as applicable to the Legislative Committee as to the Church
C Assembly as they were to the Convocation of York then, and as they would be to Convocation to-day.

That ground being sufficient to dispose of the rules, it is unnecessary to express any opinion upon the other question—namely, whether the decision of the Archbishop of Canterbury was final and conclusive or whether this court could go behind it. It is sufficient to quote from *R.* v. *Archbishop of York* (2):

D > "Whether the decision of the Archbishop was correct in point of law is a matter on which we offer no opinion, an expression which must not be taken as suggesting anything in any way unfavourable to it."

For those reasons I agree that these rules should be discharged.

**SALTER, J.**—I agree that the rules should be discharged. The powers conferred
E on the Church Assembly are powers to initiate legislation. No doubt the Measures which the Church Assembly puts forward may affect the rights of the subject, but Parliament has not conferred on it any power to determine judicially any question affecting the rights of subjects. The person or body to whom these writs are to go must be a judicial body in this sense, that it has power to determine and decide, and the power carries with it, of necessity, the duty to act judicially. I think that the
F Church Assembly has no such power and, therefore, no such duty. Its powers are purely deliberative and legislative, and it has no judicial functions.

The widest statement of the rule with regard to the issue of the writs of prohibition and certiorari is to be found in *R.* v. *Inhabitants of Glamorganshire* (3):

> "This court will examine the proceedings of all jurisdictions erected by Act of
G Parliament."

It is to be noted that the word used is "jurisdictions." Holt, C.J., did not say "the proceedings of all persons or bodies entrusted with powers by Act of Parliament." The meaning to be attached to "jurisdiction" is found in another part of that judgment. Counsel in that case had been arguing that no writ of certiorari lay to remove orders made by commissioners of bankrupts. In the judgment the
H reason given is:

> "And as to the commissioners of bankrupts, . . . they had only an authority and not a jurisdiction."

I think that that was the precise point here. Those observations apply à fortiori to the Legislative Committee. I cannot understand how it can be argued that it has
I judicial functions. It seems to be no more than the machinery through which the Church Assembly carries out its legislative functions.

*Rules discharged.*

Solicitors: *Gregory, Rowcliffe & Co.; Wainwright & Co.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

# VOSPER *v.* GREAT WESTERN RAIL. CO.

[KING'S BENCH DIVISION (Atkin and Lawrence, L.JJ., sitting as additional judges), July 18, 1927]

[Reported [1928] 1 K.B. 340; 97 L.J.K.B. 51; 137 L.T. 520; 43 T.L.R. 738; 71 Sol. Jo. 605] B

*Railway—Carriage of goods—Passenger's hand luggage—Loss—Liability of railway company—No negligence by passenger.*

A railway company are liable as common carriers for the safety of passengers' luggage, and so are liable for the loss of hand luggage carried by a passenger, unless they prove that the loss was caused by the passenger's neglect or negligence without which it would not have happened. C

A passenger with a third-class ticket from Exeter to London told a railway porter at Exeter to put his suitcase in a first-class carriage. The porter did so; the passenger went to the restaurant car, got a lunch-ticket, placed his hat and stick in a third-class carriage, returned to the restaurant car, had a meal and found friends there, and then spent the rest of the journey, apart from a visit to the restaurant car for tea, in a different third-class carriage with his friends. On arrival at London he went to the first-class carriage for his suitcase, but found that it had disappeared. It was never found. D

**Held:** the railway company were liable to the passenger for the loss of the suitcase, because the passenger had not failed to take reasonable care of it, and, even if he had neglected to do so, there was no evidence to show that the loss was occasioned by his neglect. E

*Great Western Rail. Co.* v. *Bunch* (1) (1888), App. Cas. 31, applied.

**Quære:** whether the railway company would still have been liable if they could have established either that the passenger had had no intention at all of travelling in the first-class carriage, or that he had intended to travel first-class without paying the extra fare. F

**Notes.** As to the carrier's liability for luggage kept in the passenger's control, see 4 HALSBURY'S LAWS (3rd Edn.) 169, and for cases see 8 DIGEST (Repl.) 131–136.

Cases referred to:

(1) *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128; 52 J.P. 147; 36 W.R. 785; 4 T.L.R. 356, H.L.; 8 Digest (Repl.) 134, *861*. G

(2) *Talley* v. *Great Western Rail Co.* (1870), L.R. 6 C.P. 44; sub nom. *Great Western Rail. Co.* v. *Talley*, 40 L.J.C.P. 9; 23 L.T. 413; 19 W.R. 154; 8 Digest (Repl.) 131, *845*.

(3) *Joseph Travers & Sons, Ltd.* v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp. M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, *278*. H

(4) *Ehinger* v. *South-Eastern and Chatham Rail. Co. and Pullman Car Co., Ltd.* (1922), 38 T.L.R. 678; 66 Sol. Jo. 633; 8 Digest (Repl.) 138, *893*.

(5) *Steers* v. *Midland Rail. Co.* (1920), 36 T.L.R. 703; 8 Digest (Repl.) 134, *865*.

(6) *Richards* v. *London, Brighton and South Coast Rail. Co.* (1849), 7 C.B. 839; 6 Ry. & Can. Cas. 49; 18 L.J.C.P. 251; 13 L.T.O.S. 139; 13 Jur. 986; 137 E.R. 332; 8 Digest (Repl.) 135, *869*. I

(7) *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C.B. 13; 24 L.J.C.P. 137; 1 Jur. N.S. 427; 3 W.R. 409; 3 C.L.R. 805; 139 E.R. 658; 8 Digest (Repl.) 135, *870*.

**Appeal** from Marylebone County Court.

The plaintiff claimed damages against the defendants for loss of a suit-case and

its contents during a journey from Exeter to Paddington on Mar. 1, 1926, by one of the defendants' trains. There was a conflict of evidence in regard to the circumstances in which the suit-case was put on the train, but the county court judge found as a fact that it was placed in a first-class compartment by one of the defendants' porters at St. David's station, Exeter, on the instructions of the plaintiff. The plaintiff held a third-class ticket, and on entering the train placed his hat and stick in a third-class compartment; he then went to the restaurant-car for lunch, and after lunch did not go back to the compartment where he had placed his hat and stick, but to another third-class compartment in which some friends of his were travelling. He left that compartment to take tea in the restaurant-car, and afterwards went back to it with his friends. On arrival at Paddington the suit-case could not be found. The county court judge held that, as there was no evidence where or when the suit-case disappeared, the defendants had failed to discharge the onus of showing that their liability as common carriers was modified by the plaintiff having caused or contributed to the loss by his own negligence. He gave judgment for the plaintiff for £51. The defendants appealed.

*F. T. Barrington-Ward*, K.C., and *Kenelm Preedy* for the defendant railway company, referred to *Great Western Rail. Co.* v. *Bunch* (1), *Talley* v. *Great Western Rail. Co.* (2), *Joseph Travers & Sons, Ltd.* v. *Cooper* (3), *Ehinger* v. *South-Eastern and Chatham Rail. Co. and Pullman Car Co., Ltd.* (4), and *Steers* v. *Midland Rail. Co.* (5).

*Phineas Quass* for the plaintiff passenger.

**ATKIN, L.J.**—This is an interesting case in which events have happened which, I suppose, may happen again in the course of railway transit to passengers on the railway. The plaintiff was travelling back from Exeter to London; he arrived at the Great Western railway station at Exeter in the morning, and thereupon handed a suit-case and a hat to a porter, telling him that he was going to travel by the 1.45 p.m. train from Exeter to London. The porter told him, quite properly, that in those circumstances he ought to put the goods in the cloak room, because, obviously, he had not authority to take possession of the goods on behalf of the company. That was done. The porter was handed the cloakroom ticket, and he arranged to meet the plaintiff when he arrived in time for the afternoon train. The plaintiff duly arrived about 1.30 p.m. and found the porter waiting for him with the suit-case and the hat, and the two then proceeded to the platform from which the train would start. It appears that a couple of carriages are attached at Exeter to a train that comes from Plymouth; those carriages wait in a bay where the Exeter passengers for London get on board. There was some conflict of evidence between the plaintiff and the railway company's servants as to what actually took place. The plaintiff says that he told the porter to label the suit-case, that he took the hat from the porter, and that he saw the porter put the suit-case in the van, gave him the customary tip, after which the porter went away, and the plaintiff went to the restaurant-car and got a ticket for lunch, and deposited his coat, stick, and hat in an empty third-class carriage near the restaurant-car.

The plaintiff had a third-class return ticket. The plaintiff having had his lunch in the restaurant-car and having found friends of his travelling in the Exeter carriages, went back and spent the journey with them except for another visit to the restaurant-car for tea; so that he never travelled either in any first-class carriage or in the third-class carriage where his coat, stick, and hat were. Those facts were found by the learned county court judge. But the railway porter told another story. He said that when they went across the bridge he asked the passenger whether or not he wanted a first-class carriage, and the passenger said "Yes." He then asked the passenger whether he wanted a smoking carriage, and he said "Yes," and that thereupon the porter opened the door of a first-class carriage in the bay, put the suit-case on the seat and the hat on the rack, left the goods, and received his tip. The learned county court judge has found that that was

what really happened, and we have to accept the finding of the learned county court judge on that view of the case. If the learned county court judge chose to accept the view of the railway company's servant in that respect, we cannot interfere with his finding.

Therefore, the position is that the goods were placed by the porter in the first-class carriage at the request of a passenger who held a third-class ticket. When the train arrived at Paddington the plaintiff went to the carriage and failed to find the suit-case, which in fact has been irretrievably lost. He then brought this action against the railway company. It has been well established that railway companies are common carriers of passengers' luggage, they are common carriers of passengers' luggage which is labelled and put in the van and also of hand-luggage which is taken by the passenger and not put in the van; but in respect of the luggage that is not put in the van there is a modification of their ordinary liability. The modification of their ordinary liability is that they are not liable as common carriers if they can show that the loss occurred by reason of the negligence of the passenger in regard to hand-luggage. The authority for that is *Great Western Rail. Co.* v. *Bunch* (1). In that case the wife of the plaintiff had arrived at Paddington Station at 4.20 on Christmas Eve with a bag and two other articles of luggage in order to travel by the 5 o'clock train. The two trunks were labelled and the porter took them and the hand-bag to the plaintiff's wife, the train not being then at the platform. The wife then asked the porter to put the bag in the carriage with her and asked him if it was safe to leave it there. He said that it would be safe and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. After she had left the luggage she and her husband returned to the platform and found that the two labelled articles had been put in the van of the train, but that the porter and the bag had disappeared. Apparently the porter was not identified. I do not imagine it was considered to be a case of theft, but the bag was never found. In an action against the railway company the learned county court judge found that the porter was guilty of negligence, and held the railway company liable. The question arose what was the liability of the railway company in those circumstances. There, undoubtedly, had been two views expressed by the authorities up to that time. LORD WATSON states the controversy in a few words which seems to me conclusive and binding on this court. LORD WATSON says (13 App. Cas. at p. 46):

> "It does not admit of question that passengers' luggage, duly delivered to the company's servants for carriage in the railway van, remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand-luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care; others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants."

LORD WATSON goes on to say (ibid. at p. 48):

> "However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *London, Brighton and South Coast Rail. Co.* (6) and *Butcher* v. *London and South Western Rail. Co.* (7). I think the contract

ought to be regarded as one of common carriage, subject to this modification that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory."

That seems to me to be the view taken both by LORD HERSCHELL and LORD MACNAGHTEN and, indeed, by LORD HALSBURY, who I do not think intends to modify the principle when he says (ibid. at p. 42):

> "All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default."

Counsel for the railway company, in accepting that view of the law—indeed, he is bound to accept it—laid stress on the words there, "accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself," and suggests that that is an essential condition of the contract under the liability of common carriers. It appears to me, however, impossible to confine the doctrine to those narrow limits, because everyone knows that in these days hand-luggage is constantly carried in such circumstances that there is no room in the carriage itself for the hand-luggage, and, with the consent and approval of the railway companies, luggage is constantly carried in the corridors of the railway carriages, either in close proximity to the carriage in which the passenger is travelling, or in as close proximity as the luggage can be put—very often, as we know, in a corner at the end of the coach. It is obvious also that there cannot be a duty on the passenger to remain in the carriage the whole time; there may be occasions on which he may leave and reasonably be absent; indeed, he is invited by the railway company on occasions to be absent for considerable times in taking meals in the restaurant cars which the railway company provides, and in which, as I have said, they invite the passengers to travel for the purpose of the meal. To my mind also an ordinary incidence of carriage is that a passenger who has chosen the carriage in which he is to travel may afterwards for different reasons change his mind and may travel a substantial part of the journey—indeed the whole of the journey—in some other carriage, as, for instance, where he has procured a seat in a non-smoking carriage and desires to smoke, or where he has taken a seat in one carriage and finds friends in an adjoining or some other carriage and joins that party. All those cases appear to me to be cases in which the railway company is still under its liability to carry the goods as part of their contract of common carriers.

The real point appears to me to be this. The porter is given the custody of the goods for the purpose of enabling the company to carry out its part of the contract of transit. As LORD MACNAGHTEN, in *Great Western Rail. Co.* v. *Bunch* (1) said (ibid. at p. 56):

> "The contract, as the case may be, runs from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely."

Therefore, it appears to me that the railway company came under the obligation of the contract to carry these goods securely, subject to the modification which is

mentioned by LORD WATSON. In this case the learned county court judge has found that he is unable to say that the loss was in fact contributed to by the fact that the passenger did not travel with the luggage or that this absence contributed to any lack of care on his part. The learned county court judge has thrown the onus on the railway company, and that appears to me to be right. The railway company are under the initial obligation of common carriers, and if they seek to absolve themselves by reason of a breach of the special terms to which LORD WATSON referred, the duty is on them to show that the loss was occasioned by the passenger's want of care. As the learned county court judge has found in this case that this loss was not occasioned by the plaintiff's lack of care, this judgment must stand.

The only question of some little difficulty which arises in this case is that the goods were put in a first-class carriage, whereas the passenger had a third-class ticket. If it could have been established that the passenger had in fact no intention at all of travelling in that carriage or had the intention of travelling first-class, it might be—I do not say it would be—that a different set of circumstances might arise. But, on the other hand, one knows that third-class passengers do from time to time for different reasons travel in first-class carriages. Sometimes they do it in open violation of their rights, sometimes they do it because there is no room and they think that that absolves them from paying the extra fare; sometimes they do it because they think it convenient to take a third-class ticket and intend to pay the first-class fare. Sometimes there is a reservation, no doubt, that they will not pay unless someone comes and asks them for it. But, nevertheless, those are lawful forms of user of a railway carriage and, as I have said, a third-class passenger is not an outlaw when he travels in a first-class carriage, and the railway company are still under a duty to him personally and they are under a duty in respect of his luggage.

The question, of course, arises on fact in each case whether a person is or is not guilty of a lack of care which caused the loss. That is a matter of fact to be determined in every case. I can well imagine that a judge might find that the onus is discharged if he finds that the passenger on a long journey has left his luggage in a place where there were many other passengers about, and has taken no care of it, and travelled in an entirely different carriage. As I have said, it is a pure question of fact. In this case the learned county court judge has found the onus is not discharged. For those reasons it appears to me that his careful judgment is correct in law, and therefore the appeal must be dismissed with costs.

**LAWRENCE, L.J.**—I agree. It seems to me, on the authority of the *Great Western Rail. Co.* v. *Bunch* (1) that the railway company came under a general liability as common carriers in respect of this suit-case, but that the liability was modified by an implied condition that the passenger should take reasonable care. If the railway company had been able to prove that the loss was caused by the passenger's neglect or negligence, and that it would not have happened without such negligence, then I think they would be entitled to succeed. The learned county court judge seems to me to have placed the onus in the right place. He held that there was no evidence here which would have justified him in holding that the passenger had in fact neglected his duty to take reasonable care, but if he had, certainly that there was no evidence to show that the loss was occasioned by that neglect. In those circumstances I think it follows that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *A. G. Hubbard; H. F. K. Ireland.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

# R. v. WOOD. Ex parte ANDERSON

[King's Bench Division (Lord Hewart, C.J., Avory and Salter, JJ.), October 13, 1927]

[Reported [1928] 1 K.B. 302; 97 L.J.K.B. 113; 138 L.T. 224; 91 J.P. 185; 44 T.L.R. 23; 25 L.G.R. 501; 28 Cox, C.C. 446]

*Coroner—Inquest—Retirement of jury—Consideration of verdict—Presence of coroner in jury room—Effect on inquisition.*

It is contrary to public policy that at an inquest the coroner should go into the jury's room after the jury have retired to consider their verdict and before the verdict has been delivered in open court. If a coroner does so, even though only for the purpose of answering an inquiry which the jury seek to make of him or of giving the jury further directions which they request, the inquisition will be quashed.

**Notes.** The procedure by way of rules nisi and absolute for certiorari has now been abolished. An applicant for certiorari must now obtain leave to move (instead of a rule nisi), and then move for an order of certiorari (instead of a rule absolute). See R.S.C. Ord. 59, rr. 1–8.

Considered: *R.* v. *Devine, Ex parte Walton*, [1930] All E.R. Rep. 302. Referred to: *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal*, [1929] All E.R. Rep. 33; *R.* v. *Reynolds*, [1945] 1 K.B. 20.

As to the requirements for a valid verdict by a coroner's jury see 8 Halsbury's Laws (3rd Edn.) 514; as to quashing inquisitions see ibid. 529, and for cases see 13 Digest (Repl.) 164–166.

Cases referred to:

(1) *Re Ballyragget* (1882), 17 Ir. L.T. 34.

(2) *Re Mitchelstown Inquisition* (1888), 22 L.R. Ir. 279; 13 Digest (Repl.) 166, *68.

**Rule Nisi for a Writ of Certiorari** to quash the inquisition on an inquest held before Mr. John Richardson Wood, coroner for the Thirsk Division of the North Riding of Yorkshire, to inquire into the death of one Walter Tindall.

On Aug. 4, 1927, the deceased was knocked down and killed by a motor car driven by the applicant for the rule, Mr. H. Y. Anderson. At the inquest, which was held on Aug. 6 and 9, 1927, the coroner, after the jury had retired to consider their verdict, went at their request to their room in order to answer questions which the jury desired to ask him for the purpose of assisting them, and he remained with them for a quarter of an hour. The jury returned a verdict of "accidental death" and added a rider that there had been a certain amount of negligence and that they desire to censure severely the driver of the car.

The rule was obtained by Mr. Anderson on the grounds (a) that the coroner was in the jury's retiring-room while they were considering their verdict and that he took the verdict in private, and (b) that the verdict and the rider were contradictory and were bad on their face.

*G. P. B. Lailey* showed cause for the coroner.

*H. J. Wallington* in support of the rule.

*A. R. Linsley* for the Chief Constable of the North Riding of Yorkshire.

**LORD HEWART, C.J.**—This is a rule nisi for a writ of certiorari to remove into this court an inquisition taken before one of the coroners for Yorkshire on the body of one Walter Tindall. It is sought to bring that inquisition into this court in order that it may be quashed without further order. Various grounds are set out in the rule. It is enough, I think, to refer to the first of them: that is, the ground that the coroner was guilty of misconduct in, first, being present in the jury's retiring room, and secondly in taking the verdict from the jury privately. With

regard to the facts of the case there does not appear to be any substantial dispute. According to the affidavit of Mr. Anderson, who was present at the inquest, the following matters happened after the jury had retired to consider their verdict: "The jury had been absent for approximately twenty minutes when they sent a message asking to see the coroner. The coroner then went to the room into which the jury had retired, remaining alone with them at least a quarter of an hour. The coroner then came back into the room where the inquiry was held, and, sitting down at the top of the table, turned to Mr. Crombie" (that is a gentleman who was engaged as a solicitor on behalf of one of the parties) "and whispered certain words to him. Mr. Crombie, who was seated next to me, whispered to me saying that the coroner had told him, 'Verdict of accidental death but they wish the driver to be censured.' The jury then returned to the room, and on being asked by the coroner whether they had agreed on their verdict, the foreman answered, 'Yes' and read, from a piece of paper in his hand, the following words, 'We find after carefully considering all the evidence that Mr. Tindall was accidentally killed by being knocked down by a motor-car, but the jury are of the opinion that there has been a certain amount of negligence on the part of the driver of the car and they wish to pass a severe vote of censure upon him'." In like manner, Mr. Crombie in his affidavit says, "The jury accordingly, under the guidance of the police, then retired into another room on the ground floor. The jury had been absent for about twenty minutes when I was informed and believe that they sent for the coroner, and that he accordingly went into their retiring room and remained with them for about a quarter of an hour. I was with Mr. Anderson in the room on the first floor where the adjourned inquest was being held. The coroner returned into this room just prior to the jury returning and sat in his seat. I was sitting immediately on his left. The coroner whispered to me, 'It is all right, it is a verdict of accidental death, but the jury want the driver censured.' I repeated these words in a whisper to Mr. Anderson. The jury then returned, and, on being asked by the coroner whether they were agreed on their verdict, the foreman of the jury stood up and said, 'Yes,' holding in his hand a piece of paper from which he read the following words,"—those are the words to which I have already referred. Now what is the observation of the coroner himself upon this matter? It is very brief. All that he says is this, "I went to the jury's retiring room at their request as alleged in the affidavit of Mr. Anderson and dealt with the questions upon which they sought my direction." It is not necessary, I think, to enter into other questions which are raised by the affidavits and by the arguments in this case.

Speaking for myself I confine my judgment to this sole ground. It seems to me to be clearly contrary to public policy that a coroner should go into the jury's room after they have retired to consider their verdict, even though it be for the purpose of answering an inquiry which the jury seek to make of him, or of giving the jury further directions which they request. The principle, it seems to me, was clearly stated in a few words in the year 1882, in the Irish case to which reference has been made, *Re Ballyragget* (1). That case came before a court consisting of MAY, C.J., FITZGERALD and BARRY, JJ., and one of the allegations was that during the time when the coroner's jury in that case were in deliberation, the coroner and his clerk remained present. In giving judgment, in which FITZGERALD and BARRY, JJ., concurred, MAY, C.J., said (17 Ir. L.T. at p. 36):

> "As to his not interfering in the discussion when the jury were deliberating, this is no excuse. He has violated the principle to be observed in such cases. The jury should have been segregated from all the rest of the public. This is the proper practice, and it is no answer to the complaint to say that the coroner read the evidence to the jurors when they returned to the room."

In like manner, in the year 1888, in another Irish case, *Re Mitchelstown Inquisition* (2), an inquisition was quashed on the ground of irregularity and of misconduct. In that case also, after the jury had retired, the coroner, being informed that the

jury had agreed, but before their verdict was declared, entered the room where they were in consultation and took their verdict in the room before returning into court. Those matters having been proved, it became common ground that that inquisition could not be supported. The case was tried before a court consisting of Morris, C.J., Harrison, O'Brien and Murphy, JJ.; and Morris, C.J., in giving the judgment of the whole court, used these words (22 L.R. Ir. at p. 301):

> "I now approach a portion of the case with considerable reluctance, because I am obliged to discuss the conduct of the coroner. I am not going to enter into a pedantic exposition of the whole line of authorities showing that an inquisition could be quashed for misconduct on the part of the judicial officer who held it. The cases were to be found in Grady and Scotland's Crown Practice. I will only refer to the *Ballyragget Case* (1) which was decided in this court before May, C.J., and the present Lord Fitzgerald, and the present Barry, L.J. In that case it was held that the coroner, being in the room with the jury before they found their verdict, was an irregularity for which there was no excuse."

And having referred to the facts of the case then before the court, the Chief Justice went on to say:

> "The coroner called his apprentice into the jury room and the apprentice swore that the coroner took no part in the deliberations of the jury, although the apprentice was not there when the coroner first went in, and the apprentice said that the finding which he wrote down was dictated to him by the coroner and not by the jury. But the question did not depend on any groping to ascertain whether or not the coroner interfered. It was public policy that the coroner should not go into the jury room, but that the jury should declare their verdict in open court."

All those words seem to me to apply clearly to the present case. I forbear from entering into other matters; especially do I refrain from making any observations upon the very things which the coroner said and did. It is not suggested by anybody that when he was in the jury room he was doing anything other than helping the jury with their verdict according to their request; but so doing in that place, in those circumstances, he was doing something which ought not to have been done. I am clearly of the opinion, therefore, that this rule should be made absolute and this inquisition quashed.

**AVORY, J.**—I am of the same opinion. The cases which have been quoted in the Irish courts are sufficient authority for quashing this inquisition on the first ground on which the rule was granted. Quite apart from that there appears to me to be general grounds for saying that the proceedings before the coroner were unsatisfactory and that the jury never had any proper direction before them as to what their duty was. I agree that the inquisition should be quashed.

**SALTER, J.**—I agree. The segregation of the jury while considering their verdict is an essential principle in all jury trials, and that principle was not observed on this occasion.

**LORD HEWART, C.J.**—The order of the court is that an inquest be held touching the said death and that that inquest be held by the coroner for the Pickering district of the North Riding of Yorkshire, Mr. J. F. Porter. There need be no view of the body.

*Rule absolute.*

Solicitors: *Eland, Nettleship & Butt*, for *J. R. Wood*, York; *Long & Gardiner*, for *George Crombie & Sons*, York; *Lambert & Hale.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

# R. *v.* TEESDALE

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Salter, JJ.), October 17, 1927]

[Reported 138 L.T. 160; 91 J.P. 184; 44 T.L.R. 30; 28 Cox, C.C. 438; 20 Cr. App. Rep. 113]

B

*Criminal Law—Vagrancy—Incorrigible rogue—Previous conviction—Words "rogue and vagabond" not used—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 4, 5.

By s. 4 of the Vagrancy Act, 1824, it is provided that any person who commits any of a large category of specified offences "shall be deemed a rogue and vagabond within the true intent and meaning of this Act." By s. 5 it is provided: ". . . Every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender . . . to the house of correction, there to remain until the next general or quarter sessions of the peace . . ." A person may be dealt with as an incorrigible rogue under s. 5 of the above Act, on a second conviction of any of the offences specified in s. 4, even though the earlier conviction has not used the actual words "rogue and vagabond," inasmuch as s. 4 provides that any person committing any of the specified offences "shall be deemed" a rogue and vagabond.

C D E

*R.* v. *Evans* (1), [1915] 2 K.B. 762, and *R.* v. *Johnson* (2), [1909] 1 K.B. 439, distinguished.

**Notes.** As to incorrigible rogues, see 10 Halsbury's Laws (3rd Edn.) 701, and for cases see 14 Digest (Repl.) 142–143. For the Vagrancy Act, 1824, see 18 Halsbury's Statutes (2nd Edn.) 202.

F

Cases referred to:

(1) *R.* v. *Evans*, [1915] 2 K.B. 762; 84 L.J.K.B. 1603; 113 L.T. 508; 79 J.P. 415; 31 T.L.R. 410; 59 Sol. Jo. 496; 25 Cox, C.C. 72; 11 Cr. App. 178, C.C.A.; 14 Digest 142, *1061*.

(2) *R.* v. *Johnson*, [1909] 1 K.B. 439; 78 L.J.K.B. 290; 100 L.T. 464; 73 J.P. 135; 25 T.L.R. 229; 53 Sol. Jo. 288; 22 Cox, C.C. 43; 2 Cr. App. Rep. 13, C.C.A.; 14 Digest 142, *1060*.

G

**Appeal** against sentence.

The appellant was convicted of indecent exposure at a court of summary jurisdiction at Lincoln on July 12, 1927. He had previously been convicted on Jan. 7, 1925, at a court of summary jurisdiction at Lincoln of a similar offence. That conviction did not use the actual words "rogue and vagabond," the offence being described as "vagrancy—exposing person with intent to insult certain females in Boultham Lane." That conviction was duly proved, and the appellant was committed to quarter sessions for sentence as an incorrigible rogue under s. 5 of the Vagrancy Act, 1824. He was there sentenced to twelve months' imprisonment with hard labour. Leave to appeal against sentence was granted.

H I

*A. M. Lyons* for the appellant, referred to *R.* v. *Evans* (1), and *R.* v. *Johnson* (2).

*Tinsley Lindley* for the Crown was not called on to argue.

**LORD HEWART, C.J.,** delivered the following judgment of the court.—This appellant, Thomas Teesdale, was convicted at a court of summary jurisdiction in Lincoln of being an incorrigible rogue within the meaning of s. 5 of the Vagrancy Act, 1824, in that he did indecently expose his person with intent to insult a certain female, the appellant having previously been convicted as a rogue and

vagabond under s. 4 of the same Act. He was sent to quarter sessions and was sentenced by the recorder to twelve months' imprisonment. His application for leave to appeal was heard on Aug. 18, 1927, when his counsel apparently raised for the first time a point which was not taken below, with the result that on this appeal against sentence we are looking into the merits.

The point urged is that on a true view of the materials before quarter sessions the conditions laid down by the statute were not fulfilled. It is necessary to see what those are. By s. 4 of the Vagrancy Act, 1824, it is provided that any person who commits any of a large class of acts "shall be deemed a rogue and vagabond within the true intent and meaning of this Act." Section 5 provides:

> ". . . every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . shall be deemed an incorrigible rogue within the true intent and meaning of this Act, and it shall be lawful for any justice of the peace to commit such offender . . . to the house of correction, there to remain, until the next general or quarter sessions of the peace. . . ."

In other words, in order that a person may "be committed to the house of correction, there to remain until the next general or quarter sessions," he must satisfy the condition that he has committed an offence under this Act, having previously committed an offence which brings him within the category of rogues and vagabonds.

Before the court of quarter sessions there was a certificate: "Thomas Teesdale is this day convicted of being an incorrigible rogue"—it enters into particulars and then recites that on Jan. 7, 1925, as was duly proved, the appellant was duly convicted of being a rogue and vagabond. It is not denied that if that certificate is correct, the conditions were complied with, but it is said that in respect of the earlier act there was not in so many words an adjudication that he was a rogue and vagabond, but merely that he was guilty of the offence of exposing his person. In other words, it is said that he had committed an act which brought him within the category, but that the minute of conviction was insufficient because it did not go on to state what the statute said should be deemed—namely, that he was a rogue and vagabond—and it is said that that was an omission which could not be cured by the certificate before the court of quarter sessions. It is argued that there must be an adjudication in express terms that the person is a rogue and vagabond. Attention has been directed to two cases, *R.* v. *Evans* (1) and *R.* v. *Johnson* (2). With regard to both those authorities it is enough to say that they are dealing with cases quite different from the present case, and the condition did not arise. Nor do I think it necessary to deal with the question which arose obiter in *R.* v. *Evans* (1) whether where a person has been twice convicted as a rogue and vagabond he must necessarily be convicted of being an incorrigible rogue.

The true meaning of the words of s. 5 may require consideration at some future date, but the position in regard to the second offence seems to be that no argument is open to the appellant that the first conviction was not a conviction as a rogue and vagabond merely because the words "rogue and vagabond" do not in terms appear in the conviction setting forth particulars of an offence mentioned in s. 4. In the opinion of the court that argument fails, not only because the certificate was in proper form and because the point was not taken, but because the justices clearly treated the appellant in the earlier case as having committed an act of such a character that under the Act he was deemed to be a rogue and vagabond. With regard to the sentence we see no ground for interference.

*Appeal dismissed.*

Solicitors: *Nelson & Jackson*, Lincoln; *J. Baker Anderson*, Lincoln.

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

A

# SILVERMAN *v.* IMPERIAL LONDON HOTELS, LTD.

[King's Bench Division (Swift, J.), January 19, 20, February 3, 1927]

[Reported 137 L.T. 57; 43 T.L.R. 260]

B

*Contract—Implied term—Right to enter and use premises—Duty of occupier to visitor—Bugs in beds at Turkish bath.*

*Invitee—Negligence—Premises dangerous to owner's knowledge—Failure to remedy danger—No warning to invitee—Bugs in beds at Turkish bath.*

C

The defendants, owners of Turkish baths, permitted customers who visited the baths late at night to use the beds in the cubicles till early the next morning. Two customers, who slept the night at the baths, found when they awoke next morning that they had been bitten by bugs. The defendants knew from previous complaints that there was a danger of customers being bitten at their baths despite the precautions which they took, but they did not warn their customers. In an action by one of the customers for damages for breach of contract, and, alternatively, damages for personal injuries caused by negligence,

D

**Held:** the defendants were liable (i) in contract because it was an implied term of the contract under which the plaintiff was admitted to the baths that the baths were warranted reasonably fit for use in the way in which such baths were ordinarily used and that the beds were reasonably fit for sleeping on after a bath: *The Moorcock* (1) (1889), 14 P.D. 64, applied; (ii) in tort because, knowing the dangerous condition of their premises, they had negligently failed to take all reasonable steps to remedy it.

E

**Notes.** By the Occupiers' Liability Act, 1957, s. 2 (2) and s. 5 (1), there is implied in a contract by which a person occupying or having control of premises gives another person a right to enter or use those premises "a duty [on the occupier] to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." By s. 2 (1) this "common duty of care" is owed under the Act by the occupier "to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty . . . by agreement or otherwise." As to terms implied in contracts see 8 Halsbury's Laws (3rd Edn.) 123–124 and for cases see 12 Digest (Repl.) 681–710, as to the duty of care owed by an occupier to persons entering his premises for payment see 23 Halsbury's Laws (2nd Edn.) 606, for cases see 36 Digest (Repl.) 54–61, and for the Occupier's Liability Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 832.

F

G

Cases referred to:

H

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

(2) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. and Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311, Ex.Ch.; 36 Digest (Repl.) 46, *246*.

I

(3) *Hayward* v. *Drury Lane Theatre, Ltd. and Moss Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, *255*.

(4) *Mersey Docks Trustees* v. *Gibbs*, *Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur. N.S. 571; 14 W.R. 872; 2 Mar. L.C. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, *111*.

(5) *Parnaby* v. *Lancaster Canal Co.*, *Lancaster Canal Co.* v. *Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.; 36 Digest (Repl.) 57, *311*.

(6) *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q.B. 944; 64 L.J.Q.B. 568; 72 L.T. 551; 59 J.P. 437; 43 W.R. 497; 11 T.L.R. 366; 39 Sol. Jo. 447; 14 R. 417, C.A.; 42 Digest 970, *22*.

**Action** for damages for breach of contract and negligence.

The defendants were the owners of well-equipped Turkish baths in Russell-Square. The plaintiff and his brother used these baths on the night of Aug. 25–26, 1925, and slept on beds in cubicles there provided. In the morning they woke up to find they had been badly bitten by bugs, and the plaintiff on medical advice had to be absent from business for a time. Both brothers had come from Margate to London on Aug. 25 and had spent the day on their business and the evening at a boxing match before going to the baths. The plaintiff sued for damages for breach of contract and alternatively damages for the personal injuries caused by the negligence of the defendants. The defendants denied that there was any implied warranty that the plaintiff should not be bitten or that they were guilty of any negligence as they had taken every reasonable care to see that their premises were free from bugs.

*B. B. Stenham* for the plaintiff.

*E. F. Lever* and *F. Peregrine* for the defendants.

*Cur. adv. vult.*

Feb. 3. **SWIFT, J.**, read the following judgment. In the month of August, 1925, the plaintiff, Maurice Silverman, who is a manufacturer's agent, was staying with his brother, Mark Silverman, at a furnished house hired by them jointly for the occupation of their families for a summer holiday at Margate. On the 25th of that month the two brothers both had occasion to visit London and to stay the night there. They left Margate some time in the morning; they arrived in London about midday ; they then separated and went about their several businesses, meeting again in order that they might dine together in the evening ; they dined at a restaurant in the West End and then proceeded to witness a boxing competition at the Ring, Blackfriars, and about 10.30 in the evening they went to the Imperial Turkish Baths, situate in Russell-Square, for the purpose of having a Turkish bath and afterwards staying there until the following morning. From the evidence before me it appeared that the Imperial Turkish Baths, belonging to the Imperial London Hotels, Ltd., the defendants, were established in 1913 and were constructed on the most scientific, hygienic, and up-to-date principles, and it is claimed by the defendants that they "are without doubt the finest in the world." Apart from the matters which form the subject-matter of complaint in this action, the evidence was unanimous that the defendant's baths were extremely well managed and in every way well appointed and up to date. When a customer visits the building for the purpose of a Turkish bath it appears that he is shown into a large hall partitioned off into cubicles containing beds or couches, with cupboards for the reception of clothing ; that in those cubicles the customer undressed and, wrapping himself in towels provided by the bath attendants, he then walks into the room or series of rooms comprising the Turkish baths and afterwards returning to his cubicle, reclines on the bed or couch wrapped up in a sheet until he has sufficiently rested and cooled to be able to again go out into the open air. It appears that customers to the baths who go there late in the evening are allowed to remain in the cubicle until early the next morning. For the use of the cubicle by them before and after the bath and the bath and attendance the customer is charged an inclusive sum of 5s. On the morning of Aug. 26 when they left the Turkish baths both the plaintiff and his brother found themselves to be suffering from an irritation of the skin which was afterwards diagnosed to be occasioned by the bite of bugs. In consequence of that irritation the plaintiff, Mr. Maurice Silverman, suffered considerable pain and inconvenience ; he was for a time incapacitated from following his business and he incurred some medical expenses. He brings this action alleging that he sustained personal injuries, with consequent damage to himself, from bug bites received by him whilst on the defendant's premises, and he

alleges that the defendants are liable to compensate him for the damage which he has suffered because they have either broken their contract with him or they have been guilty of negligence which has resulted in the injuries which he alleges he sustained. A

I am quite satisfied that on Aug. 26 the plaintiff was suffering from the effects of recently inflicted bug bites, and I am quite satisfied that the effect of those bites was to cause him the pain and suffering and the monetary loss which I hereafter deal with. The questions which I have to decide are whether those bug bites were sustained by the plaintiff in the defendants' Turkish baths as he alleges, and if so, whether the defendants are in such a way responsible for them as to be liable in law to compensate the plaintiff for the injury which he sustained. The evidence is that when the plaintiff and his brother went to the baths about 10.30 on the night of Aug. 25 there was no mark or sign of any sort on their bodies indicating the bite of any insect. They were stripped and in that condition saw each other, and they were also under the observation of the bath attendant who waited upon them whilst they were in the baths. They have both sworn that neither of them had any mark upon them, nor did they feel any irritation, and I am quite satisfied, and find as a fact, that when they went to the baths they had not been bitten. I am equally satisfied that when they left the baths in the morning both of them had been bitten, and bitten very extensively. I do not think that either of them at first realised the extent of his own or his brother's injuries. The plaintiff says from the time he woke up he felt considerable irritation, but he did not think anything of it, and his brother had not begun to appreciate that he had been bitten until later on in the day ; but I am quite satisfied that they both had been bitten at the time they left the baths in the early morning of Aug. 26. It follows, therefore, that, in my view, the plaintiff and his brother were bitten by bugs whilst on the defendants' premises during the night of Aug. 25 and 26, 1925. This, of course, does not dispose of the case. In the first place it was contended by the defendants that, even assuming that the plaintiff was bitten on their premises, it did not follow that he was bitten by a bug or bugs which were on those premises before he went there. It was contended that, coming from a furnished house in Margate in a third-class railway carriage, spending the afternoon and evening in London, dining in a crowded restaurant and afterwards visiting a boxing competition, he might easily have picked up and carried with him to the Turkish baths the insect or insects which subsequently caused his injury. I think this contention would have been of great weight had the plaintiff alone been bitten whilst on the defendants' premises. But there was the clearest evidence before me that not only was the plaintiff bitten on the night of Aug. 25, but that his brother also was bitten, and that two other persons, quite independently of and quite unknown to the plaintiff, had been bitten in the same way in the defendants' hall on the previous night. There was also evidence before me, quite apart from the allegation of the plaintiff, that there have been complaints made to the defendants' servants of persons having been bitten upon previous occasions, and there was evidence that bugs had been seen by at least two people in the defendants' premises on occasions other than that upon which the plaintiff visited them. In these circumstances I am satisfied, and I find as a fact, that the injuries which the plaintiff sustained were occasioned by bug bites inflicted upon him by bugs which were in the defendants' premises on the night of Aug. 25, and that the plaintiff was in no way instrumental in taking these bugs there or responsible for their being there. B C D E F G H I

It was then contended by counsel for the defendants that they had not been shown to be in any way responsible to the plaintiff for the injuries which he had sustained, because there was no implied warranty in the contract which they had entered into with him that he should not be bitten, and there was no negligence on their part which resulted in the plaintiff's injuries inasmuch as they had taken all reasonable steps to see that their premises were free from bugs. I am of opinion that by the contract made between the plaintiff and the defendants the latter impliedly

warranted that their premises were reasonably fit for use as Turkish baths in the way that such baths are ordinarily used, and, amongst other things, that the beds or couches in the cubicles were reasonably fit for reclining or sleeping on after the bath had been taken. I am also of opinion that the defendants owed a duty to the plaintiff to take reasonable care that no bugs or other dangerous insects should infest their premises. The contract made between the plaintiffs and the defendants was that for the sum of 5s. the defendants should, inter alia, provide the plaintiff with a place in which he could spend the night. It seems to me that such a contract implies a term that the place provided shall be reasonably fit for that purpose. I accept the definition of an implied contract laid down by BOWEN, L.J., in *The Moorcock* (1) cited to me by counsel on behalf of the defendants:

> "Now an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that in all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of both perils or chances."

Applying those words, I cannot come to any other conclusion but that the parties in this case contemplated that the cubicle and bed or couch in which and on which the plaintiff was invited to lie should be free from bugs or other insects which might inflict harm upon the plaintiff, and I am of opinion that in the contract between them there was implied a term that the premises should be so free from bugs as to be reasonably fit for the purpose for which they were to be used. If there were such an implied contract it matters nothing what steps the defendants had taken to render their premises fit; they have contracted that they shall be reasonably fit, and if the premises are not so, and the plaintiff is thereby injured, it avails the defendants nothing although they have taken every possible step in an endeavour to make them fit.

Apart from contract the defendants were, in my opinion, under an obligation to a person using their premises to abstain from negligence, and, if they did not, and the plaintiff was injured thereby he can recover. The plaintiff was, in my opinion, in a better position than a mere invitee, he was a person using the defendants' premises for payment. The defendants therefore owed to him a wider duty than that laid down by WILLES, J., in *Indermaur* v. *Dames* (2), as the duty owed to a person going to premises upon business which concerns the occupier and upon his invitation express or implied; they were bound to see that the premises which they invited the plaintiff to use for payment were reasonably safe, and if they were not safe, and the owners could know of the dangerous condition and negligently did not know of it, they are liable for damages caused: see SCRUTTON, L.J., in *Hayward* v. *Drury Lane Theatre* (3), and *Mersey Docks Trustees* v. *Gibbs* (4), and *Parnaby* v. *Lancaster Canal Co.* (5). A fortiori, the defendants would be liable to the plaintiff if they knew of the dangerous condition of the premises and did not rectify it but allowed the plaintiff to use it without warning whilst the danger continued. From

the evidence as to the statement made by the defendants' manager at the interview with the plaintiff and his brother on the Tuesday after the plaintiff had been bitten, I am satisfied that the defendants knew of the danger, and they allowed the plaintiff to use the premises without rectifying it or warning him of it. I think that in many ways the defendants took great precautions to ensure the cleanliness of their premises and the freedom of the latter from dirt or insects. Detailed evidence was given to me of elaborate brushing, washing, spraying and disinfecting of the beds and couches and of the cubicles and hall which contained them. In my opinion those precautions were not sufficient. A witness for the plaintiff, Miss Charlotte Mahoney, who is a domestic servant, told me that "you do not get bugs in a house which is kept clean," and a witness for the defendants, a bath attendant named Bampton, said, "If you keep the place clean you do not get bugs." Now the evidence before me is that so far back as 1922 a witness named Hillain was badly bitten by bugs and he killed "well over a dozen"; that in May or June Capt. Percy, a veterinary surgeon, was bitten by bugs and that he caught three which he took to the defendants' manager ; that in July or August a Mr. Soloman caught a bug and took it to one of the defendants' servants and that on Aug. 24, 1925, a Mr. Prague and another man (unidentified) were badly bitten by bugs in defendants' premises and complained to the attendants. When the plaintiff and his brother complained some days after Aug. 25 to the defendants' manager the latter stated that he had had complaints before and asked the plaintiff to send in a medical report. I am forced by this evidence to the conclusion, and I find as a fact, that bugs were on Aug. 25, 1925, in the cubicle occupied by the plaintiff and his brother in such quantities as to render that cubicle unfit for use, and I find that they were there in such quantities because the defendants had not taken all reasonable steps to get rid of them after they had received numerous complaints that they were there. I do not think that it could be urged that the presence of one bug upon one occasion would be proof of a breach of this warranty or neglect of their duty, and it seems to me that what I have to determine in this case is whether on the night of Aug. 25, bugs were present in such quantities as to render the premises unfit for use as Turkish baths, or so as to show that the defendants had failed to take reasonable care that such dangerous insects should not be upon their premises. Taking the whole of the evidence into consideration, I have come to the conclusion that upon the night there were upon the defendants' premises bugs in such a quantity as to render the cubicles which was assigned to the plaintiff and his brother unfit for user as a sleeping or reclining place, and that they were there in breach of the defendants' warranty and because of the defendants' negligence, and that the plaintiff has suffered damage in consequence of such breach of warranty and negligence.

Giving full weight to the whole of the plaintiff's special damage as I find it to be proved, and compensating him, as I think, adequately for his pain and suffering and inconvenience, I award to him the sum of £52 10s., and I give judgment for him for that amount with costs on the High Court scale.

Solicitors : *Peet & Manduell; Robinson & Blaber.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

A

## MITCHELL *v.* B. W. NOBLE, LTD.

[Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), February 7, 1927]

[Reported [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; 43 T.L.R. 245; 71 Sol. Jo. 175; 11 Tax Cas. 372]

B

*Income Tax—Deduction in computing profits—Expenditure for purposes of trade—Capital or revenue expenditure—Company—Payment to director to obtain his resignation—Income Tax Act*, 1918 (8 *& 9 Geo. 5, c.* 40), *Sched. D., Rules applicable to Cases I and II, r.* 3 (*a*), (*f*).

C

A private company carrying on the business of insurance and re-insurance brokers depended to a large extent for the maintenance of its business on the standing which it had acquired and on the personal attributes of its directors. One of the directors (A.) was alleged to be guilty of conduct which under an agreement would have enabled the company "to dismiss him forthwith, paying to him such proportion of his salary only as should then be due." The agreement further provided that a director guilty of such misconduct and being so dismissed could be required by his co-directors to sell to them at par his shares in the company. Being desirous of avoiding any scandal which might affect the good name of the company, the directors entered into negotiations with A. which resulted in an agreement dated Dec. 30, 1921, under which A. resigned and the company agreed to pay to A. £19,200 by an initial payment of £5,200 and the rest by instalments over four years. On the question whether those payments were deductible by the company in computing its net profits for the purposes of taxation,

D

E

**Held:** the payments were sums wholly and exclusively expended by the company for the purposes of its trade within the Income Tax Act, 1918, Sched. D., Rules applicable to Cases I and II, r. 3 (a), since they were made to enable the company to carry on its business; they were revenue expenditure and not capital expenditure within r. 3 (f) of those rules ; and, accordingly, they were deductible in computing the company's net profits.

F

Dictum of Viscount Cave, L.C., in *British Insulated and Helsby Cables* v. *Atherton* (1), [1926] A.C. at p. 211, applied.

Decision of Rowlatt, J., (1927), 137 L.T. 33, affirmed.

G

**Notes.** The Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 3, was replaced by the Income Tax Act, 1952, s. 137.

Distinguished: *Overy* v. *Ashford Dunn & Co.* (1933), 49 T.L.R. 230. Considered: *Collins* v. *Adamson & Co.*, [1938] 1 K.B. 477; *I.R. Comrs.* v. *Williams' Executors*, *Williams' Executors* v. *I.R. Comrs.*, [1942] 2 All E.R. 266; *Associated Portland Cement Manufacturers, Ltd.* v. *I.R. Comrs.*, *Associated Portland Cement Manufacturers, Ltd.* v. *Kerr*, [1946] 1 All E.R. 68. Referred to: *Morley* v. *Lawford* (1928), 44 T.L.R. 716; *Anglo Persian Oil Co.* v. *Dale*, [1931], All E.R. Rep. 725; *Investment Trust Corpn., Ltd.* v. *Singapore Traction Co.*, [1935] Ch. 615; *Bassett Enterprise, Ltd.* v. *Petty* (1938), 21 Tax Cas. 730, *Scammell & Nephew, Ltd.*, [1939] 1 All E.R. 337; *Union Cold Storage Co.* v. *Ellerker*, [1938] 4 All E.R. 692; *I.R. Comrs.* v. *Williams' Executors*, *Williams' Executors* v. *I.R. Comrs.*, [1943] 1 All E.R. 318; *Spofforth and Prince* v. *Golder*, [1945] 1 All E.R. 363; *Mann, Crossman and Paulin, Ltd.* v. *Compton, Mann, Crossman and Paulin, Ltd.* v. *I.R. Comrs.*, [1947] 1 All E.R. 742; *Cooke* v. *Quick Shoe Repair Service* (1949), 30 Tax Cas. 460; *Boarland* v. *Kramat Pulai, Ltd.*, *I.R. Comrs.* v. *Kramat Pulai, Ltd.*, *I.R. Comrs.* v. *Southern Malayan Tin Dredging, Ltd.*, *I.R. Comrs.* v. *Malayan Tin Dredging, Ltd.*, [1953] 2 All E.R. 1122; *Morgan* v. *Tate and Lyle, Ltd.*, [1954] 2 All E.R. 413.

H

I

For the Income Tax Act, 1952, s. 137, see 31 Halsbury's Statutes (2nd Edn.) 134.

Cases referred to : A

(1) *British Insulated and Helsby Cables* v. *Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187, H.L.; 28 Digest (Repl.) 133, *499*.

(2) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 22 T.L.R. 754; 50 Sol. Jo. 666; 5 Tax Cas. 215, H.L.; 28 Digest (Repl.) 79, *298*.

(3) *Hancock* v. *General Reversionary and Investment Co., Ltd.*, [1919] 1 K.B. 25; 88 L.J.K.B. 248; 119 L.T. 737; 35 T.L.R. 11; 7 Tax Cas. 358; 28 Digest (Repl.) 129, *491*. B

(4) *Smith* v. *Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 30 T.L.R. 588; 6 Tax Cas. 477; 28 Digest (Repl.) 132, *496*.

(5) *Ounsworth* v. *Vickers, Ltd.*, [1915] 3 K.B. 267; 84 L.J.K.B. 2036; 113 L.T. 865; 31 T.L.R. 530; 6 Tax Cas. 671; 28 Digest (Repl.) 118, *454*. C

**Appeal** by the Crown from an order of ROWLATT, J.

The material facts are set out in the headnote and in the judgment of LORD HANWORTH, M.R. ROWLATT, J., held that sums paid to a director of the taxpayer, B. W. Noble, Ltd., to procure his resignation were deductible by the company from its profits in computing its net profits for the purposes of taxation. D

*The Attorney-General* (*Sir Douglas Hogg, K.C.*), and *R. P. Hills* for the Crown. *E. M. Konstam, K.C., C. T. de Quesne, K.C.*, and *S. P. J. Merlin* for the company.

**LORD HANWORTH, M.R.**—This case raises the question whether or not a deduction can be made within r. 3 of the Rules applicable to Cases I and II of Sched. D of the Income Tax Act, 1918, as being a sum wholly and exclusively laid out or expended for the purposes of the trade. Secondly, it raises the question whether, if it is so wholly and exclusively laid out, it is to be treated as attributable to capital or not? E

The company was a private company and it carried on a business of insurance brokers and re-insurance brokers. It had business both in London and Paris, and the special circumstances of the holding of the capital and the original issue of the notes which are provided under the agreement, to which our attention has been called, offer features which are peculiar to this present trading company. It was, however, a company which, with a very small capital was able, by reason of the standing which it had acquired and the personal attributes of its directors, to do a large business, which resulted in very large dividends. In 1921 disputes arose with a particular director. That director was a shareholder and he was in a position, even if he had been removed from his directorship, still to hold his shares. The charge against him was that he had been guilty of conduct which would have brought him within a clause of the agreement of Nov. 25, 1918, to which our attention has been called. Under that agreement, cl. 18 is : F G

> "If a director should commit an act of bankruptcy or compound with his creditors or be guilty of such misconduct towards the company or otherwise as would in the absence of any agreement to the contrary entitle the company summarily to dismiss a director so offending from his employment, the company should have power to dismiss him forthwith, paying to him such proportion of his salary only as should then be due." H

Then a provision was made whereby that clause could be put in force ; and, further, under cl. 19, within one calendar month of a director being dismissed from his employment under the provisions of cl. 18, either or both of the remaining parties—the other directors—should be at liberty to give to the party so dismissed notice in writing requiring him within seven days to sell at par and transfer to the remaining parties, either in equal shares or such shares in proportion as they should in writing direct, the whole of the shares in the company then held by the party so dismissed. In 1920 disputes arose with this director, who was the holder of a I

certain number of shares, and it was alleged against him by his colleagues that he had in fact been guilty of conduct which would have brought into operation that cl. 18, with the consequent rights which would have inured to them of being able to demand that he should hand over the shares under cl. 19. The Case finds that, this situation having arisen,

> "the other directors desired to get rid of him and considered it necessary for the sake of the good name of the company to do so. It was admitted in evidence before us that the company might possibly have been justified by law in exercising its powers of dismissal, but as the other directors were very anxious that the matter should not become public, and that a scandal affecting the reputation of the company should be avoided, they entered into negotiations with this director for his retirement,"

and ultimately terms were agreed.

The effect of that agreement was shortly that with reference to his shares in respect of which a demand could have been made under cl. 19 if he had been guilty under cl. 18, those shares were transferred at face value to his colleagues, but this director was not minded to admit that he had been guilty of conduct which enabled his colleagues to put in force cl. 18 ; he was, however, prepared to negotiate, and no doubt the fact was that he was in a strong position. This company was doing very good business indeed ; it is a business, however, to which good faith, standing, and credit are essential, and we must by no means overlook the findings of the commissioners that the other directors considered it necessary for the sake of the good name of the company to get rid of this director, and they also were bonâ fide satisfied that, if possible, they ought to avoid a scandal affecting the reputation of the company, for both those objects were objects which were of deep importance to the company. The company's immediate as well as future interests were concerned in the way in which the directors handled that situation. The directors had to deal with a difficult problem, and remembering their attitude which I have already recounted, it seemed right to them to make an agreement with this director which should prevent a scandal, free the company from the serious position in which the continuance of this director as a director would have placed them, and enable the company to continue to maintain its good name and its good business. By the agreement, therefore, which they made on Dec. 30, 1921, apart from the term whereby the other directors bought his shares, it was agreed that the company should pay to this director £19,200, and this total was the agreed sum settled between the parties, but payment was to be by instalments over a period of four years ; there was to be an immediate payment of £5,200 of it, and for the rest there were to be four payments of £3,500 successively year by year.

It is contended, first, that this is not within r. 3, that this sum of £19,200 is not money wholly and exclusively laid out or expended for the purposes of the trade. The commissioners held that it was a business expense, and they allowed the deduction. I think that we must interpret that phrase of the commissioners as meaning that the expense was incurred for the benefit of and in relation to the carrying on of the business of the company ; and after looking at their findings I can well understand their reaching that conclusion. Secondly, I think that the observation of my learned colleague is well founded ; that in fact they allowed the deduction, with the result that they intended to show that in treating it as a business expense they meant to find, so far as it is a question of fact, that it was an expense wholly and exclusively laid out or expended for the purposes of the trade. Junior counsel for the Crown, however, is quite right in saying that the mere findings of fact would not be sufficient unless it was possible for an expense of this sort to have attributed to it the necessary characteristics which are required in order that in law it may be a deduction. By this rule no deductions are to be made unless r. 3 (a) is fulfilled and under r. 3 (f) no deduction is permissible in respect of capital.

On the point whether or not this was an expense wholly and exclusively laid out for the purposes of the trade, it appears to me that so far as the question of fact can be found, there is a definite finding of the commissioners that it was so ; and as to whether or not they could or were entitled to find that it was an expenditure for trade, I agree with ROWLATT, J., that the words used by VISCOUNT CAVE, L.C., in his speech in *British Insulated and Helsby Cables* v. *Atherton* (1) are germane to this decision. He says ([1926] A.C. at p. 211) :

> "It was made clear [by the cases] that a sum of money expended, not of necessity and with a view to do a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of a business, may yet be expended wholly and exclusively for the purposes of the trade . . ."

If I may respectfully say so, I think the authorities which are cited by the Lord Chancellor clearly point to that being a compendious summary of the effect of them. The co-directors were minded in taking this action to save their trade from a scandal, the directors were satisfied that it was not possible to keep this director as a director, and that it was in the interests of the good name of the company to get rid of him ; and it appears to me that one must hold first of all that this sum was expended by the company, and then I think it is plain that within r. 3 (a) this sum ought to be allowed to be deducted as an expense for the purposes of the trade. Applying another test, an older test, which is laid down in *Strong & Co., Ltd.* v. *Woodifield* (2) by LORD LOREBURN, where he says ([1906] A.C. at p. 452) :

> "I think only such losses can be deducted as are connected with it in the sense that they are really incidental to the trade itself,"

I think the same results follow ; or if I apply the words of LORD DAVEY (ibid. at p. 453) :

> "These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade."

It seems to me that the directors had to handle a situation of both delicacy and gravity, and, their bonâ fides not being questioned, it is clear that they took a course which they were justified in taking and made a payment in the interests of the carrying on of their trade.

That being so, the second question arises : Is it to be treated as a capital expense? It is said, not unfairly, that the sum was definitely agreed, a payment no doubt by instalments, but the sum was immediately ascertained, and was in that sense in the nature of a capital payment, liquidated though it may be over a subsequent period of time ; and it is said that for this payment they obtained an immediate result, namely, the resignation of the director. It was not a recurring incident ; it was not something which would have to be dealt with in subsequent years, but it was an immediate result final in its conclusion inasmuch as it severed the connection between the director and the company. All that is very true, and I agree that perhaps it is more difficult to see whether it should be treated or not as a capital payment, but I think ROWLATT, J., puts it well at the end of his judgment, where he says :

> "This gentleman being there as an unsatisfactory servant was not a permanency. He was no doubt there for his life, but I do not think you can say : 'By that expenditure of capital I will get rid of this nuisance affecting my business, and have his room rather than his company by making this capital expenditure. I cannot look at it in that way. It seems to me it is simply this, athough the largeness of the figures and the peculiar nature of the circumstances perplex one, that this is no more than a payment to get rid of a servant in the course of the business and in the year in which the trouble comes."

We have had a number of cases reviewed which were discussed and considered in this court and in the House of Lords in the *British Insulated and Helsby Cables* v.

*Atherton* (1), and the Lord Chancellor gives the instances of payments which have been chargeable, although apparently final in their quality and are held to be properly chargeable against the receipts for the year. He said ([1926] A.C. at p. 213):

> "Instances of such payments may be found in the gratuity of £1,500 paid to a reporter on his retirement . . . and in the expenditure of £4,494 in the purchase of an annuity for the benefit of an actuary who had retired, which in *Hancock's Case* (3) was allowed, and I think rightly allowed, to be deducted from profits."

I respectfully share the view of LORD BUCKMASTER that it is not easy to find much help from the particular facts of decided cases; nor is it easy to define the limits of the principle on which one is acting. At the same time, in a concrete case it is possible to determine whether an expenditure is a capital expenditure or rightly to be attributed to revenue. I do not in the least wish to go back on anything that I said myself in the *British Insulated and Helsby Cables Case* (1), but it appears to me that on the facts of this case this sum should be treated as a revenue item and not as a capital item. It seems to attain more closely to *Hancock* v. *General Reversionary and Investment Co., Ltd.* (3), and the *Law Reporting Case* (4), rather than to other cases such as *Ounsworth* v. *Vickers, Ltd.* (5), and the *Helsby Cables Case* (1) itself. It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company, but to enable them to continue, as they had in the past, to carry on the same type and high quality of business unfettered and unimperilled by the presence of one who, if the public had known about it, might have caused difficulty to their business and whom it was necessary to deal with and settle with at once.

For those reasons it appears to me that on the second point ROWLATT, J., was also right. I agree, therefore, with his reasoning and his conclusions, and I think the appeal must be dismissed with costs.

**SARGANT L.J.**—I am of the same opinion. So far as questions of fact go, the decision of the commissioners is in favour of the taxpayer here; but their decision in a case of this kind is not conclusive, because it is obvious that questions of law, as well as of fact, arise in determining whether such a payment as this is brought or is not brought within the permissible deductions allowed under the Income Tax Acts.

First, as to the question whether this was a disbursement wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation, it seems to me that there is nothing at all to show that it was not so exclusively laid out. The object as disclosed by the Case was the object of preserving the status and reputation of the company, which the directors felt would be imperilled either by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid that and to preserve the status and dividend-earning power of the company, it seems to me a purpose which is well within the ordinary purposes of the trade, profession, or vocation of the company. A good deal of stress was laid on this, that the individual directors were enabled to purchase at par shares in respect of which a very very large dividend was being earned, but it is to be noted that that is only precisely what they would have been entitled to do if the director had been in fact dismissed, under cl. 18; they would have been entitled to get his shares under cl. 19. Beyond that, it appears to me that in a company of this kind it was absolutely necessary that if a director left the service of the company, his shares should be transferred to the other directors of the company. The constitution of the company, which was substantially a private company, showed that it was recognised that the very small share capital—very small in proportion to the earning power of the company—should be held exclusively by those who had the direction and management of the company. Again, the

mere fact that this very large dividend would be earned for the directors on the shares so transferred does not appear to me in any way conclusive or tending against them, for this reason, that they, if they were to get these dividends, got those results through the prosperity of the whole company. It was only as an incidental or secondary result of the prosperity of the whole company that their shares, and the participating certificates, would result in large profits for them ; and, therefore, although that might be the result, none the less, as it was a secondary result and only followed on the prosperity of the whole company, a payment to insure the prosperity of the whole company was not, in my judgment, in any way tarnished or rendered suspicious by the fact that it would ultimately inure in a secondary sense for the benefit of those who remained the directors and managers of the company.

Then comes the point whether this very large payment was so exceptional in its nature that it must be considered as a capital payment and not a payment by way of deduction from annual outgoings. With regard to that, I entirely agree with the view of the learned judge, that the dismissal of a servant, or compensation paid to ensure the dismissal of a servant (which, this director was) is a payment which would in the ordinary course be attributed to the year in which the payment was made, and I see no reason for thinking in this case that it was of the nature of a capital expenditure. A situation of this sort is, unfortunately, liable to recur ; I hope it may not recur in the annals of this company ; but by making the payment they have in no way ensured that it shall not occur in the future, any more than in the case of any other company. I am a little struck with this, a circumstance which I think was noted in the dissenting judgments both of Lord Carson and Lord Blanesburgh in *British Insulated and Helsby Cables* v. *Atherton* (1), that it is impossible to say to what capital account of the company one could possibly attribute this payment. It is quite impossible to put against the capital account of the company, as I conceive it, a payment of this nature. It seems to me that the payment, though large and though exceptional, was not of such a nature ; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business. It was a payment which as a matter of fact was made out of the profits of the company, apparently, as to the £5,000 in the year in which it was paid, and, as to the future payments, it will have to be made from the profits in the year in which those payments will have to be made. To my mind, it is essentially different from those various payments in the cases which have been referred to, which were of the nature of adding to the equipment, or improving the equipment, or otherwise made for the permanent benefit of the company. Junior counsel for the Crown spoke throughout of the directorship of the director who was dismissed as being a life director, but I think that really is to miss the point. He was to be a director for life unless he was dismissed ; and it was because the other directors thought he was liable to be dismissed and were seeking to dismiss him, and therefore to make his office a much more temporary office than a life office, that the whole of this question arose and that this payment had to be made.

In my judgment the learned judge was right on both points, and the appeal should be dismissed.

**LAWRENCE, L.J.**—I agree that the sum in question was wholly and exclusively expended by the company for the purpose of its business, in the sense that the sole object with which the company made the payment was to enable the company to continue to carry on and earn profits in its business. On the question whether the sum is capital or revenue expenditure, a point on which the commissioners have given no express finding, I confess to having had a doubt, which is not yet wholly resolved, whether the payment was not made to secure an advantage for the enduring benefits of trade within the meaning of that expression used by Lord Cave in the *British Insulated and Helsby Cables Case* (1). As, however, both the

Master of the Rolls and SARGANT, L.J., have arrived at a definite conclusion that the sum was a revenue expenditure, and as my doubts are not strong enough to cause me to dissent from the judgments just delivered, I do not think that any useful purpose would have been served if counsel for the respondents had been called upon. Accordingly, the appeal will be dismissed.

*Appeal dismissed.*

Solicitors: *Solicitor of Inland Revenue; Ashley, Tee & Sons.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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## ATTORNEY-GENERAL *v.* BELILIOS

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), October 24, 25, 26, November 29, 1927]

[Reported [1928] 1 K.B. 798; 97 L.J.K.B. 139; 138 L.T. 294; 44 T.L.R. 214; 72 Sol. Jo. 49]

*Succession Duty—Succession—Foreign property—Foreign will—Appointment of English trustees—Orders of English court in execution of trusts—Taxation of succession on death of life tenant.*

*Estate Duty—Foreign settlement made by will—Foreign property—Appointment of English trustees—Orders of English court in execution of trusts—Death of life tenant—Creation of English settlement—Liability to duty of foreign assets.*

By his will made in 1883, a testator, who died in 1905 domiciled in Hong Kong, declared that the will was to take effect according to the law of Hong Kong. His estate, which comprised real and personal property in Hong Kong, was directed to be held, in the events which happened, on trust for his son for life and subject thereto for his grandsons. The testator's son was at all material times domiciled in Hong Kong, and probate of the will was granted to him. In 1911, new trustees, domiciled and resident in the United Kingdom, were appointed, and various applications were thereafter made to the court in England relating to the execution of the trusts of the will. The grandsons were made wards of the English court. In 1922, the son died and estate duty and succession duty were claimed in respect of trust property which was situated in Hong Kong.

**Held:** the successors (i.e., the grandsons) did not become entitled by virtue of the laws of England, because the appointment of English trustees and the orders of the English court did not have the effect of constituting the will an English settlement; and, therefore, the grandsons' succession was not liable to succession duty and it followed that no estate duty was exigible.

Dictum of VISCOUNT CRANWORTH, L.C., in *Wallace* v. *A.-G.* (1) (1865), 1 Ch. App. at p. 7, applied.

Dictum of BACON, V.-C., in *Thompson* v. *Birch* (2), [1876] W.N. 177, dissented from.

**Notes.** Succession duty and also legacy duty were virtually abolished by the Finance Act, 1949, s. 27. Estate duty on property situated abroad was by s. 28 (2) of that Act imposed on a basis similar to that which subsisted prior to the abolition of legacy and succession duty.

Followed: *Duke of Marlborough* v. *A.-G.* (*No. 1*), [1945] 1 All E.R. 165. Referred to: *Re Drake's Settlement Trusts*, *Wilson* v. *Drake*, [1937] 4 All E.R. 171.

As to estate duty on property situated outside Great Britain see 15 HALSBURY'S LAWS (3rd Edn.) 56 et seq.

Cases referred to:

(1) *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 11 Jur. N.S. 937; 14 W.R. 116, L.C.; 21 Digest 63, *413*.

(2) *Thompson* v. *Birch*, [1876] W.N. 278, C.A.; 21 Digest 99, *726*.

(3) *A.-G.* v. *Campbell* (1872), L.R. 5 N.L. 524; 41 L.J.Ch. 611, H.L.; 21 Digest 99, *719*.

(4) *Re Cigala's Settlement Trusts* (1878), 7 Ch.D. 351; 47 L.J.Ch. 166; 38 L.T. 439; 26 W.R. 257; 21 Digest 101, *732*.

(5) *Wolverton* v. *A.-G.*, [1898] A.C. 535; 67 L.J.Q.B. 829; 79 L.T. 58; 62 J.P. 708; 47 W.R. 97; 14 T.L.R. 519, H.L.; 21 Digest 90, *660*.

(6) *Harding* v. *Queensland Stamps Comrs.*, [1898] A.C. 769; 67 L.J.P.C. 144; 79 L.T. 42; 14 T.L.R. 488, P.C.; 21 Digest 83, *d*.

(7) *Lambe* v. *Manuel*, [1903] A.C. 68; 72 L.J.P.C. 17; 87 L.T. 460; 19 T.L.R. 68, P.C.; Digest Supp.

(8) *Lord Advocate* v. *Macalister*, [1924] A.C. 586; 93 L.J.P.C. 220; 131 L.T. 545; 40 T.L.R. 564; 68 Sol. Jo. 575, H.L.; 21 Digest 107, *796*.

(9) *A.-G.* v. *Jewish Colonisation Association*, [1901] 1 K.B. 123; 70 L.J.Q.B. 101; 83 L.T. 561; 65 J.P. 21; 49 W.R. 230; 17 T.L.R. 106, C.A.; 21 Digest 97, *714*.

(10) *Re Badart's Trusts* (1870), L.R. 10 Eq. 288; 39 L.J.Ch. 645; 24 L.T. 13; 18 W.R. 885; 21 Digest 99, *725*.

(11) *Toronto General Trusts Corpn.* v. *R.*, [1949] A.C. 679; 88 L.J.P.C. 115; 121 L.T. 106; 35 T.L.R. 450; sub nom. *R.* v. *Toronto General Trusts Corpn.*, [1919] 2 W.W.R. 354; 46 D.L.R. 318, P.C.; 21 Digest 99, *t*.

(12) *Winans v. A.-G.*, [1910] A.C. 27; 79 L.J.K.B. 156; 101 L.T. 754; 26 T.L.R. 133; 54 Sol. Jo. 133, H.L.; 21 Digest, 5, *1*.

(13) *A.-G.* v. *Johnson*, [1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720; 21 Digest 98, *718*.

(14) *Re Smith's Trusts* (1864), 10 L.T. 598; 12 W.R. 933; 21 Digest 99, *724*.

(15) *Duke of Northumberland* v. *A.-G.*, [1905] A.C. 406; 74 L.J.K.B. 734; 93 L.T. 88; 54 W.R. 31; 21 T.L.R. 639, H.L.; 21 Digest 84, *602*.

(16) *A.-G.* v. *Lord Sudeley*, [1896] 1 Q.B. 354; 65 L.J.Q.B. 281; 74 L.T. 91; 60 J.P. 260; 44 W.R. 340; 12 T.L.R. 224, C.A.; affirmed, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 45 W.R. 305; 13 T.L.R. 38, H.L.; 21 Digest 122, *917*.

**Appeal** by the taxpayers from a decision of ROWLATT, J.

The Attorney-General by information claimed estate and succession duty on the death in 1922 of Raphael Belilios, tenant for life under the will of his father Emanuel Belilios, who died domiciled in Hong Kong in 1905, leaving estate, mostly consisting of investments in Hong Kong companies, of the value of £66,000. The testator gave all his property, subject to an annuity to his wife, to his son for life, with remainder to the son's children in equal shares. The facts are stated shortly in the above headnote and fully in the judgments of the court. ROWLATT, J., held, following a decision of BACON, V.-C., in *Thompson* v. *Birch* (2) and distinguishing *Wallace* v. *A.-G.* (1), that estate duty was payable, but that no succession duty was payable as the Finance Act, 1925, s. 24, was not retrospective. The defendants appealed.

*Maugham, K.C.*, *Latter, K.C.*, and *J. D. Israel* for the taxpayers.

*The Attorney-General* (*Sir Douglas Hogg, K.C.*), and *Beebee* for the Crown.

***Cur. adv. vult.***

Nov. 29. The following judgments were read.

**LORD HANWORTH, M.R.**—This is an appeal from Rowlatt, J., who, on June 17, 1927, gave judgment on this information in favour of the Crown. The relevant facts are few and not disputed. The testator, Emanuel Raphael Belilios, late of Victoria, in the colony of Hong Kong, made his will dated Oct. 1, 1883. By it, after making provision for his wife, he left his property, which included both real and personal property in Hong Kong, to his son for life, and then to his children. The information states that the testator declared that the will, so far as the case admitted, with an exception thereinafter mentioned was to take effect according to the law of Hong Kong. The testator died domiciled in that colony on Nov. 11, 1905, and probate of his will with two codicils was granted there to his son on May 15, 1906. The son, Raphael Emanuel Belilios, who was domiciled at Hong Kong, died on Oct. 17, 1922, in the United Kingdom. At his death the beneficial interest in the estate of which he had been tenant for life passed under the dispositions of the testator to the two infant sons of Raphael Emanuel Belilios. That estate consisted of (a) some £1,300 in a bank in the United Kingdom; (b) shares in Hong Kong companies which realised £66,246 15s. 7d., and also some other shares; (c) some immovable property situate in the colony of Hong Kong.

Between the deaths of the testator and of his son a number of applications had been made to the Chancery Courts here, and new trustees, domiciled and resident in the United Kingdom had been appointed. No question arises as to the property in the United Kingdom, which passes under the testator's will; but the appellants contend that the Crown are not entitled to be paid succession duty, on the death of the son in 1922, in respect of what may be called the Hong Kong property. Probate duty amounting to £7,634 was paid on that in the colony. The Crown contend that succession duty under the Succession Duty Act, 1853, s. 2, and likewise estate duty—which they admit rests on the same footing—is payable on all the property passing on the death of the son in 1922, on the ground that "At the date of the death of the said Raphael Emanuel Belilios the will of the said testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice, whose wards the said infants had become and then were by virtue of the orders hereinbefore referred to."

The question, therefore, to be decided is whether what was undoubtedly, so to speak, a foreign settlement in 1905 has now become a settlement subject to succession duty. For the appellants it is argued that the wide words of s. 2 which would in their terms cover any property wherever situate—even belonging to a non-resident foreigner—must be governed by some limitation, and that it is limited to the succession to property of those who become entitled to it by the laws of this country.

The Attorney-General, contra, argues that a disposition—even if originally foreign—may come within the Act if there are British elements attached to or concerning it, so that British law is invoked, as was done in the present case. When a British forum is involved, and its aid invited, he claims that that gives a different effect to the disposition, which may, and ought in the present case to be held to fall within the section.

Section 2 of the Act of 1853 opens with the words:

> "Every past or future disposition of property . . . and every devolution by law of any beneficial interest in property or the income thereof . . ."

Lord Cranworth had to consider these wide words in *Wallace* v. *A.-G.* (1). He rejects the suggestion that, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person becoming entitled within s. 2; and he states his opinion (1 Ch. App. at p. 7):

"I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country." A

Those words appear to me to be supported, and not challenged by, or mistrusted in, the judgment of LORD WESTBURY in *A.-G.* v. *Campbell* (3). (L.R. 5 H.L. at p. 530 and p. 531). LORD WESTBURY does not doubt LORD CRANWORTH's decision, for he points out the "extraordinary conclusion" that was contended for, viz., that under the will of a man dying domiciled abroad, the first legatee, though not liable to legacy duty, became liable to succession duty under the Act. Then he deals with the case before him, in which under the direction of the terms of the will a trust in this country had been created, and he pointed out that the character of the ownership was determined under the trusts directed to be created by the will. B

The reasoning of the Master of the Rolls in *Re Cigala's Settlement Trusts* (4) does not, in my judgment, run contrary to the above decisions. Applying the tests used by SIR GEORGE JESSEL to the present case, the settlement in the present case is the testator's will, a settlement by and on persons who were foreigners to the law of this country of property which was situate in that other country. If so, it remains a Hong Kong settlement and succession. C

"I am unable to find in the Act any warrant for the view that a succession once created can by the act of the successor cease to exist and another succession be substituted for it," D

said LORD HERSCHELL in *Wolverton* v. *A.-G.* (5) ([1898] A.C. at p. 548); unless, however, by a direction such as was found in *A.-G.* v. *Campbell* (3) there was a trust created subject to a different jurisdiction. The words of LORD CRANWORTH are accepted in the judgment in *Harding* v. *Queensland Stamps Comrs.* (6) ([1898] A.C. at p. 774). That judgment includes the great authority of LORD WATSON and LORD DAVEY. Finally, LORD MACNAGHTEN, giving the judgment of LORD HALSBURY, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY, as well as of himself, in *Lambe* v. *Manuel* (7), repeats the approval of the case of *Wallace* v. *A.-G.* (1). It is also, I think, clear that the date when the character of the succession becomes attached to it is at the moment when the succession is conferred: "The date of the entitlement" as LORD CAVE calls it in *Lord Advocate* v. *Macalister* (8). E F

It seems, therefore, that 1905 is the dominant date to decide the nature of the settlement and of the succession. If so, this succession was foreign. What has happened to bring the succession or any trust relating to it within this jurisdiction? The facts of the present case do not bring it within the decision in *A.-G.* v. *Campbell* (3). STIRLING, L.J., in his exhaustive review of the cases in *A.-G.* v. *Jewish Colonisation Association* (9) appears to hold that the question whether any property comes within the purview of s. 2 of the Succession Duty Act, 1853, depends on the facts and circumstances of each case. He said: G

"Weighing all these circumstances as best I can I think there is nevertheless a strong preponderance in favour of the view that inasmuch as the settlement in question is an English settlement . . ." H

The tests he applies are: (i) According to what law was the operative settlement made? (ii) Where was the legal control? (iii) What forum had cognisance of the trusts? STIRLING, L.J., does not suggest that the principle formulated by LORD CRANWORTH is incorrect, though he holds that his rule must be taken to be satisfied where property is found to be legally vested in a person subject to the jurisdiction of the English courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the law of England. These words must, I think, be estimated in relation to the facts of the case that he was considering, and not antagonistically to those of LORD CRANWORTH, in *Wallace's Case* (1), for he quotes the statement of the ratio decidendi of *A.-G.* v. *Campbell* (3), as given by LORD WESTBURY, which is not inconsistent with LORD CRANWORTH's proposition. I will not transcribe it: but the crucial part of it appears to be in the words: I

A "The character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will."

In the present case there was no appropriation of any part of the property so as to make it English property, or to alter the character of the original disposition. The ownership passed in 1922 under the testator's will. The Hong Kong courts would have had jurisdiction to secure that the disposition was effective to the successors on the son's death in 1922. It seems wrong to neglect this root of title, and to set aside the fundamental facts on which the devolution of the property depends. No doubt, in the *Jewish Colonisation Case* (9) there were strong facts to justify the decision, a deed in English form and language, to an English company with a registered office in London. The root of the disposition had been transplanted to London. But in the present case Hong Kong cannot be lost sight of. The preponderance lies in favour of the view that the settlement retained its original characteristics. *Re Badart's Trusts* (10) is an illustration of an appropriated sum which became liable to succession duty under the particular circumstances of the case, and it was distinguished from *Wallace's Case* (1). There is, in my judgment, in the present case no such separation or other fact which involves the notional removal to this country of the property passing, or any part of it, in respect of which succession and estate duties are now claimed, and thus the conclusion must be reached that the duty is not payable. It is notable that in *Toronto General Trusts Corpn.* v. *R.* (11) ([1919] A.C. at p. 685) the present Lord Chancellor treats the principle indicted by Lord Cranworth in *Wallace's Case* (1) as a test as to the limitation of the imposition of succession duty and adopts it. Rowlatt, J., appears to have found himself bound by *Thompson* v. *Birch* (2) and quotes the words of Bacon, V.-C., as to a fund established in this court, "no matter by what means." I am not sure that I appreciate those words. But the authorities to which I have referred all strongly support the principle laid down by Lord Cranworth, and I cannot accept *Thompson* v. *Birch* (2) if it does otherwise. For those reasons I am of opinion that the claim of the Crown to these duties fails. The appeal will be allowed with costs and the information discharged with costs.

**SARGANT, L.J.**—The question under appeal here, viz., whether estate duty is payable on the general residuary estate of the testator, admittedly depends on whether succession duty would have been payable thereon under s. 2 of the Succession Duty Act, 1853. That section uses language of the widest character, sufficient on its bare terms to include a succession arising under any disposition, British or foreign, and in respect of any property, real or personal, wherever situate. It would, for instance, include a succession under the will of a domiciled American to real estate in the City of New York. Some implied limitation must, therefore, be read into the words of the section for the purposes of reasonable construction. We have here to ascertain the extent of this implied limitation to see whether or not it prevents the application of the section to the succession now in question. There have, of course, been a good many decided cases in relation to the section, but none which is quite on all fours with the present case.

The succession in the present case is in relation to real estate in the colony of Hong Kong, and to personal property situate in the same colony, together representing the residuary trust estate of a testator who died domiciled in that colony in 1905. The will and two codicils of that testator gave this residuary estate on trusts, in the events which happened for the testator's son, Raphael Emanuel Belilios, during his life, and after his death on trust for his two sons. The executors and trustee named in the will and codicils were four in number, viz., the testator's widow, the testator's son, and the respective managers for the time being in Hong Kong of two English banking companies; but the only one of these four persons who actually proved the will and acted in the trusts thereof was the testator's son. The will was couched in terms familiar to English lawyers and, I should think, equally familiar to lawyers in Hong Kong. It was proved in Hong Kong, and on

a subsequent appointment of trustees in 1911 by the testator's son he purported to act under the laws of that colony. The testator's son, Raphael Emanuel Belilios, who remained domiciled in Hong Kong during the whole of his life, died on Oct. 17, 1922, and it is on the occurrence of that event that duty is claimed to have become payable, on the ground that the beneficial interest then accruing to the two infant sons of the tenant for life constituted a succession within the meaning of s. 2 of the Succession Duty Act, 1853. This claim is resisted on the ground that this succession to property in Hong Kong under the laws of that colony did not on the testator's death constitute a succession within the meaning of the Act of 1853, and that nothing has since occurred sufficient to bring it within that Act.

The first case which defined the extent of the limitation which must undoubtedly be placed on s. 2 of the Act of 1853 is that of *Wallace* v. *A.-G.* (1). There LORD CRANWORTH, L.C., said that in order to come within the section the successor must become entitled by virtue of the laws of this country. It is argued for the Crown that subsequent decisions show that this limitation was too broad; and it is no doubt the case that in subsequent judgments the test adopted by LORD CRANWORTH has not been always applied in the precise terms employed by him. But I do not think that his language has ever been disapproved or, indeed, adversely criticised. And, in the cases in which the courts have since had to consider whether the documents in question created a taxable succession, I think that the various indications on which they have relied have almost always been indications as to the law under which the succession arises, and that the question so often put as to whether the documents form an English settlement is substantially the same as LORD CRANWORTH'S test. And, further, it is to be noted that the test suggested in *Wallace* v. *A.-G.* (1) has been adopted in two comparatively recent cases of high authority: *Winans* v. *A.-G.* (12), and *Toronto General Trusts Corpn.* v. *R.* (11). It has, indeed, been argued for the Crown that the important case of *A.-G.* v. *Campbell* (3) shook the general authority of *Wallace* v. *A.-G.* (1) and has shown that a succession originating under foreign law—in that case Portuguese law—may be taxable under the Act of 1853. But, in my judgment, the case when carefully examined does not conflict at all with LORD CRANWORTH'S judgment. In *A.-G.* v. *Campbell* (3) the trust in question was not constituted by the Portuguese will itself, but was a trust created under Engish law, though by virtue of a direction in a Portuguese will that it should be so constituted. The distinction lies in the difference between executory and executed dispositions. The dispositions in the Portuguese will as to the annuity fund in question were purely executory ; they would naturally, in the first instance, be construed under that law, and no doubt were valid under that law since they were in fact carried out. But they were so carried out in accordance with their precise terms by the constitution of a new and separate English trust. And it was in relation to the succession created by this English trust that the question of duty arose. In my view the language both of LORD HATHERLEY and of LORD WESTBURY, in allowing the claim for succession duty, shows that this was the ratio decidendi. The same considerations seem to me to account for the decision in *A.-G.* v. *Anglo-Jewish Colonisation* (9). Neither in this case nor in *A.-G.* v. *Campbell* (3) would it be necessary, as the learned judge suggests, for the court to apply foreign law for the purposes of administration. In each case there is found a duly constituted English trust to be administered as such, though the origin of the constitution of the trust has been foreign.

In *Re Cigala's Settlement Trusts* (4) an English lady on her marriage with an Italian gentleman settled both English and Italian property by a settlement in English form and with English trustees. This was held to create a taxable succession. The decision entirely satisfied LORD CRANWORTH'S test. The successor obviously became entitled under English law to the beneficial interest devolving on him in either class of property. In *A.-G.* v. *Johnson* (13) the succession held taxable was in property in Assam remaining unsold, but the succession was created by an English will devising the property to English trustees upon trust to sell

A and hold for beneficiaries here. The law creating and governing the trust was English. *Re Smith's Trusts* (14) was, it seems, concerned with a resettlement effected by the whole of the beneficiaries under an original settlement. A succession under this resettlement was held taxable. The case is obviously analogous to that of *A.-G.* v. *Campbell* (3). The effective document was the resettlement.

In the present case ROWLATT, J., has felt the force of the taxpayer's contention B that the decision in *A.-G.* v. *Campbell* (3) depended on the fact of a new trust having been created in this country under English law; but he has held himself precluded from adopting this view by what he describes as a ruling of BACON, V.-C., in *Thompson* v. *Birch* (2) ([1876] W.N. at p. 278), also stated in HANSON ON DEATH DUTIES (7th Edn.) p. 393. But, when this case is examined, it appears that the Vice-Chancellor's remarks were not in the nature of a decision (his decision was C on a different point, and was subsequently reversed), but was merely an obiter expression of opinion as to what duty would become payable on a future event. I think that ROWLATT, J., attached too much importance to this dictum even in relation to its effect in a court of first instance; in this court, at any rate, it is open to review; and it is, in my opinion, contrary to the general line of authority on this subject and is wrong. It is important to observe that under the Act of 1853 D a succession is constituted, if at all, immediately on the death of the testator, and not on the death of the tenant for life, or other limited owner, on whose death the successor becomes entitled in possession; and the succession duty attaches immediately on the earlier event, and is merely postponed as to payment till the later event. The consequence is that the ultimate incidence of the tax cannot be avoided by any intermediate dealing. It has, however, been contended on behalf E of the Crown that the converse does not follow; and that, although in this case this Hong Kong will by a Hong Kong testator of Hong Kong property may not have created on his death a taxable succession in the hands of his two grandsons, it does not follow that intermediate events between the death of the testator and that of the tenant for life may not have rendered this succession a taxable one under the Act, even although during the whole period the two grandsons may have been F infants. Assuming, though without deciding, that such a result may be possible, what are the events on which the Crown relies as effecting this change? They are set out in the information and are of two kinds. First, there is the indenture of May 4, 1911, under which the sole acting trustee and tenant for life, Raphael Emanuel Belilios, appointed as trustees in his stead four new trustees all resident in England. And, secondly, there are a number of orders made in the Chancery G Division in this country on successive applications by the continuing trustees of the testator's will, by which certain proposed arrangements were approved in relation to the execution of the trusts of the will.

As regards the first point, I cannot think that a change in the personnel of the trustees of the will effected as it was under the Hong Kong law, and in the necessary H absence of any consent on the part of the infants, can have any effect in changing the nature or incidents of their succession, though the result was that for some time all the trustees were resident in this country, and that after a subsequent appointment, in which Raphael Emanuel Belilios resumed his character of trustee, the majority of the trustees were so resident. As regards the second point, not only was no general order ever made here for the administration of the trusts of the I will, a step which the Chancery Division here would, I think, have felt great difficulty in making, having regard to the local situation of the trust and the great bulk of the trust property, but the orders that were made went little, if at all, beyond the giving of advice to trustees here as to the steps it would be reasonable for them to take in the carrying out of a colonial trust constituted on lines similar to well-known forms of trust in this country. Indeed, I doubt whether, strictly speaking, the Chancery Division here could make orders, as to execution of the trusts of the testator's will, which would have the same binding effect in the colony of Hong Kong as orders to the like effect made here; though the orders

here would no doubt have a great practical effect should the bonâ fides of the trustees, or the propriety of their conduct, ever be questioned in proceedings in the courts of Hong Kong. And, further, the infancy of the two grandsons until after the death of their father, Raphael Emanuel Belilios, negatives any suggestion of a consent on their part to a change in the character of their succession as a consequence of these proceedings. Junior counsel for the Crown, who specially relied on the change that had been effected, was asked to lay his finger on the particular transaction from which, and the particular point of time at which, the crucial change in the infants' succession occurred. The best answer he could give was to point to the indenture of appointment of May 4, 1911. There was no single one of the orders made by the court which he was able to indicate as being conclusive for his purpose. In my judgment, the succession of the infants to the testator's residue was at the testator's death a succession by virtue of colonial law and to colonial property; and has never lost that character or fallen within s. 2 of the Act of 1853. I agree, therefore, that the appeal should be allowed, with costs here and below.

**LAWRENCE, L.J.**—On this appeal the appellants rely on the test laid down by LORD CRANWORTH in *Wallace* v. *A.-G.* (1) as to the limitation on the imposition of succession duty under the Succession Duty Act, 1853, and maintain that they are not accountable for any duty under that Act on the ground that the infant beneficiaries do not claim title by virtue of the laws of this country. The Attorney-General did not challenge the general correctness of the test laid down by LORD CRANWORTH, which, in my judgment, must be treated as firmly established: see, among other cases, *Lambe* v. *Manuel* (7) and *Toronto General Trusts Corpn.* v. *R.* (11), but he strenuously denied that, in the special circumstances of this case, the application of that test, when correctly interpreted, led to the result contended for by the appellants. The disposition which is alleged to have conferred a succession within the meaning of s. 2 of the Act is the will of a testator who died domiciled in the colony of Hong Kong in 1905 possessed of movable and immovable property locally situate in that colony. It is not suggested that this will, when it first became operative on the death of the testator, constituted a disposition conferring a succession within the meaning of the section as interpreted by LORD CRANWORTH, but the Attorney-General contended that, by reason of certain events which had happened before the death of the tenant for life in 1922, it had been brought within the section and had become what has conveniently been called an "English settlement," i.e., a disposition conferring a succession within the Act.

The case made for the Crown was that the crucial date when to ascertain whether the will was an English settlement or not was the death of the tenant for life, at which date it was alleged by the Crown that the facts were as follows. The trustees, in whom the legal title to the trust property was vested, were resident in England; the English courts had exercised jurisdiction in matters relating to the execution of the trusts of the will, in particular by giving directions as to the realisation of the trust property; the interests taken by the infant beneficiaries under the will were English choses in action; and the infant beneficiaries were wards of an English court. The case so made raises, first, the broad question whether a disposition, outside the Act when made, can by the subsequent manipulation of the parties interested under it be brought within the Act and, secondly, if that question be answered in the affirmative the further question whether the events relied on by the Crown have had the effect of bringing the present will within the Act.

Section 2 of the Act, so far as material, provides that every disposition by reason whereof a person becomes beneficially entitled to any property on the death of any person, whether immediately or after an interval, either certainly or contingently and either originally or by way of substitutive limitation, is deemed to confer on the person becoming entitled by reason of such disposition a "succession"

A and the term "successor" denotes the person so entitled, and the term "predecessor" denotes the testator or other person from whom the interest of the successor is derived; s. 10 imposes the duty on every such "succession"; s. 20 makes the duty payable on the "successor" becoming entitled in possession to the "succession"; and s. 42 makes the duty a first charge on the "succession." The provisions of these sections make it clear that a succession within the Act is established once B and for all at the moment of time when the disposition is made and first becomes operative; at that moment the succession is deemed to be conferred on the successors and from that moment the duty is imposed and the charge attaches. That this is the true effect of the Act is well established and not open to doubt: see per LORD HERSCHELL in *Wolverton* v. *A.-G.* (5) ([1898] A.C. at p. 548), and per LORD CAVE C in *Lord Advocate* v. *Macalister* (8) ([1924] A.C. at p. 591). According to the scheme of the Act it would seem that the only date for ascertaining whether a disposition conferring a succession within the Act has been effected is the date when the disposition is made. It is also well settled that when a succession within the Act has once been established no manipulation of the parties afterwards can get rid of it, and if authority be needed for that proposition it is to be found in the emphatic statement to that effect made by LORD HALSBURY in the case of *Duke of Northumber-* D *land* v. *A.-G.* (15) ([1905] A.C. at p. 409). Counsel for the taxpayers, with great force and much reason, contended that the corollary to that proposition is that where a disposition does not establish a succession within the Act when it is made, no manipulation of the parties afterwards (short of acts amounting to the creation of a new disposition) can establish such a succession. The Crown, whilst not disputing that a succession once established cannot be got rid of by the parties, E contended that the converse does not hold good, and further that LORD CRANWORTH'S test, when interpreted in light of the subsequent decisions, cannot be taken as having laid down the broad principle contended for by counsel for the taxpayer. In my opinion the authorities relied on by counsel for the Crown do not support their contentions, nor do any of the authorities cited qualify or shake the test F laid down by LORD CRANWORTH. The relevant cases have been fully dealt with in the judgments of the other members of this court. I will, therefore, content myself with stating shortly the reasons why, in my opinion, those most strongly relied on do not establish the contentions of the Crown or govern the decision in the present case.

*A.-G.* v. *Campbell* (3) and *A.-G.* v. *Jewish Colonisation Association* (9) are cases G where trusts were established in England by, or by the direction of, persons domiciled abroad, which trusts when established in this country constituted English settlements from the time of such establishment and consequently came within the Act. As in each of these cases the trust derived its origin from the directions given by a person domiciled abroad, the validity of the directions so given no doubt depended on the law of the domicile of the person giving them, but that H fact did not prevent the establishment of the trust in England, when actually effected, from being held to constitute an English settlement, under which the beneficiaries claimed title by virtue of the laws of England. *Re Cigala's Settlement Trusts* (4) and *A.-G.* v. *Johnson* (13) are cases where the trusts were established by persons domiciled in England and were English settlements from the moment when they were made, therefore constituting dispositions under which the bene- I ficiaries claimed title by virtue of the laws of England. In none of the cases which I have mentioned so far was there any question, such as has arisen here, of a trust effectively established abroad, and therefore not constituting an English settlement when first established, having subsequently been brought within the Act by the manipulation of the parties interested under it.

The two cases next referred to are nearer the present case. *Re Smith's Trusts* (14) was a case where all the parties entitled under a will of a testator domiciled abroad executed a deed in England appointing new trustees and declaring trusts of the fund (which apparently had been brought to England) identical with the trusts of

the will, and STUART, V.-C., held that succession duty was payable. The reasons for the decision of the learned Vice-Chancellor are not reported, but I think that that case must have been decided on the ground that the beneficiaries claimed title, not under the will, but under the English deed, and consequently that the latter constituted a disposition conferring a succession within the Act. If the beneficiaries were treated as claiming title under the will, the decision is, in my opinion, inconsistent with LORD CRANWORTH'S test and must be treated as overruled by *Wallace's Case* (1).

*Thompson* v. *Birch* (2) ([1876] W.N. at p. 278; HANSON (7th Edn.) p. 393) contains a dictum by BACON, V.-C., which was relied on by ROWLATT, J., and has been much relied on by counsel for the Crown in this court. In that case the main point was whether the testator was domiciled in America or in the United Kingdom. The testator there had appointed English trustees and his American executors had remitted the proceeds of the testator's property (consisting of American shares) to the English trustees, who had paid such proceeds into court in an action commenced in England by the infant beneficiary to secure the trust fund. The learned Vice-Chancellor decided that the testator was domiciled in America, and in the course of his judgment expressed the opinion that succession duty would become payable on the death of an annuitant, who was then still alive, on the ground that the fund was "a fund established in this court, no matter by what means." The learned Vice-Chancellor seems to have based his opinion on *Campbell's Case* (3), stating that he did not understand that case to depend on the fact that the testator there had directed an English trust to be established. With the greatest respect to the learned Vice-Chancellor I think he was wrong if he meant that the mere fact of payment into court of a settled fund, whatever might be the trusts affecting it and the circumstances under which it was paid in, would attract succession duty. Such a proposition seems to me to be too wide and inconsistent with LORD CRANWORTH'S test. Moreover, I think the learned Vice-Chancellor took an erroneous view of the decision in *Campbell's Case* (3), which, in my opinion, was based on the fact that the testator there had directed an English trust to be established. In any event the opinion of the learned judge does not apply to the facts of the present case, as here no fund was ever established in an English court. Before leaving the authorities I would only add that I know of no case which supports the proposition that a will of a testator domiciled abroad effectively establishing a trust in respect of property locally situate in the country of his domicil has become an English settlement because at the date of the death of the tenant for life the trustees and beneficiaries happen to be residing in England and because the former had sought the protection of the English courts in certain administrative acts and the latter had been made wards of an English court. Such a proposition has at least the merit of novelty.

I now revert to the facts of the present case. Counsel for the Crown shrank from pointing to any particular act or event as having caused the will to become an English settlement, though junior counsel for the Crown, when pressed by the court, seemed inclined to rely most strongly on the appointment of the English trustees in 1911 as being the crucial event. The main contentions of the Crown were, first that, as the language of s. 2 was wide enough to cover a disposition of property situate abroad made by a person domiciled abroad, the onus lay on the respondents to prove that the present will did not fall within it, and secondly, if that were not the right view, that it was sufficient for the Crown to point to the facts existing at the date of the death of the tenant for life as showing that at that date the will was an English settlement and that it was not the concern of the Crown to prove how and when the will had first become an English settlement. As to the first of these contentions, I think that it is ill-founded. As it is obvious that some limitation to the very wide words in the section must be implied, the duty of the court is first to satisfy itself as a matter of construction what the true limitation to be implied is and then to ascertain whether the case has been brought

within the section according to its true construction. LORD CRANWORTH'S test shows the proper limitation to be implied, and according to that test the present will, when first it became operative, clearly did not fall within it; therefore it rests on the Crown to prove that the will was subsequently brought under its provisions. As to the second of these contentions, it is obvious that, in order that the court should be in a position to appreciate the true state of affairs at the date of the death of the tenant for life, it is incumbent on the Crown to adduce evidence of the relevant events which had occurred prior to that date; proof of the allegation that the will had become an English settlement at a particular date, in my opinion, necessarily involves proof of how and when such alleged event had in fact happened. The death of the tenant for life does not, of course, confer any new succession on the infants and the date of that death has no effect whatever on the character of the settlement; it is only material from the Crown's point of view, because if the will had prior to that date become an English settlement the duty would then have become payable. The question of onus, however, is not really material in this case, as all the relevant facts have been placed before the court by one or other of the parties, and the court is in a position to reach a definite conclusion on the whole of the facts.

In considering the facts relied on by the Crown in support of the contention that the will had, before the death of the tenant for life, become an English settlement, it is of the utmost importance to bear in mind that the trust property had not been realised by the trustees and remained locally situate in Hong Kong, and, further, that the ultimate beneficiaries were infants and therefore powerless to assent or dissent from any of the acts of the tenant for life or of the trustees. The appointment of new trustees in 1911 was effected in accordance with the laws of Hong Kong, where the appointor and consequently his wife and infant beneficiaries were and remained domiciled. The motive which induced the appointment does not seem to me to be in the least material. In my opinion neither the appointment by the appointor of his wife and of the three other persons who were resident in this country to act jointly with himself, nor his subsequent retirement from the trusteeship (followed later by his resumption of office), had the effect of causing the will to become an English settlement. The mere vesting in the trustees of the legal title to the property in Hong Kong did not operate to bring that property into this country. The trustees in order to execute the trusts of the will would have to seek the forum of the country where the testator was domiciled and the trust property was situate and they would have to execute the trusts according to the laws of that country. The infant beneficiaries would, notwithstanding the appointment of trustees, claim title solely by virtue of the laws of that country. Even if the English courts by virtue of their jurisdiction in personam, had power to execute the trusts of the will, which is open to serious doubt, such courts would, in executing such trusts, have to apply the law of Hong Kong. If the trustees were to go abroad, the English courts would have no power to allow service of a writ for the execution of the trusts of the will to be served upon them out of the jurisdiction, as such trusts are not trusts to be executed according to the law of England: see R.S.C. Ord. 11, r. 1 (d). Further, I am clearly of opinion that the giving of directions by the English courts at the instance of the trustees in matters affecting the trusts of the Hong Kong property did not have the effect of causing the will to become an English settlement. In giving those directions the courts could only have acted in exercise of their jurisdiction in personam and must have had regard to the Hong Kong law. How far the directions of an English court would operate to exonerate the trustees if the trusts ever came to be executed by a Hong Kong court I need not pause to consider. If the appointment of trustees resident in England did not operate to make the will an English settlement it follows, in my opinion, that the fact that the infants acquired a right of action in England against such trustees, which is the natural consequence of the appointment, did not have any such operation. The right which the infants have thus acquired is a right to

have the trusts of the testator's will executed in the country where the testator was domiciled and where the trust property is situate. Such a right cannot, in my opinion, be properly called an English chose in action, such as the right of the beneficiaries was held to be in *A.-G.* v. *Lord Sudeley* (16). The foundation of the judgments of the majority of the members of the Court of Appeal and of all the learned Law Lords in that case was that the testator there was domiciled in England, where his will was proved and where his estate was being administered. Lastly, I find a difficulty in appreciating how the fact that the infants were made wards of court here can affect the question whether the will under which they take beneficial interests has or has not become an English settlement. Such wardship does not alter the law by virtue of which they claim title to their shares in the testator's estate or affect their rights in any way. It would indeed be startling if the fact of the infants having been made wards of court were to operate to their detriment by imposing upon them and their shares a liability for succession duty from which they would otherwise be free. In my judgment it has no such effect.

In the result, I have arrived at the clear conclusion that, on the assumption that it might have been possible by some means to have caused the will of the testator to have become an English settlement during the lifetime of the tenant for life, the manipulation of the parties which has in fact taken place in the present case has (in the absence of the realisation of the Hong Kong property and of the transfer of the proceeds to this country) fallen short of having brought about that result. Having reached this conclusion, it becomes unnecessary for me to express a final opinion on the broader question whether a disposition outside the Act, when made, could by any subsequent manipulation of the parties (short of an act amounting to a new disposition, which in this case would be impracticable owing to the infancy of the beneficiaries), become a disposition within the Act, though, as at present advised, I think that counsel for the taxpayers is right in his contention that consistently with Lord Cranworth's test it could not. I agree that the appeal succeeds, with the consequences indicated by the Master of the Rolls.

Solicitors: *Elvy Robb & Co.; Solicitor of Inland Revenue.*

[*Reported by* H. Langford Lewis, Esq., *Barrister-at-Law.*]

# WILLIAMS *v.* SANDERS

[King's Bench Division (Rowlatt, J.), May 23, 24, 1927]

[Reported [1927] 2 K.B. 498; 96 L.J.K.B. 912; 137 L.T. 820; 43 T.L.R. 663; 11 Tax Cas. 673]

*Income Tax—Annual value—House let in several apartments—Income Tax Act*, 1918 (*8 & 9 Geo. 5, c. 40*), *Sched. A., No. VII, r. 8 (c).*

For the purpose of assessment to income tax under Sched. A the annual value of a house or building let in different apartments or tenements and occupied by two or more persons severally is the aggregate of the rack rents of the separate tenements.

**Notes.** The Income Tax Act, 1918, No. VII, r. 8, was replaced by the Income Tax Act, 1952, s. 109 (1).

Referred to: *Embleton* v. *Norwich Union Life Insurance Society*, *Norwich Union Life Insurance Society* v. *Embleton* (1927), 11 Tax Cas. 681; *Lyons* v. *Collins*, [1936] 2 All E.R. 292.

As to annual value of flats and tenement buildings, see 20 Halsbury's Laws (3rd Edn.) 57. For the Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.), and for cases, see 28 Digest (Repl.) 6 et seq.

Cases referred to:

(1) *Stevens* v. *Bishop* (1888), 20 Q.B.D. 442; 57 L.J.Q.B. 283; 58 L.T. 669; 52 J.P. 548; 36 W.R. 421; 4 T.L.R. 325; 2 Tax Cas. 249, C.A.; 28 Digest (Repl.) 160, *630*.

(2) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest (Repl.) 216, *916*.

(3) *A.-G.* v. *L.C.C.*, [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest 192, *791*.

(4) *Russell* v. *Coutts* (1881), 9 R. (Ct. of Sess.) 261; 1 Tax Cas. 469.

(5) *Grinter* v. *Fleming*, [1900] 2 Q.B. 735; 69 L.J.Q.B. 875; 83 L.T. 347; 64 J.P. 709; 49 W.R. 23; 4 Tax Cas. 239, D.C.

(6) *Biddle* v. *Morris*, [1924] 2 K.B. 490; 93 L.J.K.B. 907; 132 L.T. 492; 40 T.L.R. 791; 9 Tax Cas. 87; 28 Digest (Repl.) 9, *26*.

(7) *Grant* v. *Langston*, [1900] A.C. 383; 69 L.J.P.C. 66; 82 L.T. 629; 64 J.P. 644; 16 T.L.R. 416, H.L.

(8) *Farmer* v. *Cotton's Trustees*, [1915] A.C. 992; 84 L.J.P.C. 137; 113 L.T. 657; 31 T.L.R. 478; 59 Sol. Jo. 611; 6 Tax Cas. 590, H.L.

(9) *Turner* v. *Carlton*, [1909] 1 K.B. 932; 78 L.J.K.B. 378; 100 L.T. 400; 5 Tax Cas. 395; 28 Digest (Repl.) 7, *13*.

(10) *A.-G.* v. *Mutual Tontine Westminster Chambers Association, Ltd.* (1876), 1 Ex.D. 469; 45 L.J.Ex. 886; 35 L.T. 224, C.A.

**Case Stated** by the General Commissioners of Income Tax acting for the Division of Roborough, South Devon, pursuant to s. 149 of the Income Tax Act, 1918. The Case Stated was as follows.

At a meeting of the commissioners, held on July 15, 1924, for the purpose of hearing appeals, Arthur Lawrence Williams, of 47, York-Street, Regent's Park, London (hereinafter called "the appellant"), appealed against an assessment to income tax, Sched. A, in the sum of £50 gross, made on him for the year of assessment ending April 5, 1924, in respect of a messuage and premises known as No. 39, Admiralty-Street, East Stonehouse, Plymouth, Devon. The premises in the said assessment referred to consisted of a house or building owned and let by the appellant in four different apartments or tenements under separate weekly tenancies, each terminable on one week's notice by either landlord or tenant. The four different

apartments were occupied by four distinct tenants and their families, with the use in common of the passages, stairs, washhouse, w.c., and front and back entrances. The tenants belong to the poorer classes, and pay for the said apartments the respective weekly rents of 10s. 6d., 7s., 3s. 9d., and 6s., making the weekly aggregate rental of 27s. 3d., the landlord paying all the rates, water rates, and inhabited house duty payable in respect of the said premises. All the said rents were fixed by agreements which commenced within the period of seven years preceding April 5 next before the time of making the assessment appealed against. The appellant put in evidence the following estimate of the annual value of the said premises, which had been prepared by him in respect of the year ending April 5, 1923, namely:

| | £ s. d. | £ s. d. |
|---|---|---|
| Gross income from four weekly tenants if fully occupied—27s. 3d. × 52 | | 70 17 0 |
| Deduct to convert from four weekly tenements into annual value in one letting of the whole house—20 per cent ... ... ... ... ... | | 14 3 0 |
| | | 56 14 0 |
| Deduct— | | |
| Inhabited house duty, £36 at 3d. ... ... ... ... | 0 9 0 | |
| Rates on estimated rateable value, £29 at 13s. 2d. ... ... | 19 1 10 | |
| Water rate, £36 at 4 per cent. ... ... ... ... ... | 1 3 2 | |
| | | 20 14 0 |
| Rack rental value ... ... ... ... ... ... ... | | £36 0 0 |
| Deduct— | | |
| Statutory allowance for repairs, one-fourth ... ... ... | £9 0 0 | |
| Conventionary rent ... ... ... ... ... ... | 1 12 0 | |
| | | 10 12 0 |
| Net ... ... ... ... ... ... ... | | £25 8 0 |

Mr. Body, a rating surveyor, in giving evidence in support of this estimate, informed us that, in arriving at the figures therein contained, he did so on the assumption that for the purpose of income tax annual value must be understood to be the rack rent at which the premises are worth to be let by the year, and that such rent was to be estimated by considering what a single intending tenant by the year of the whole of such premises so occupied and used would pay the landlord as rent if such tenant bore the usual tenant's rates and taxes; that to compute such rent it was necessary to consider a hypothetical tenant, and the rent he would give having due regard to what he was able to obtain from actual or hypothetical sub-tenants and the profit he would expect in recompense for his time and trouble in management, and that, in considering the rent, such tenant would have regard and consequently regard should be had by the commissioners to the probability of some part of the premises or the whole remaining unlet and on his hands for part of his own period of tenancy, and that the hypothetical tenant of the whole of such premises would not be of the same class of persons as those tenanting mere apartments or tenements in such premises nor moved to acquire the tenancy by the same objects, and that, in consequence, the actual rents paid for the separate tenements must be regarded as only a factor or element to be taken into account, and not a starting point or basis of calculation in computing the rack rent at which the house or building was worth to be let by the year. It was not suggested by Mr. Body that the rents actually payable for the separate tenements were capable of increase or decrease, nor that a single tenant of the whole premises could be obtained save for the purpose of farming out these premises at rents corresponding to those actually payable. It was given in evidence that considerable sums of rent were in arrear, that the chance of recovery of these arrears was small, and

A that losses due to sickness, unemployment, poverty, and dishonesty were invariably attendant on this class of tenancy and type of tenant.

The assessment of the property for 1922–23 for poor rate purposes was £28 gross, £22 rateable, the actual rates paid in that year were £15 18s. 2d. It was argued that it is a common practice for rating authorities to ascertain new assessments for Sched. A, and if the annual value under Sched. A is increased to raise the annual B value for rating purposes. It was argued the rates payable would have been estimated by an intending tenant on the basis of the rent he agreed to pay, and on that footing the rates would probably be at least £20 8s. 0d., and would have been estimated as at least that amount by an intending tenant at all material times, and the appellant contended that, in estimating the rack rent which would be payable by an intending tenant of the whole (such tenant as is herein mentioned), this C increase would be taken into account by the commissioners as it would be by the intending tenant in estimating the rent he would pay. Mr. Body stated that his estimate was based on his experience in connection with this and similar properties in the locality, considering the relation between the rent that one person would, as tenant of the entire house or holding, be prepared to pay on a letting by the year as contrasted with the amounts payable or expected to be paid by several weekly D tenants of the four distinct apartments or tenements into which that house or building was divided.

The commissioners gave their decision in the following terms:

> "We take the view that, in the case of properties let at a weekly rent or let to more than one tenant, the gross rents, less the rates paid by the owner, less a E contingency balance of 1/26th of the net rents at the time of making the assessment, represent the rack rent, and, therefore, we make the assessment of 39, Admiralty-Street, East Stonehouse, £48."

The appellant taxpayer appealed.

*Hawke*, *K.C.*, and *H. E. Kingdon* for the taxpayer.

F *The Attorney-General* (*Sir Douglas Hogg*, *K.C.*), and *Reginald Hills* for the Crown.

**ROWLATT, J.**—In this case the contest related to a house or building divided up and let in working-class tenements weekly at so many shillings each week, with the common use of the stairs and certain accessories. An assessment was made in respect of this building on the landlord by virtue of group VII, r. 8 of the Rules applicable to Sched. A. That Rule provides, shortly, that the assessment and charge G shall be made on the landlord in respect of any house or any building let in different apartments or tenements and occupied by two or more persons: any such house or building shall be assessed and charged as one entire house or tenement. Counsel for the appellant said that as this house has to be assessed as one entire house or tenement, then in considering the annual value, which is the amount that it is worth to let by the year at a rack rent, one must look at the imagined rack rent H for the house or building as one entire house or tenement; and, he said, one cannot let a tenement of this kind as one entire house or tenement unless one lets it to a middleman in order to let it out in weekly tenancies; and he would not do that unless there was a profit to him, and, therefore, the weekly rents of the tenants are not the immediate basis of the annual value; they only can come in so far as I they influence the middleman in quoting his figure. I think that is untenable. The purpose of this Rule is to make it clear that the tax in respect of these houses is to be charged on the landlord and not on the occupiers, which is the primâ facie Rule as laid down by r. 1 of this group; and the whole group is headed: "Rules as to persons chargeable." Therefore, we find here a direction that the assessment in respect of these premises shall be charged to income tax on the landlord, and "as one entire house or tenement" means that there is to be one charge on the landlord, and I do not think for a moment that it lets in a speculation as to a middleman. What the house is worth to be let at a rack rent is the sum of the rack rents one

can get for the house, and I do not see that it is any the less so because it is obtained piecemeal ; and it is not necessary in order to give effect to this Rule, the purpose of which is to make the landlord assessable in one entire assessment, to introduce an alteration in the principle of valuation.

Counsel for the appellant laid some stress on the circumstance that the house or building was to be assessed. That only means that the landlord is to be assessed in respect of the house or building, and the purpose of the Rule was not confined merely to showing the person chargeable. But I think he could have made it a little stronger if he had referred to the section in the old Act, [the Income Tax Act, 1853 (which is in substance reproduced in r. 8 (c) of No. VII in the Act of 1918)], where the words were different:

> "Any house or building let in different apartments . . . shall nevertheless be charged to duty under this Act as one entire house, and the assessment thereof shall be made on the landlord"

—which is the other way. But even so, I think that is the same answer. Any house or building let in different apartments—all the time they are looking to the letting of apartments ; there does not come in contemplation that there shall be any hypothetical letting to an intermediary in the way that is contended for. I think that is clear and the well-known case of inhabited house duty, *A.-G.* v. *Mutual Tontine Westminster Chambers Association, Ltd.* (10), decided in 1876 is really of material assistance in taking that view. Therefore, I think the appellant's argument fails. This case must go back to the commissioners, because I do not think they have followed the right reasoning. They have said: "We take the view that in the case of properties let at weekly rent or let to more than one tenant the gross rents, less the rates paid by the owner, less a contingency balance of 1/26th of the net rents at the time of making the assessment, represent the rack rent." What the commissioners have done is exactly what junior counsel for the Crown rightly contended was wrong, viz., to take the weekly rents and knock off 1/26th for contingencies and take that as the rack rent. That is wrong. They are right in taking and adding together the rents of the tenements, but they are wrong in taking and adding together the weekly rents with a discount. They have no right to do that. There is no authority for it at all. If they are going to take the weekly rents of the tenements and add them together they must find out what the particular tenements are worth to let at a rack rent by the year, and nothing else than that. They must say what a man would give if he has to take the place for a year and to be responsible for a year ; and then they can add them up and allow for the rates and so on, and that will be the correct figure. I do not know what the result will be; it may be that it will reduce the assessment to something very small ; it may not affect it, it may increase it.

The case must go back for the commissioners to take the aggregate sums which the tenements are worth to let at a rack rent by the year.

Solicitors: *Royds, Rawstorne & Co.*, for *Square, Geake & Windeatt*, Plymouth; *Solicitor of Inland Revenue.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

A

# Re CASSEL, Deceased. PUBLIC TRUSTEE *v.* MOUNTBATTEN AND OTHERS

[CHANCERY DIVISION (Russell, J.), June 28, 29, July 14, 1927]

B [Reported [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; 43 T.L.R. 743; 71 Sol. Jo. 804]

*Estate Duty—Passing—Property deemed to pass—Annuity—Continuing annuity —Leasehold property bequeathed to persons in succession—Direction to trustees to bear outgoings out of residuary estate—Finance Act*, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 1, *s.* 2 (1) (*b*).

C By his will a testator bequeathed his leasehold premises known as Brook House to Mrs. C. for her life and then to Lady L. for her life, and directed his trustees to pay the rent, outgoings, rates, taxes, and repairs and insurance thereof out of the income of his residuary personalty. Mrs. C. having died, the question arose how the estate duty payable in respect of the passing on her death of the benefit of the said direction was to be borne as between the next D life tenant, Lady L., and the residue, and how it was to be assessed.

**Held:** (i) the benefit of the annual sum payable by virtue of the direction passed on the death of Mrs. C. within the Finance Act, 1894, s. 1, and s. 2 of that Act was therefore excluded; and the value of that benefit should be assessed under s. 7 (5) and s. 7 (8) of that Act: *Earl Cowley* v. *I.R. Comrs.* (2), [1899] A.C. 198, applied. (ii) The duty should be borne in the first instance E by the residuary estate, but recouped to residue by means of a policy of insurance on the life of Lady L. vested in the trustees of the will, who should retain the amount of the annual premium out of the money which would otherwise be applied in accordance with the direction.

**Notes.** Considered: *Re Northcliffe, Arnholz* v. *Hudson*, [1928] All E.R. Rep. F 310; *Christie* v. *Lord Advocate*, [1936] 1 All E.R. 443. Distinguished: *Re Johnson's Settlement Trusts, McClure* v. *Johnson*, [1943] 2 All E.R. 499. Approved and followed: *Re Duke of Norfolk's Will Trusts, Public Trustee* v. *I.R. Comrs.*, [1950] 1 All E.R. 664. Distinguished: *Re Payton, Payton* v. *I.R. Comrs.*, [1951] 2 All E.R. 425. Referred to: *I.R. Comrs.* v. *Crossman, I.R. Comrs.* v. *Mann*, [1936] 1 All E.R. 762; *Re Lambton's Marriage Settlement, May* v. *I.R. Comrs.*, [1952] G 2 All E.R. 201.

As to continuing annuity see 15 HALSBURY'S LAWS (3rd Edn.) 11 et seq.

Cases referred to:

(1) *Re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 60 Sol. Jo. 565, C.A.; 21 Digest 35, *220*.

(2) *Earl Cowley* v. *I.R. Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. H 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, *27*.

(3) *Re Cassel, Public Trustee* v. *Mountbatten*, [1926] Ch. 358; 95 L.J.Ch. 281; 134 L.T. 724; 42 T.L.R. 338; 70 Sol. Jo. 504; 37 Digest 79, *194*.

(4) *A.-G.* v. *Jameson*, [1905] 2 I.R. 218; 38 I.L.T. 117; 21 Digest 24, *m*.

I **Adjourned Summons.**

By his will Sir Ernest Cassel bequeathed his leasehold premises known as Brook House to his trustees (together with fixtures and furniture) to permit Mrs. Wilhelmina Cassel to have the use and enjoyment thereof for life, and after her death upon the like trust for the benefit of Lady Louis Mountbatten. The testator further directed that "the rent outgoings rates and taxes for the time being payable in respect of the said assessuage and premises and [the cost of] keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall always be paid for by my trustees out of the income of my

residuary personal estate." On Sept. 16, 1925, Mrs. Cassel died. This summons was then taken out asking (i) how the estate duty which became payable on the death of Mrs. Cassel, on account of the annual expenditure provided for in respect of Brook House by the clause set out above, should be borne as between Lady Louis and the testator's residuary estate; and (ii) how the same should be assessed. The Inland Revenue Commissioners agreed to be joined as defendants, for the purpose of being bound by the judgment. By the Finance Act, 1894:

"Section 1: In the case of every person dying after the commencement of this Act there shall . . . be levied and paid upon the principal value . . . of all property . . . which passes on the death of such person a duty called 'Estate Duty.'

Section 2: Property passing on the death of the deceased shall be deemed to include . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

*Bischoff* for the trustee.
*Greene, K.C.*, and *J. V. Nesbitt* for the tenant for life.
*Turnbull* for the infant daughter of the tenant for life.
*Ashton Roskill* for Sir Felix Cassel and Mrs. Jenkins.
*Maugham, K.C.*, and *W. Hunt* for persons interested in residue.
*Stamp* for the Inland Revenue Commissioners.

*Cur. adv. vult.*

July 14. **RUSSELL, J.,** after stating the facts, continued: Dealing first with the question how the estate duty should be assessed, the point resolves itself into the question as to how the principal value—on which the estate duty must be levied and paid—is to be ascertained; in other words, whether, as regards the benefit conferred by the special clause, property passed on the death of Mrs. Cassel—so that the case falls within s. 1 of the Finance Act, 1894, by force of the provisions of that section—or whether the case falls within s. 1 only by virtue of the provisions of s. 2.

If I were unassisted or unimpeded by previous authority, I should have said that the case was only brought into charge under s. 1 by virtue of the provisions of s. 2. I should have thought that where a life interest in A. ceased by A.'s death, with the result that an interest in B., which during A.'s life was reversionary, became an interest in possession, no property passed on A.'s death. A.'s interest merely ceases, no part of it is transferred to B., or passes to B. I should have thought that such a case fell directly within the provisions of s. 2 (b), and only came within the charging s. 1 by virtue of s. 2. If this were the correct view, the principal value would be ascertained under the provisions of s. 7 (7) (b), upon what is sometimes called the slice theory. That is to say, the principal value would be the capital sum which at 6.39 per cent. would produce £5,000, say £78,250. The estate duty would be payable out of the residuary estate, but a portion of the interest thereon would be borne by the person for the time being entitled to the benefit of the special clause. Such person would bear the same proportion of the whole interest as the £78,250 bears to the value of the whole residuary estate including the £78,250. That is to say, the £5,000 per annum applicable under the special clause would be reduced by that amount of interest accordingly. This method of apportioning the burden of the estate duty would be in accordance with the decision of the Court of Appeal in *Re Palmer, Palmer* v. *Palmer* (1). This, indeed, was the contention before me of counsel for the Inland Revenue Commissioners, who contended that in the ordinary case of property settled on A. for life, with remainder to B., estate duty was leviable on A.'s death not under s. 1 simpliciter, but under s. 1 by virtue of s. 2. In other words, such a case was a s. 2 case, and not a s. 1 case; it was a s. 2 case to which s. 7 (7) (a)

A was applicable. On this footing it was argued that the case before me was a s. 2 case to which s. 7 (7) (b) applied.

As I have before indicated, this view appeals strongly to me if I am at liberty to adopt it. It is said, however, on the other side, that I am not free to adopt this view ; that on the death of Mrs. Cassel property passed within the language of s. 1, and that s. 2 never comes into play at all; and this on the authority of the B House of Lords in *Earl Cowley* v. *I.R. Comrs.* (2). I have carefully considered *Cowley's Case* (2), and, in my opinion, it prevents me from holding that the present case is not a s. 1 case, but a s. 2 case. In *Cowley's Case* (2) a tenant for life had died, with the result that the tenant for life in remainder had become tenant for life in possession. The main question for decision was whether estate duty was payable on the gross value of the settled estate without deducting the amount of C sums previously raised by mortgages of the fee. It was held that the amount of the mortgages must be deducted on the ground that the property which passed to a new tenant for life was the equity of redemption in the entire estate. Some of the Lords concerned in that decision dealt with the case on the alternative footings of s. 1 and s. 2, arriving on either view at the same result; but they all, I think, took the view that the case fell under s. 1 and not under s. 2. LORD D HALSBURY, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND and LORD DAVEY clearly said so. If this be so, then s. 2 would not come into consideration. To borrow LORD MACNAGHTEN's language, the provisions of s. 2

> "do not . . . refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass."

E I feel constrained to hold that the present case falls within s. 1.

What, then, is the property which passes on Mrs. Cassel's death? In my opinion, the true answer is, the benefit of the annual sum payable under the special clause. I have already, in my previous judgment (*Re Cassel, Public Trustee* v. *Mountbatten* (3)), indicated the nature of this provision. Its duration is for a term F which must expire in 1995. It may expire earlier if Brook House is sold; but in view of the benefits conferred by the special clause, this event, though possible, is improbable. In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the persons for the time being entitled under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which G passed on the death of Mrs. Cassel. Next, how is the principal value of that property to be ascertained? The machinery provided by the Act is s. 7 (5), supplemented to some extent by s. 7 (8). That machinery does not exactly fit the present case, because, from the personal nature of the provision, the benefit of it could not be sold at all; an outside purchaser would not obtain delivery of the goods. Nevertheless, the machinery must be made to fit, and I think it can be H made to fit. It was made to fit in the Irish case of *A.-G.* v. *Jameson* (4). The value cannot be ascertained by reference to market price, because there can be no market. But a hypothetical market price at Mrs. Cassel's death could be fixed by ascertaining the value of the £5,000 per annum over the unexpired period of the special clause. This value should not be the full value, for the owner of Brook House does not receive the annual sum, she only enjoys the benefit of payments I made in respect of her property, all of which do not necessarily represent payments which she would otherwise have made out of her own pocket. To some extent, therefore, the full value would be in excess of the true value. Further, there is always a possibility of the special clause ceasing to operate before 1995 in the event of Brook House being sold. There should, I think, be no difficulty in the commissioners taking all these matters into consideration, and forming a fair opinion of the principal value, subject, of course, to the right of appeal given by the statute.

Having ascertained the principal value on the above footing, the first question raised by the summons then arises. I must here proceed on general principles.

Various suggestions were made before me. It would, I think, be wrong to say that the present tenant for life must herself pay the duty out of her own pocket. The duty at 29 per cent. must obviously be a large sum; and her period of enjoyment of the benefits of the special clause might not be sufficiently prolonged to recoup to her the disbursement. On the other hand, residue has not benefited by the death of Mrs. Cassel. The charge on residue continues throughout the duration of the term. The death of Mrs. Cassel has not reduced or diminished the burden. Accordingly, in my opinion, residue should not permanently bear any part of the burden. The burden must be borne by the person to whom the property has passed—but on equitable terms. The extent of her burden should be made as far as possible payable out of and commensurate with her benefit. This can, in my opinion, be properly achieved in the following manner: Let the amount of the estate duty be raised and paid out of the residuary estate. Let a policy of assurance be effected on the life of Lady Louis to cover the amount of such duty, and let that policy of assurance be assigned to the trustees. Let the interest on the amount of the duty and the premiums on the policy be retained and paid by the trustees out of the annual sum which would otherwise be payable under the special clause. The result will be, that on the death of Lady Louis the residue will be fully recouped, and she will have borne the burden of the duty to the extent of the annual diminution of her benefit under the special clause.

Before parting with the case I must say a word about *Re Palmer, Palmer* v. *Palmer* (1). It was urged that this case was, in both its aspects, governed by that decision. In many respects the two cases resemble each other, and if I had been able to hold here that this was a s. 2 case I should have applied *Re Palmer, Palmer* v. *Palmer* (1). But in *Re Palmer, Palmer* v. *Palmer* (1), the question as between s. 1 and s. 2 was not before the court. The inland revenue was not represented. The question was simply this: How as between the persons interested in residue was the burden of the estate duty already paid as on a s. 2 case to be borne? The hands of the court were tied to that extent. The case had to be treated on the footing of s. 2 being the section to be considered, and not s. 1.

In the result, I make the following declarations: (i) Declare that the estate duty ought, in the first instance, to be borne by residue, and that residue should be recouped by means of a policy of insurance on the life of Lady Louis to be vested in the trustees, securing payment at her death of a sum equal to the amount of the duty and the interest on the amount of the duty, and the policy premiums being retained and paid by the trustees in each year out of the sum which would otherwise have been applied by them under the special clause. [All parties agreed that the rate of interest should be 5 per cent. as from the date of Mrs. Cassel's death.] (ii) Declare that such duty ought to be charged on the principal value—to be ascertained under s. 7 (5) and (8) of the Finance Act, 1894—of the right to enjoy, for a period expiring at the latest on Sept. 29, 1995, the benefits conferred by the special clause.

Solicitors: *Norton, Rose & Co.; Nicholl, Manisty & Co.; Solicitor to Inland Revenue.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

# DAVIS *v.* HARRISON

[King's Bench Division (Rowlatt, J.), June 2, 1927]

[Reported 96 L.J.K.B. 848; 137 L.T. 324; 43 T.L.R. 623; 11 Tax Cas. 707]

*Income Tax—Income—Professional football player—"Benefit" payable after five years' service.*

The respondent was a professional football player in the employment of the E. club. The agreement between the respondent and the E. club was made subject to the rules of the Football Association and the Football League and other bodies, under which rules it was provided that clubs might enter into agreements with players providing for a "benefit" payment after five playing seasons' continuous service and that players should be qualified for further benefits after further service. In April, 1923, a fresh agreement was entered into between the E. club and the respondent, by which it was agreed, inter alia, that "bonuses" were to be paid "in accordance with League rules." On Nov. 30, 1923, the respondent (being then in his ninth season with the E. club) was transferred by the E. club to another football club. The E. club thereupon obtained leave from the Football League to pay the respondent £650 as accrued benefit, and before April 5, 1924, drew a cheque for that amount and held it at the disposal of the respondent, who took the cheque on May 3, 1924. An additional assessment to income tax under Sched. E for the year ending April 5, 1924, was made on the respondent in respect of the payment of £650.

**Held:** the payment was not compensation for loss of employment, but was additional remuneration in respect of which the respondent was assessable to income tax under Sched. E for the year ending April 5, 1924.

*Seymour* v. *Reed* (1), ante p. 294, distinguished.

**Notes.** Referred to: *Dewhurst* v. *Hunter*, [1932] All E.R. Rep. 753; *Corbett* v. *Duff*, *Dale* v. *Duff*, *Feebery* v. *Abbott*, [1941] 1 All E.R. 512; *Moorhouse* v. *Dooland*, [1955] 1 All E.R. 93.

As to voluntary payments to holder of an office, see 20 Halsbury's Laws (3rd Edn.) 322 et seq.; and for cases, see 28 Digest (Repl.) 222 et seq.

Case referred to:

(1) *Seymour* v. *Reed*, ante p. 294; [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 43 T.L.R. 584; 71 Sol. Jo. 488; 11 Tax Cas. 625, H.L.; 28 Digest (Repl.) 232, *1009*.

**Case Stated** by the General Commissioners for the Division of Prescot in the County of Lancaster for the opinion of the court.

At a meeting of the commissioners held on Jan. 26, 1925, George Harrison (hereinafter called "the respondent") appealed against an additional assessment to income tax under Sched. E of the Income Tax Acts in the sum of £650 made upon him for the year ending April 5, 1924, in respect of a sum of £650 paid to him as a professional football player by the Everton Football Club Co., Ltd., in the following circumstances. By an agreement dated April 28, 1913, made between the Everton Football Club Co., Ltd. (hereinafter called "the Everton club") of the one part and the respondent of the other part, the respondent agreed to play football for the Everton club on the terms and conditions therein mentioned. The Everton club was a member of the Football Association, Ltd. (hereinafter called "the association"), which was an association consisting of such clubs and associations playing association football and being otherwise qualified according to the laws of the game as settled by the International Football Association Board and the rules, regulations and byelaws of the association as the council of the association may approve. The Everton club was also a member of the Football League, Ltd.

(hereinafter called "the league") which was a combination of forty-four football clubs. The agreement of April 28, 1913, provided (inter alia):

"4. The player shall observe and be subject to all the rules, regulations and byelaws of the Football Association, the Football League, the Southern League, the Inter-League Board, the English League Board and any other association or combination of which the club shall be a member . . . 6. In consideration of the observance by the said player of the terms and conditions of this agreement the said W. C. Cuff on behalf of the club hereby agrees that the said club shall pay to the said player the sum of £4 per week from April 30, 1913, to April 30, 1914, with a bonus of ten pounds on signing the receipt whereof is hereby acknowledged."

In accordance with the rules of the association the respondent was duly registered by the association as a professional player for the Everton club on May 6, 1913. On April 20, 1920, the Everton Club passed the following resolution:

"The secretary was instructed to apply for permission to pay the following players the sum of £500 each in lieu of benefits: T. Fern, G. Harrison, R. Thompson, F. Mitchell, L. C. Weller, R. N. Parker, J. Clennell."

The permission was given and the sum of £500 was paid to the respondent. On May 4, 1922, the Everton club gave a written undertaking to the respondent, agreeing to his having a second benefit, if still engaged by the club in the season following his having completed ten consecutive seasons with the club and subject to the consent of the league management committee being obtained. On April 19, 1923, a fresh agreement was entered into between the Everton club and the respondent whereby the respondent agreed to play for the club on the terms and conditions therein mentioned. The agreement provides (inter alia):

"4. The player shall observe and be subject to all the rules, regulations and bye-laws of the Football Association and of any other association, league or combination of which the club shall be a member . . . 8. In consideration of the observance by the said player of the terms provisions and conditions of this agreement, the said Thomas H. McIntosh on behalf of the said club shall pay to the said player the sum of £6 per week from May 7, 1923, to Aug. 18, 1923, and £8 per week from Aug. 20, 1923, to May 3, 1924. . . . 10. Bonuses to be paid in accordance with league rules."

In accordance with the rules of the association hereinafter referred to the respondent was again registered by the association as a professional player for the Everton club on April 20, 1923. Between October and November, 1923, negotiations were entered into for the transfer of the respondent from the Everton club to the Preston North End football club, and on Nov. 30, 1923, the respondent was transferred to the Preston North End club. On Dec. 4, 1923, the Everton club passed the following resolution:

"The action of Mr. A. Coffey and secretary in transferring this player (i.e. the respondent) to Preston North End, at a fee of £2,000 payable half on Dec. 21 and balance on or before Dec. 31, 1924—Action confirmed—and it was decided to apply to the league for permission to pay him £650 as accrued benefit."

At a meeting of the committee of the league held on or about Dec. 30, 1923, permission was given to the Everton club to pay the said sum of £650 to the respondent. A cheque for that amount was accordingly drawn by the Everton club, and before April 5, 1924, the respondent was informed that the said cheque was waiting at the office of the club to be taken up. The cheque was actually handed to the respondent on May 3, 1924.

Rule 30 of the rules of the association provides for the registration of professional players by the association, and also provides that players may be transferred from one club to another. Rule 31 provides (inter alia) that clubs may enter into

agreement with the registered professional players for certain specified periods. Rule 32 provides (inter alia) that the council of the association shall have power (subject as therein mentioned) to transfer a member from one club to another. A professional transferred must be re-registered by the club to which he is transferred. Rule 34 provides that clubs must have written agreements with their professional players stating all the terms of the engagements, and such agreements must be completed when the players sign the registration form. Rule 36 provides that any league or other combination of clubs may, subject to these rules, make such regulations between their clubs and players as they may deem necessary.

Rule 6 of the rules of the league makes certain provisions for the registration and transfer of players. Rule 7 and r. 8 provide for the maximum wage to be payable to professional players and also provide for payment of "talent money" as therein mentioned. Rule 9 provides as follows:

"Clubs may enter into agreements with players after three playing seasons' continuous service providing for a benefit after five playing seasons' continuous service. All benefit must be sanctioned by the management committee but shall not exceed £650. Players shall be qualified for a second benefit after ten playing seasons' continuous service. All benefit moneys must be paid over to players within fourteen days, or if left in the hands of the club a definite and written agreement must be entered into and a copy furnished to the league within fourteen days of the benefit becoming due and sanctioned. The service referred to in this rule must be substantially with the first team. Benefits to other players must be proportionately smaller and sanctioned by the management committee before promised. Where a player re-signs for his league club, and has not meanwhile played for another club, he does not break his continuity of service, but the period he remained unsigned cannot be counted as a portion of the period for benefit of payment in lieu of benefit or accrued share of benefit."

Rule 10 provides:

"When a player is transferred the club transferring him may, with consent of the management committee as a reward for loyal and meritorious service, pay to such player in lieu of presumed accrued share of benefit a percentage of the amount which the club has guaranteed, or would have been likely to guarantee such player for a benefit reckoned upon the playing seasons of service in proportion to the qualifying period for a benefit with such club, reckoned as follows:—After one season's service 75 per cent. of the presumed accrued share of benefit. After two season's service 80 per cent. After three seasons' service 85 per cent. After four seasons' service 90 per cent. After five seasons' service 100 per cent. Examples: If a club usually guarantees £350 after seven playing seasons' continuous service, the amount which could be approved would not exceed £50 for each playing season of service. If a club usually guarantees £500 after five playing seasons' continuous service, the amount which could be approved would not exceed £100 for each playing season of service. In estimating the period of service the fractional part of a year or playing season may be reckoned, but sanction will not be given unless the player has played for the club for at least four months of the playing season. The management committee shall not approve payment under this rule to any player whose conduct has been unsatisfactory or who by reason of his conduct or demands on the club practically compels the club to transfer him. The amounts sanctioned to reserve players must be proportionately less than to first team players. A club through any of its responsible officials either promising or leading a player to hope for any payment in excess of the rules will be regarded as guilty of breach of rule."

Rule 11 provides:

"All agreements between clubs and players may be for any period provided by

the rules of the Football Association and must be subject to the rules of the Football Association and the Football League at the time such agreement is entered into, and to such alterations of rules as shall be decided upon during the period of such agreement, and contain clauses of the following effect:—This agreement shall be subject to termination by the club on any reasonable ground on four weeks' notice in writing being given to the player but such notice shall state the grounds upon which the agreement is so terminated. They shall also observe and be subject to all the rules, regulations and bye-laws of the Football League, the Football Association, the International Football League board, the English Football League board, and any other association, league or combination of which the club or the Football League shall be a member . . ."

The assessment the subject of the appeal was signed by the commissioners on Sept. 17, 1924, and notice of appeal was received on behalf of the respondent on Nov. 14, 1924.

The commissioners were of opinion that the payment of £650 was a payment made on account of compensation for loss of office and that the payment was not assessable to income tax and they allowed the appeal. The inspector of taxes expressed dissatisfaction with this decision as being erroneous in point of law and requested a Case to be stated for the opinion of the court.

*Reginald Hills* (with him *the Attorney-General* (*Sir Douglas Hogg, K.C.*)) for the appellant, was stopped.

The respondent did not appear.

**ROWLATT, J.**—I think the Crown are entitled to succeed. This is a case of a professional football player who has received what is termed a benefit. The benefit seems to be, as far as I can see, simply a payment. It is not the result of direct subscriptions by the public and indirect support to the fund by the public attending at a match at which the gate money goes to the professional, as it was in the recent cricketer's case [*Seymour* v. *Reed* (1)]. It simply represents an extra sum of money given by the club to the professional. In this case the professional had had a round sum of £500 handed to him earlier in his career and then he was promised and guaranteed in writing another £650 at the end of ten year's service. In the ninth year he transferred to another club, the transfer being really the joint act of himself, the transferring club, and the club to which he was being transferred, and he was given the £650 which he would have got the next year really as part of that arrangement. That is, stated shortly, the position, and I have to decide whether income tax is or is not exigible under Sched. E, the employment being the employment with the transferring club. In *Seymour* v. *Reed* (1), which recently went to the House of Lords, in the opinion of Lord Phillimore there is one sentence which has to be considered carefully in this connection, because the learned Lord says that a gift of money handed by the employer to his employee during the course of the employment, and even in respect of loyal and meritorious services, may still be a gift. I apprehend that the question is always under that word "may," whether it is given, because some further remuneration is thought proper to pay, or whether it is a gift which springs directly from goodwill only, although that goodwill, of course, has been generated by long association with the servant during which he has rendered loyal and meritorious service. If there were no loyal and meritorious service the goodwill would not arise, but I think that it must always be a question of fact how the particular payment is to be regarded.

There is a very large element of business in this matter, and it is totally different from the cricketer's case. The transferring club in question is a member of a league of clubs, and over all the leagues there is the association, and they have rules. The written agreement hiring this man is subject to the rules, and r. 34 provides that "Clubs must have written agreements with their professional players," and r. 36 provides that

A "any league or other combination of clubs may, subject to these rules, make such regulations between their clubs and players as they may deem necessary."

The league made rules, and r. 9 was:

"Clubs may enter into agreements with players after three playing seasons' continuous service providing for a benefit after five playing seasons' continuous
B service. . . . Players shall be qualified for a second benefit after ten playing seasons' continuous service."

The service must be substantially with the first team and the benefits to other players must be proportionately smaller. Rule 10 provides:

"When a player is transferred the club transferring him may, with the con-
C sent of the management committee, as a reward for loyal and meritorious service, pay to such player in lieu of presumed accrued share of benefit a percentage . . ."

and in the facts of this case he could get the 100 per cent. of his anticipated benefit. As I have already said, before he was transferred the club had given him a written undertaking agreeing to his having a second benefit after ten
D consecutive years. These rules contemplated as a matter of the strictest business the power to grant benefits, a power which must be regarded as a matter of business, and as being likely to be exercised, if funds permitted, in a proper case. That being the position, he received one benefit, and was promised in writing another.

If he had continued with the club to the end of the ten years and received this second benefit, I cannot conceive the case falling within *Seymour* v. *Reed* (1);
E it seems to me quite a business-like arrangement all through and simply an extra payment not only in view of his services, but for his services. The commissioners decided against the Crown on a totally different point. They said that this payment is compensation for the loss of his employment with the transferring club. In other words, they construed r. 10 as providing for paying the respondent a sum when he leaves the club and loses that particular employment. In this con-
F nection the words "as a reward for loyal and meritorious service" are against the respondent on this point. It is not a payment to a man, good, bad, or indifferent, because he is losing his employment; it is still paid to him as a reward when it is paid by way of anticipation in this way; but, not to dwell on a point which is perhaps a small one, looking at it quite broadly, I agree with counsel that this payment cannot be said to be compensation for loss of employment; the respondent
G did not lose his employment. He is a player for one of these league clubs. He can under the arrangement be transferred with his own consent, and the consent of the two clubs. The time comes when he is. He is not losing his employment. He is passing out of the employment of one employer, but, in substance, he is not being turned adrift, or anything of that sort. He is going to another club, and when going to another club there is something which may be due to him when he
H leaves the first club. As a matter of business expectation I suppose there is a very good chance of his getting it when he goes to the other club. Perhaps if he thought he would not get it he would not go. He goes and in going gets advanced to him what he would surely have earned next year. He has earned this just as much as he earned anything else in the service of the club, and I think the appeal must be allowed.

*Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

A

# Re HIGGS' AND MAY'S CONTRACT

[CHANCERY DIVISION (Eve, J.), June 23, July 12, 1927]

[Reported [1927] 2 Ch. 249; 96 L.J.Ch. 413; 137 L.T. 803; 71 Sol. Jo. 761]

*Sale of Land—Title—Trustees prior to* 1926—*Land held on trust to sell when only two of testator's children surviving—On Jan.* 1, 1926, *ten children still living—Trustees' ability to convey good title—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. I, Part IV, para.* 1 (3), *para.* 4—*Law of Property (Amendment) Act*, 1926 (16 *& 17 Geo.* 5, *c.* 11), *Sched.*

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By his will a testator (who died before 1926) directed that, when and as soon as all his children except two should be dead, the trustees should realise all his trust estate and divide the proceeds equally between the two surviving children and the children of deceased children (the latter taking equally between them if more than one). On the coming into operation of the Law of Property Act, 1925, the beneficiaries were ten children, seven grandchildren, and the personal representative of a deceased grandchild. In 1926 the trustees purported to contract to sell premises, part of the estate. The purchaser took objection to the title on the ground that para. 4 added to Part IV of Sched. I to the Act of 1925 by the Law of Property (Amendment) Act, 1926, vested the land in the tenant for life, and that a vesting deed ought to be executed accordingly.

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**Held:** on Jan. 1, 1926, the land vested in the trustees of the settlement as joint tenants on the statutory trusts by virtue of para. 1 (3) of Part IV of Sched. I to the Act of 1925, and para. 4 was inapplicable, and, therefore, the trustees had good title to convey.

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**Notes.** Followed: *Re Robins, Holland* v. *Gillam*, [1928] All E.R. Rep. 360. Applied: *Re House, Westminster Bank* v. *Everett*, [1929] 2 Ch. 166. Referred to: *Re Barrat, Body* v. *Barrat*, [1929] 1 Ch. 336.

As to the transitional provisions relating to undivided shares in land see 27 HALSBURY'S LAWS (2nd Edn.) 629 et seq.; and for cases see 40 DIGEST (Repl.) 858 et seq.

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**Adjourned Summons.**

On Dec. 2, 1926, a contract was entered into between the trustees of the will of W. Higgs, deceased, and the respondent, May, whereby the trustees agreed to sell to the respondent property in Ballater Road, Brixton, which formed part of that held in trust by them. The testator by his will had provided that when all his children should be dead except two, the trustees should realise the trust estate and divide the same between such two survivors and the child or children of his deceased children, the last-mentioned children, if more than one, to take equally between them one equal share of the proceeds. In these circumstances the respondent contended that the trustees had not a good title because by para. 4 of Sched. I, Part IV, of the Law of Property Act, 1925, added by the schedule to the Law of Property (Amendment) Act, 1926, the property was vested in the tenants for life that a vesting deed ought to be executed and that such tenants for life were the persons to give a title. The trustees thereupon took out this summons under s. 49 of the Law of Property Act, 1925, seeking a declaration that the property vested in them in fee simple on the statutory trusts under para. 1 (3) of Part IV of Sched. I to that Act, and that accordingly a good title had been shown.

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*Topham, K.C.*, and *Fawcus* for the applicants.

*Ramsbotham* for the respondent.

*Cur. adv. vult.*

July 12. **EVE, J.,** read a judgment in which he stated the facts and continued: On Jan. 1, 1926, the entirety of the land was settled land, held under one and the same settlement in equity in undivided shares vested in possession, and by virtue

of para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925, would appear on that date to have vested in the applicants as trustees of the settlement as joint tenants on the statutory trusts; and on this assumption the contract of sale was entered into, and title thereunder deduced. But the purchaser declined to accept this title, and insists that the case comes within the new para. 4 added by the Law of Property (Amendment) Act, 1926, to Part IV, of Sched. I to the Act of 1925, and that the land is vested in the tenants for life, in whose favour a vesting deed ought to be executed by the applicants, and who alone can make out a good title. I cannot accept this view. As there is nothing in the amending Act which repeals para. 1 (3), no construction ought readily to be imposed on the new paragraph which would involve a conflict between the two. If possible, they should be so construed as to be applicable to the particular cases to which each is directed, and so that they may neither conflict or overlap. By the amending paragraph, particular cases—those in which the settled land is so limited as to devolve as an undivided whole—are excepted from the operation of para. 1 (3), and in my opinion that is all that is effected thereby. No doubt there must be some good reason for distinguishing this particular class of case, although for the moment I am not able to suggest what it is; but this much is, I think, abundantly clear, that no case can properly be held to fall within the new paragraph unless it can be shown to possess the particular qualifications therein indicated, and, in my opinion, land settled on trust for sale and division of the proceeds cannot by any stress of imagination be described with accuracy as land so limited as to devolve or descend—for that, I take it, is what is meant by the word "devolve"—as an undivided whole. Accordingly, I hold that the land agreed to be sold falls within para. 1 (3), and that the contentions of the vendors are right. They are entitled to the declaration they ask and the purchaser must pay the costs of the summons.

Solicitors: *Lewis & Sons; Kingsbury & Turner.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

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## Re HAYWARD. MERSON AND ANOTHER *v.* HAYWARD AND OTHERS

[CHANCERY DIVISION (Clauson, J.), July 22, 27, 1927]

[Reported [1928] 1 Ch. 367; 71 Sol. Jo. 845; 97 L.J.Ch. 197; 138 L.T. 735]

*Settled Land—Statutory trusts—"Persons interested in the land"—Trustees for sale—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35.

In the Law of Property Act, 1925, s. 35, the words "persons . . . interested in the land" cover both those interested beneficially and those interested as trustees for sale.

**Notes.** As to the transitional provisions relating to undivided shares in land, see 27 HALSBURY'S LAWS (2nd Edn.) 629 et seq.; and for cases see 40 DIGEST (Repl.) 858 et seq.

Cases referred to:

(1) *Re Cliff's Contract*, [1927] All E.R. Rep. 553; [1927] 2 Ch. 94; 96 L.J.Ch. 278; 137 L.T. 372; 71 Sol. Jo. 389; 40 Digest (Repl.) 862, *3357.*

(2) *Darlington* v. *Darlington*, [1926] W.N. 192; 70 Sol. Jo. 778; 162 L.T. Jo. 139; 36 Digest (Repl.) 409, *1.*

**Adjourned Summons** for the determination of questions concerning land which had been settled.

On Dec. 31, 1925, the entirety of the land was vested in the two plaintiffs in fee simple, in 15,120 equal undivided shares. Of these 12,525 were vested at law in the plaintiffs as trustees of a conveyance, dated 1911, on trust to sell, and to hold the proceeds of sale on trusts declared by a deed of even date; a further 2,205 were vested in the plaintiffs as trustees of a settlement dated 1906, and referred to during the hearing of the summons as the Colson settlement; and the remaining 390 were vested in them as trustees of a settlement dated 1898. Although the trusts of this last settlement were no longer on foot, the plaintiffs had not conveyed the 390 shares to the persons thereto entitled. The defendant K. T. Colson was entitled to certain of the shares which were the subject of the Colson settlement. A conveyance of these to the plaintiffs, as trustees of the said settlement, had been executed, on trust to sell, pay the income of the proceeds of such sale to the defendant K. T. Colson for her life, and stand possessed of the corpus thereof in trust for the issue of her marriage as she and her husband should by deed jointly appoint; and in default of such appointment, as the survivor of them should by deed or will appoint; and in default of any appointment whatever, in trust for all the children of the said marriage in equal shares. On Feb. 3, 1919, the husband of K. T. Colson died. By a conveyance dated 1911 the 12,525 shares were conveyed in fee simple to the trustees; the conveyance freed and discharged the shares from certain trusts, powers, and mortgages, and from all claims and demands thereunder; and it conveyed them on and subject to certain other trusts and powers. On Jan. 1, 1926, the entirety of the land became vested in the Public Trustee, by virtue of the Law of Property Act, 1925, Sched. I, Part IV. Under that provision the court, by an order dated July 11, 1927, appointed the plaintiffs and the defendant Hayward to be statutory trustees of the entirety. The order was made on an originating summons, and the summons was adjourned into court for the determination of the questions: (i) Whether the trustees as trustees of the entirety were (after payment of outgoings in accordance with the Law of Property Act, 1925, s. 35) bound to pay the share of net rents and profits which, until sale, was attributable to the 2,205 shares to the defendant K. T. Colson during her life, or to the trustees of the Colson settlement, to be applied by them as income of the trust premises thereby settled; (ii) whether (after payment of costs in accordance with the same section) the trustees were bound to pay over to the trustees of the Colson settlement, so long as the trusts thereof were subsisting, such part of the net proceeds of sale from time to time arising from sales of the land as was attributable to the 2,205 shares, or were themselves bound to retain the same, and to invest and deal with it upon and subject to the trusts, powers, and provisions by and in such settlement declared and contained.

The Law of Property Act, 1925, s. 35, provided:

> "For the purposes of this Act, land held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same, and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

The following addition to the section was one of the amendments contained in the Schedule to the Law of Property (Amendment) Act, 1926:

> "Where (a) an undivided share was subject to a settlement, and (b) the settlement remains subsisting in respect of other property, and (c) the trustees thereof are not the same persons as the trustees for sale, then the statutory

trusts include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale as other capital money attributable to the share to the trustees of the settlement, to be held by them as capital money arising under the Settled Land Act, 1925."

*Nicholson Combe* for the plaintiffs.—In s. 35 of the Law of Property Act, 1925, the words "persons . . . interested" will here include the trustees of the Colson settlement: *Darlington* v. *Darlington* (2), *Re Cliff's Contract* (1). All that the amendment from the schedule to the Law of Property (Amendment) Act, 1926, does is to declare the effect of s. 35. But for that the Colson settlement would come within the wording of the amendment. The Settled Land Act, 1882, made the Colson settlement an "instrument deemed to be a settlement." Thus it follows that in s. 35 of the Settled Land Act, 1925, the Colson settlement comes under the word "settlement."

*Underhay* for the defendant Hayward.—The word "settlement" in the amendment to s. 35 of the Settled Land Act, 1925, by the schedule to the law of Property (Amendment) Act, 1926, does not include a settlement by way of trust for sale.

*G. P. Slade* for the defendant, K. T. Colson.

*H. V. Batchelor* for an infant remainderman under the Colson settlement.

**CLAUSON, J.**—I find in *Re Cliff's Contract* (1), a decision of ASTBURY, J., that the words "persons interested," where the question of shares was under consideration, were held not to be confined to persons beneficially interested, but would include persons who are interested by being trustees for sale. I will follow that decision, although s. 35 of the Law of Property Act, 1925, is not material to it. There will be, therefore, a declaration that the income is to be paid to the trustees of the Colson settlement, to be applied by them as income of the trust premises thereby settled, and that the proceeds of sale are to be paid over to such trustees, so long as the trusts of that settlement are subsisting.

Solicitors: *Iliffe, Sweet & Co.*

[*Reported by* J. C. T. RAINS, ESQ., *Barrister-at-Law.*]

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## WILLIAMS *v.* BARTON

[CHANCERY DIVISION (Russell, J.), April 6, 7, 13, 1927]

[Reported [1927] 2 Ch. 9; 96 L.J.Ch. 355; 137 L.T. 294; 43 T.L.R. 446; 71 Sol. Jo. 370]

*Trust and Trustee—Profit from trust—Trustee employed by stockbrokers—Trustee entitled to share of commission on business introduced by him—Trust property valued by employers on commission—Right of trustee to retain his share of commission.*

The defendant was employed by a firm of stockbrokers, G.B. & Co., on the basis that he would give his services and receive as payment one-half of the commission earned by G.B. & Co. on work introduced by him. The defendant and the plaintiff were trustees of the will of P., and, at the suggestion of the defendant, G.B. & Co. were employed, at the usual commission, to value securities forming part of the estate of P. The defendant received from G.B. & Co. one-half of the commission paid.

**Held:** the payment received by the defendant was a profit acquired out of and by reason of his trusteeship, and he must account for it to the trustees of the estate of P.

*Re Dover Coalfield Extension, Ltd.* (1), [1908] 1 Ch. 65, distinguished. A

**Notes.** Applied: *Re Macadam, Dallow* v. *Codd*, [1945] 2 All E.R. 664. Referred to: *Re Pelly, Ransome* v. *Pelly*, [1956] 2 All E.R. 326.

As to the duty of a trustee not to use his position for his personal advantage, see 33 HALSBURY'S LAWS (2nd Edn.) 220; and for cases see 43 DIGEST 863 et seq.

Cases referred to: B

(1) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65; 77 L.J.Ch. 94; 98 L.T. 31; 24 T.L.R. 52; 52 Sol. Jo. 43; 15 Mans. 51, C.A.; 9 Digest (Repl.) 484, *3166*.

(2) *Bray* v. *Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 12 T.L.R. 119, H.L.; 43 Digest 865, *3112*.

(3) *Re Duke of Cleveland's Settled Estates*, [1902] 2 Ch. 350; 71 L.J.Ch. 763; 86 L.T. 678; 50 W.R. 508; 18 T.L.R. 610; 46 Sol. Jo. 514; 43 Digest 885, *3276*. C

**Witness Action.**

The plaintiff brought this action as one of the two trustees of a will against his co-trustee for a declaration that the defendant was accountable to the trust estate for half-commission received by him from a firm of stockbrokers, on the ground D that in accepting the money for his commission he was making a profit out of his trusteeship. The defendant was at one time a member of the Stock Exchange, but in 1919 ceased to be a member and in 1920 and thereafter was employed by George Burnand & Co., a firm of stockbrokers. By the terms of his employment he was bound to give the firm his services in connection with Bank of England E work, and the firm agreed to pay him half the commission earned by the firm on all such work introduced by him to the firm as the firm was willing to carry out. The plaintiff and the defendant were co-trustees of the will of Sir John Roper Packington, on whose death in 1924 it became necessary to have his securities valued. It was originally intended to employ for this purpose a firm of stockbrokers who had acted for the testator during his life, but at the request of the defendant, F George Burnand & Co. were employed to value the securities. On the death subsequently of the tenant for life under the will a similar valuation became necessary and was made by George Burnand & Co. George Burnand & Co. for these two valuations charged the usual commission, which was paid to them out of the testator's estate, and they paid over to the defendant one-half of the commission so paid to them in accordance with the terms of the contract between G them and the defendant. The defendant took no part in making the valuations or in fixing the fees to be charged. The plaintiff claimed that the moneys so paid over to the defendant for half-commission and any half-commission which might have been paid to him in respect of sales and purchases of trust investments ought to be paid to the estate.

*W. P. Spens, K.C.*, and *R. M. Pattisson*, for the plaintiff, referred to *Bray* v. H *Ford* (2), *Re Duke of Cleveland's Settled Estates* (3), UNDERHILL ON TRUSTS (8th Edn.), p. 173.

*Gavin Simonds, K.C.*, and *F. McMullan*, for the defendant, referred to *Re Dover Coalfield Extension, Ltd.* (1).

*Cur. adv. vult.*

April 13. **RUSSELL, J.**, read the following judgment.—It is a well established I and salutary rule of equity that a trustee may not make a profit out of his trust. A person who has the management of property as a trustee is not permitted to gain any profit by availing himself of his position, and will be a constructive trustee of any such profit for the benefit of the persons equitably entitled to the property. On the same principle a trustee has no right to charge for his time and trouble. The rule is thus stated by LORD HERSCHELL in *Bray* v. *Ford* (2) ([1896] A.C. at p. 51):

A "It is an inflexible rule of a court of equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

It was argued on behalf of the defendant that the case was altogether outside that rule of equity, because the sums received by the defendant were merely parts of his salary paid to him by his employers under the contract of service and were not of a character for which he was liable to account.

The point is not an easy one and there is little, if any, authority to assist in its determination. The situation is an unusual one and the contract of service presents the following peculiar features. The remuneration has no relation to the services, which the defendant has to render to his employers. The defendant, while bound to render the services, might get no remuneration at all if he introduced no work, or introduced none which was acceptable to his employers. The amount of his remuneration depends (subject to his employers' acceptance of orders) on his own efforts, but on efforts not in relation to the work which he is engaged to do. Any increase of his remuneration rests with him.

From this it seems to me evident that the case falls within the mischief which is sought to be prevented by the rule. The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers to act for the estate; as the recipient of half the fees to be earned by George Burnand & Co. on work introduced by him his obvious interest is to choose or recommend them for the job. In the event that has happened they have been chosen, and chosen because the defendant was a trustee, with the result that half of what the estate pays must necessarily pass through them to the defendant as part of his remuneration for other services rendered, but as an addition to the remuneration which he would otherwise have received for those self-same services. The services rendered remain unchanged, but the remuneration for them has been increased. He has increased his remuneration by virtue of his trusteeship. In my opinion this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee.

Much reliance was properly placed on the decision of the Court of Appeal in *Re Dover Coalfield Extension, Ltd.* (1), but that case seems to me very different. At the request of the Dover company Mr. Cousins had entered into a contract with the Kent company to serve them as a director, the Kent company paying him remuneration for his services. The necessary qualification shares were provided by the Dover company, and in respect of those shares he became a trustee for the Dover company. He had not, however, used his position as a trustee for the purpose of acquiring his directorship. He had, in fact, been appointed a director before he became a trustee of the shares. The profit which he gained was not procured by him by the use of his position as trustee, but was a profit earned by reason of work which he did for the Kent company and which would not have been earned by him had he not been willing to do the work for which it was the remuneration. It was not (as in the present case) a profit acquired solely by reason of his use of his position as trustee and a profit in respect of which no extra services were rendered.

The plaintiff is entitled to the declaration asked for. If necessary, an inquiry must be directed, but if the amount can be agreed it may be inserted in the order and an order made for the payment of the agreed amount.

Solicitors: *Parker & Thomas; Ellis & Willes*, and *Ingpen & Armitage.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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